

**A CRITICAL ASSESSMENT OF THE KENYAN TRUTH JUSTICE AND  
RECONCILIATION COMMISSION'S EFFECTIVENESS IN RESOLVING THE  
LAND QUESTION**

**By**

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**C53/8117/2017**

**A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENT OF AWARD OF THE DEGREE IN MASTER OF ARTS IN  
HUMAN RIGHTS OF THE UNIVERSITY OF NAIROBI**

**NOVEMBER 2021**

## DECLARATION

This research project is my own original work and has not been presented for any examination for the award of a degree in any other university




Sign ..... Date...18/11/2021.....

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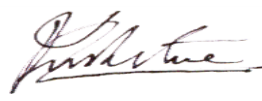
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This research project has been submitted with our approval as a university supervisors

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## **DEDICATION**

I dedicate this project to the victims of post-election violence in Kenya for suffering untold consequences of historical land injustices.

## **ACKNOWLEDGEMENT**

I owe a debt of gratitude to my supervisors i.e. Dr. Joseph and Dr. Mutuma Ruteere for their incredible and incisive guidance in the course of writing this paper. I am grateful to my friends Maureen Mukalo, Wanja Ngure, Dr. Paul Kizito and Professor Sylvia Kang'ara, for according me moral support throughout the conduct of this research project. Finally, I appreciate my parents Mr. Ileri and Ms. Muthoni, my siblings Njiru and Murugi for being my source of encouragement in the course of writing this research project.

## ABSTRACT

Most transitional justice mechanisms relegate economic social and cultural violations to the background and leave them out when addressing other categories of violations. This reflects the priorities of most countries when planning transitional efforts after a period of conflict. The primary aim of the study is to assess the transitional justice mechanism employed in Kenya i.e. truth commission in view of addressing land injustices under the category of economic, social and cultural violations. This study employs a mixed approach method to assess the effectiveness of Kenyan TJRC's in redressing the land question. The mixed approach will entail a discussion of the secondary and foundational factors that influence truth commissions' response to economic, social and cultural issues. The study in discussing the factors will pay close reference to the truth commission in South Africa. The study is conceptualized through two theories i.e. Jonah Galtung's structural violence theory and Robert Nozick's entitlement theories. The two theories are employed to enhance understanding of the land question in Kenya as well as to assess the performance of the truth commission. The study is descriptive and employs a desktop review to provide baseline information to answer the research questions and fulfil the research objectives. The research findings are organized thematically in line with the five research questions. The study established that the foundational basis upon which transitional justice mechanisms and by extension the TJRC in Kenya was founded is more suitable for addressing individual responsibility. Consequently, TJRC had practical challenge in addressing the land question. This challenge was exacerbated by other factors that were unique to the Kenyan context, including lack of political good will and questions of felicity on some members of the commission. Given the temporary character of truth commissions, the study recommends that formation and operation of truth commissions should be accompanied by long term measures that ensure the implementation of commissions' recommendations.

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# CHAPTER ONE

## GENERAL INTRODUCTION

### 1.1 Introduction and Background to the Study

The following section defines transitional justice and map out the larger conceptual terrain in which the rest of the discussions will take place. In the section, responses to World Wars are described in order to enable an understanding of how different countries respond to massive atrocities. Description of the responses hopes to illuminate the evolution of Transitional justice in its endeavor to respond to the different needs of victims and the context of its implementation.

For the purposes of this study, the definition of transitional justice will be drawn from International Centre of Transitional Justice which defines transitional justice as: ‘ways countries emerging from periods of conflict and repression address large scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.’The World War periods provide an important starting point in comprehending the genealogy of modern transitional justice. In response to World War I, accountability was sought through national trials and consequent collective sanctions. Briefly, at the conclusion of the First World War between Germany and allied forces, Germany was largely blamed and punished for most atrocities. The Versailles treaty that brought an end to World War 1 spelt out punitive measures against Germany. In accordance with the treaty, Germany was required to undertake substantial reparations as an acknowledgement of the damages caused during the war. (Orend, 2002:43; Teitel, 2003:72).



Scholars such as Ruti Teitel speculate that the requirements of the Versailles treaty led to economic frustrations in Germany. Accordingly, the economic instability triggered eruption of the Second World War. Further, the over-emphasis on national sovereignty as well as collective sanctions thwarted the possibility of long-lasting peace. In the Second World War, the fall-out was between Britain, Soviet Union, America on one side and Germany on the other side. To account for the violations experienced in the Second World War, Nuremberg and Tokyo trials were established consistent with the London charter of 1945 (Teitel, 2003:73).

According to Teitel, the international trials were conducted largely to surmount the challenge presented by national sovereignty as highlighted in the post-World War 1 response. As a long-lasting legacy, Nuremberg trials emphasized the individual as the subject in assigning responsibilities. This also applies in the case of international law as well as in liberal claims. In addition, the Nuremberg trials paved way for criminal procedures as a means of holding individuals to account. Jurisprudence drawn from the Nuremberg trials laid foundation for international norms (Leyh, 2016:559; Teitel, 2003:73).

Scholars have criticized the Nuremberg trials and described them as, 'victor's justice' to denote the unfair criteria used to deny the accused fair hearing during the trials. (McCargo 2015:6) explains that Nuremberg trials were conducted against a background of Germany's diminished sovereignty. Essentially, the trials served to legitimize the Allies' leadership. According to some interlocutors such as a presiding judge Pal, exclusion of the allied force from the dock amounted to uneven justice. The challenge of

victor's justice is also associated with Subsequent International Criminal Tribunal in Rwanda and in Yugoslavia.

Nuremberg trials also failed in their deterrence purpose and as a result the cold war broke out after the Second World War. The cold war was a manifestation of ideological differences between the Soviet Union (East) and the allies (West). The two forces i.e. the west and the east through baiting and coaxing got African states aligned to their ideologies. Mutua (2015:1) better captures this noting that both the East and West in rewarding allegiance of the African countries fostered repressive regimes, military fascism and single party states in African countries.

On the one hand, Soviet affiliated states placed emphasis on positive claims that individuals make to their government. On the other hand, states inclined to the Western force were drawn to negative rights emphasizing things the government could not do to individuals. Mutua further remarks that the end of Cold War, marked a departure from repressive regimes, military fascism, single party states and a renewed focus on democratic rule and adherence to the rule of law.

Countries after the cold war embarked on instituting a range of mechanisms to mark the end of dictatorial and repressive regimes. Moreover, collapse of Soviet Union ushered in liberalism whose spread was aided by globalization. Liberalism places considerable weight to individual claims as compared to collective ones. With the aid of globalization, commonly held attributes of transitional justice were spread across many countries (Teitel, 2003:75).

(Leyh, 2016:561) notes that transitional justice discourse and practice grapples with the appropriacy of criminal justice processes, the basis upon which it is founded in addressing social aspects that define collective violence. Increasingly, there is a critical appreciation that criminal procedures are too circumscribed to deal with economic, social and cultural rights. By equating justice to criminal law, the chances of transitional justice addressing other elements of violence are reduced.

Scholars such as (Koskenniemi 2002:2) explain that some atrocities are of moral, historical and even political significance and as such do not necessitate legal recourse. Similarly, (Arendt 1963: 251) asserts that the aim for trials is delivering justice and the aim of trials is distorted when other objectives are added to the list. For that reason, transitional justice incorporated non-retributive processes to meet specific needs of respective communities which are not within the purview of the trials. Other mechanisms aside from trials include: truth commissions, reparations, vetting, institutional reform, security sector reform, and reparations. Truth commissions majorly approach mass violence from non-punitive and quasi-judicial viewpoints.

According to (Hayner 2011:11), societies coming from a period of repressive regimes by means of truth commissions remember, reflect their past and pursue reconciliation. The commissions' approach supposes that collective remembrance prevents atrocities from re-occurring. Hayner defines truth commissions as official truth-seeking entities that are officially sanctioned to look into people's past with an aim of revealing patterns of abuses meted within a specified period of time. Commissions are expected to file a report of their findings as well as recommendations after the expiry of their timelines.

(Mamdani 2015:2) indicates that truth commissions were formed as an alternative to thinking about violence i.e. as political and not necessarily criminal. McCargo avers that, ‘truth commissions are less adversarial means of righting wrong.’ These premises guided the framing of the Truth and Reconciliation Commission in South Africa which is among the earliest truth commissions. The South African Truth and Reconciliation Commission partly set out to address the segregationist system that ordered the society hierarchically in the order of whites, colored, Asians and blacks. The apartheid system adopted discriminatory policies and laws in almost all sectors (Mamdani, 2015:2; McCargo, 2015: 6).

Against some of the major developments in the field on transitional justice discussed throughout this chapter, there are concerns over how socio-economic violations are addressed in countries going through transition. The concerns point at a tendency by transitional justice mechanisms to pay lip service to socio-economic violations. (Gready, 2011) underscores that transitional justice mechanisms are drawn to respond to, ‘bodily integrity’ rights that are associated with personal or direct violence. The Arab springs that constituted of anti-government protests best exemplify the results of excluding socio-economic concerns from transitions (Makdisi, 2017:22).

There has been a shift both in scholarship and in diplomacy to see the rights as interlinked. Hence, many national constitutions combine the two categories of human rights. The same can be said of the African charter on human and people’s rights that codifies all the rights into one document. The Vienna Declaration and Program of Action

insists on indivisibility, interdependency and inter-connectedness of human rights (Ssenyonjo, 2017:359; Vienna Declaration and Programme of Action, 1993: pt. 1 para 5).

In specific reference to transitional justice, Louis Arbour once the United Nations High Commissioner for Human Rights pointed:

Transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to but also beyond the crimes and abuses committed during the conflict that led to the transition, and it must address the Human rights violations that pre-dated the conflict and caused or contributed to it. With these aims so broadly defined, transitional justice practitioners will very likely expose a great number of discriminatory practices and violations of economic, social, and cultural rights (Arbour, 2007: 3).

The special rapporteur on promotion of truth, justice, reparation and guarantees of non-disclosure explains that in as much as human rights violations cannot be reduced to issues of poverty and inequality, the two are mutually reinforcing. The rapporteur further indicates that, “entrenched economic exclusion and persistent and durable inequalities may be particularly detrimental to the enjoyment of rights” (Pablo, 2016: para 82). Moreover, (Mani, 2008:254) cautions that transitional justice may be deprived of credibility in impoverished societies for failure to redress socio- economic violations.

In 2002, Kenya took part in elections through which long-serving president Daniel Toroitich Arap Moi as well the dominant Kenya African National Unity (KANU) party were removed from power. Cognizant of the atrocities perpetuated by the previous regimes, the newly elected president, Mwai Kibaki put Kenya on the path of massive reforms (Lanegran, 2015:66). Prominent among the proposed reforms was a truth commission as an official acknowledgement of grave, widespread violations of

human rights preceding the regime. A taskforce was appointed to establish the feasibility of a truth commission. The recommendations of the taskforce were in favor of a truth commission. However, this recommendation by the taskforce was not executed for various reasons including political wrangles in government over adherence to a supposed memorandum of understanding.

The post-election violence of 2007 revived consideration for the option of truth commission for stabilizing and addressing injustices. The Kenya National Dialogue and Reconciliation agreement established the Truth Justice and Reconciliation Commission. The Truth Justice and Reconciliation act no.6 of 2008 was passed in parliament. The act stipulated the mandate of the Commission. Part of the mandate was to establish an accurate, complete historical record of economic violations inflicted on the persons by the state, public institutions between 12 December, 1963 and 28th February, 2008. The latter includes the land question which is a common theme in the discussions surrounding election-related violence.

According to the act, the Kenyan Truth, Justice and Reconciliation Commission was to identify victims and perpetrators of economic crimes and in addition inquire into the irregular and illegal acquisition of public land. Clearly, the TJRC stood a chance of holistically diagnosing the land question. However, different scholars have argued that TJRC failed to redress the land question. Gitari Ndung'u blames the failure on duplication of previously published reports by TJRC. Gitari insists that on duplicating the findings, the TJRC made no efforts of recommending implementation of previous findings. Davis Malombe highlights systems and personalities throughout the

commission's period, financial and operational dependence and lack of political goodwill to partly explain the failure of TJRC to comprehensively redress the land issue (Ndung'u, 2014: 7; Malombe, 2012: 110 Act No. 6 of 2008, pt. 6).

According to Kimberly Lanegran, treatment of land question by TJRC broadly resonates with the practices of other commissions in addressing economic, social and cultural violations. Most truth commissions pay attention to civil and political rights and leave out Economic, Social and Cultural Rights(ESCRs). This according to Lanegran affects the overall efficiency of truth commissions (Lanegran, 2015:64).

## **1.2 Statement of the problem**

Truth commissions pursue truth, justice, reparation and guarantees of non- repetition. Szoke holds the view that ESRs make up a large percentage of the causes of violence. This claim is reinforced by most commissions which from the onset appreciate that socioeconomic violations significantly caused violence. The aim of prevention or guarantee of non-repetition is hardly tenable without a deliberate focus on causes of conflict (Szoke-Burke, 2015:469).

In Kenya as noted above, the Truth Justice and Reconciliation act no.6 of 2008 was passed in parliament to establish the TJRC. According to the act, the Kenyan TJRC was to identify victims and perpetrators of economic crimes. In addition, it was to inquire into the irregular and illegal acquisition of public land. The act asserted the centrality of land injustices in election –related violence experienced in the country.

However, practice has shown a tendency by truth commissions to relegate socio-economic violations to the background where they receive less attention than the civil and political rights. Unfortunately, such an approach denies the truth commissions an opportunity to make appropriate recommendations on socio-economic violations which in turn increases the possibility of violence resurging in future. According to Miller 2008: 267, by failing to respond to socio-economic violations, some transitional justice processes perpetuate silence and invisibility of some violations and thus impunity.

This study therefore critically evaluate how effective the Truth Justice and Reconciliation Commission in Kenya was in redressing land question. In evaluating how effective the commission was, a mixed method approach is applied. It entails teasing out both foundational and secondary factors that influence performance of truth commissions on socio- economic violations so as to evaluate the effectiveness of TJRC.

In doing this, reference will be extensively paid to the South African Truth and Reconciliation Commission .The South Africa's TRC is particularly important in the sense that it had an explicit mandate to look into the land question. Similarly, as in Kenya, the South African TRC took up its mandate after a period of colonization when injustices had built up and were affecting the respective communities.

### **1.3 Research Objectives**

- 1.** To determine factors that influenced TJRC performance on the land conflict in Kenya during the post-election
- 2.** To examine the relationship between land injustices and violence in Kenya



3. To evaluate how effective the Kenyan Truth, Justice and Reconciliation Commission was in resolving the land question in Kenya.
4. To explain how TJRC's performance on land question impact on vulnerable groups in Kenya

#### **1.4 Research Questions**

1. What factors influenced the performance of truth justice and reconciliation commission's on land conflict in Kenya.
2. What is the relationship between land injustices and post-election violence in Kenya in 2007
3. To what extent was the TJRC effective in resolving the land question in Kenya
4. How does TJRC's performance on land question impact on vulnerable groups in Kenya?

#### **1.5 Justification of the Study**

The above discussion sets precedence for the reasons as to why it is justifiable to undertake this kind of study. Countries around the world, Kenya inclusive, invest heavily in truth commissions. Moreover, truth commissions arouse expectations among citizens who might have suffered violations of various kinds. The apprehension of these expectations create the need to evaluate truth seeking missions against the set out mandates.

There is a growing body of literature that proposes that truth commissions should address structural violence. In the first two sections of this chapter, an attempt is made to provide an understanding of both structural violence and truth Commissions as provided by

different scholars. Next, the chapter looks into the viability of the proposal by presenting arguments advanced to that end.

### **1.6 Scope and Limitation of the study**

This study provides an analysis of the land question in the pre-colonial period up to 2008 when the Truth Justice and Reconciliation and Commission was established. Therefore, land dynamics beyond 2008 are not articulated in this study. Whereas, the background and the literature will continue referring to socio-economic violations, not all concerns under this category will be relevant to this study. There is a deliberate focus on land question. The socio-economic reference should be viewed as a broader category in which the land question fits. This study takes cognizance of the fact that election-related violence in Kenya is attributable to many factors but nonetheless pays attention to the land factor.

The study employs a human rights perspective by referring to international human rights law' provisions and by focusing on the plight of the most disadvantaged in defining the land question. In as much as this is not a comparative study, the analysis is cast within a wider scope of truth commissions across the world. Such commissions include the South African, Nepalese and El Salvadoran.

Like in many studies, this study too has limitations. The research is highly theoretical as it is exclusively dependent on secondary information attained through desktop review. This means that its findings may slightly differ from an empirical research. Journal articles and other materials reviewed may be biased by many factors. Dependence on secondary information in some way distances the theoretical perspectives from the

practical realities. To rectify this, it would help that some studies evaluating transitional justice mechanism incorporate field research.

### **1.7 Definition of terms**

**Structural Violence** - avoidable disparity between the potential ability to fulfill basic needs and their actual fulfillment.

**Justice - structure** of social interaction that would benefit all who are subject to it.

**Truth** –longing for acknowledgement of wrong and validation of painful loss and experiences. -

**Reconciliation** - societal process that involves mutual acknowledgement of past suffering and the changing of destructive attitudes and behaviours

### **1.8 Literature Review**

To offer a balanced and realistic account of how effective the Kenyan TJRC was in resolving the land question, this section discusses one truth commission that had an explicit mandate to resolve socio-economic violations in the respective countries. South Africa like Kenya experienced colonialism to the extent that affected its socio-economic set –up.

#### **1.8.1 Truth commissions on economic violations**

In the cases that truth commissions address socio-economic violations, they do so with varying attention. The Truth and Reconciliation Commission (TRC) in South Africa was partly established to mark an end to apartheid. However, South Africa before apartheid experienced the adverse effects of colonialism through discriminatory laws and practices. The 1913, Natives Land Rights Act for instance sought to dispossess black South

Africans of land. Further, Black Administration and Group Areas Act all disadvantaged the majority black population. Okoth Ogendo asserts that laws are often times used as tools of exploitations by governments. He proceeds to note that governments institute laws however atrocious to justify their social and political contexts (Okoth-Ogendo, 1991:40; Swart, 2017).

Professor Kader Asmal in 1992 and prior to the establishment of TRC remarked: ‘We must take the past seriously as it holds the key to the future. The issues of structural violence, of unjust and inequitable economic social arrangements, of balanced development in the future cannot be properly dealt with unless there is a conscious understanding of the past.’ In 1995, TRC was set up in adherence to the post-ambular provisions of the constitution. The latter required the TRC to address untold suffering, the divided society and historical injustices (TRC 1: 6).

The commission was empowered to grant amnesty to witnesses on any side of the political spectrum. However, concerns by non-governmental organizations were raised that unlike the perpetrators, the victims did not stand to gain from process. Therefore, NGOs proposed conditional amnesty. In Conditional amnesty, amnesty was pegged on full disclosure of the crimes. The victims therefore benefitted from getting the truth hence a victim-centered approach (Simpson, 1998:5).

The commission enjoyed huge interpretative powers from the act establishing the commission. However, some scholars sharply criticize the broad interpretive powers. According to Mamdani, the commission restricted the definition of victim to individuals. The narrow definition in effect interfered with the types of hearings held,

recommendations made and the possibility of ending impunity (Mamdani, 2007:33). Individual hearings did not encapsulate violations meted upon groups of people. In the nature of apartheid, violations as forced removals mainly affected South Africans as communities and not individuals. The sole focus on individuals made the commission more drawn to state agents, political activists alongside other affected members of the political elite and not the general population. Due to general dissatisfaction on individualized testimonies, the commission introduced institutional hearings. Unfortunately, the institutionalized hearings were used to contextualize individual testimonies. Secondly, violations noted at institutionalized hearings were not followed with reparations (Mamdani, 2007:34).

TRC defined gross violations as violations of human rights through, ‘the killing, abduction, torture or severe ill-treatment of any person...’. This definition leaves out economic violations in favor of civil and political violations. The second part of the definition defined the scope of the commission as strictly from 1 March 1960 to May 1994. This automatically locked out the 1913 Native land rights and other practices that existed before 1960 however atrocious. In a similar manner, the definition presented severe ill-treatments acts singularly as violations of bodily integrity that were politically motivated and suffered by individuals (Mamdani, 2007:36).

On the other hand, TRC evaded scrutiny of policies of apartheid most of which contributed to economic exclusion of marginalized black Africans. Apartheid marginalized communities in South Africa along racial lines. The fact that TRC was not focused on apartheid policies set the commission on the path of ignoring marginalization

and by extension economic exclusion. The commission acknowledged apartheid as a crime against humanity. Inconsistent with the acknowledgement, the commission failed to discuss further ethnic cleansing, institutionalized discrimination and racial discrimination some of which characterize crimes against humanity (Mamdani, 2007:37). Post-conflict analysts insist that economic and social inequalities amount to violence. Mani (2008:254) clarifies that economic and social inequalities are best expressed by social injustice, patterns of inequality, discrimination and marginalization. The above mentioned expressions according to Mani are systemic and deliberate and often pursued with an agenda of sabotaging a certain groups of people mainly the most marginalized in the society. Groups may be marginalized along class, religious and even gender lines. For instance, Schmid expresses her fears that systematic discrimination in most scenarios has a gender element that is not articulated when the focus is solely on civil and political rights (Schmid, 2009:6).

### **1.8.2 Making a case for Economic, Social and Cultural rights**

Increased justiciability of ESRs creates much ease in resolving connected violations. Increasingly, human rights conventions and treaties create binding obligations on states regarding economic, social and cultural rights. In addition, most national constitutions entrench the spirit of international human rights law by elaborating the mandates of states among other actors in realization of ESRs. This marks a shift from the traditional arrangement that left implementation of ESRs at the whim of state-parties (Szoke-Burke, 2015:471).

The International Covenant on Economic, Social and Cultural rights (ICESCR) is the most extensive document on ESCRs. The latter includes: right to favorable conditions of work, education, health, trade union freedoms, adequate standard of living, social security and participation in cultural life. Other specialized human rights treaties such as the Convention on the Elimination of Discrimination Against Women (CEDAW), are important sources of economic, social and cultural rights.

The ICESCR enjoins the state to protect, respect and fulfill its rights. The obligation to respect requires that 'states must refrain from interfering with or curtailing the enjoyment of human rights. 'With regard to fulfilling human rights, states are obliged to take positive measures to the maximum of their available resources to achieve progressively the full realization of economic, social and cultural rights. The covenant includes the cross-cutting principles of equality and non-discrimination whose implementation may not be delayed.

Laudably, the African Charter on Human and People's rights is the first instrument to codify the three generations of human rights. The African Commission on Human and People's rights has creatively expanded the normative composition of ESCRs which are less explicitly captured in the African charter. Through individual communications, detailed interpretation of the right to development and by invoking implied theory the commission has enlarged the scope of ESRs. Some of the interpretations are formalized to become part of the standards applied in the African human rights mechanism (Viljoen 2013:302).

Other treaties dedicated to vulnerable groups in the African human rights mechanism codify all the rights. These include: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), African charter on the rights and welfare of the child, African Union (AU) Convention for the Protection and Assistance of Internally Displaced Persons and African Youth Charter (Ssenyonjo, 2017:359).

But there are other reasons that in addition build on the argument that socio-economic violations should be addressed in post-conflict societies. In addition to the justiciability argument, post conflict societies should realize that by addressing themselves to economic, social and cultural rights, truth commissions put into perspective impoverished nations whose leadership is characterized by brutal and dictatorial warlords. Szoke notes that dictatorial leaders who acquire wealth through the socio-economic violations contribute massively to economic and social rights' violations. The truth commissions provide an opportune moment to confront such corrupt leaders that benefit unduly from economic resources. However, there is a caveat that such leaders use the stolen resources to protect themselves from accountability measures and hence impunity (Szoke, 2015:470).

In spite of the above arguments, Las Warldorf argues that truth commissions are overburdened with their original mandates of seeking truth, justice and reconciliation. Mandates of initiating institutional reforms, reparations and accountability according to Waldorf are already overwhelming for the commissions. He cautions that attempts to increase mandates be made in light of tight budgetary allocations, in some cases ,limited



knowledge and expertise to expedite social justice including the short time frame given to these bodies. Scholars and practitioners are therefore called upon to be realistic and avoid raising unnecessary expectations of the victims and communities at large (Waldorf 2012:172).

There does not seem to be a clear way out in deciding whether or not transitional justice should focus on economic, social and cultural violations. The following are some proposed amendments to the transitional discourse made by scholars who emphasize that transitional justice should respond to economic and social violations.

### **1.8.3 The proposed amendments**

The original contexts within which truth commissions were conceptualized such as Latin America, South Africa significantly changed and thus the goals of truth commissions. Scholars have averted that truth commissions have forward-looking as well as backward-looking roles. Other than democratization and human rights, many proposals have been made for truth commissions to redress the social dimensions of conflict. There are suggestions that transitional justice mechanisms are conducted at the same time with interventions such as peace building and development. The other suggestion entails enlarging the transitional justice scope in order to better pursue social justice. The final view offers transformative justice as an alternative agenda for transitional justice (Sandoval 2017:168).

Starting with the last proposition, scholars in this school of thought propose to reform politics, priorities and locus of transitional justice. The theoretical approach suggests transformative reforms in transitional justice. In this approach, transitional justice should

seek to challenge the unequal power relations that exist at local and global levels, prioritize local agency and the process as opposed to outcomes (Gready & Simons 2014:340).

Peace building efforts often aim at 'just peace. 'Proponents of just peace suggest that transitional justice mechanisms address other dimensions of conflict such as structural inequalities, social exclusion and poverty. These claims are founded on an understanding that the above-mentioned dimensions of conflict constitute the causes, means and even consequences of conflict (Sandoval 2017:167).

Sandoval is in the company of Wendy Lambourne who provides a peace building model incorporating socioeconomic justice. She provides a model of peace building that incorporates socio-economic justice. The model suggests that transitional justice address structural violence other than solely focusing on the legal and political illustrations of structural violence. By solely focusing on civil and political concerns, transitional justice risks treating the symptoms and not causes of conflict (Lambourne, 2009). It cannot however be overemphasized that the suggestions are theoretical and not subjected to practical realities to determine their suitability or otherwise.

## **1.9 Theoretical Framework**

The theory of structural violence traces its origin to Jonah Galtung who coined the term structural violence in his works that first appeared in the international peace Research journal in 1969. The term was initially applied in peace research before its application was extended to anthropology, sociology and clinical medicine. Galtung in place of a narrow conception of violence that concentrates on physical violence offers a view that

puts into perspective the process by which structures harm people by means of disrupting attainment of basic needs (Ho, 2007:1).

Galtung formulated a triangle of violence from which he described three types of violence i.e. personal, structural and cultural. The theory argues that actors and objects of violence can be easily identified in the case of personal violence. In structural violence, harm is inflicted on people through structures. Structures seek to constrict individual's agency. When agency is constricted in a manner that basic human rights are not tenable, then structural violence violates human rights. Cultural violence on the other hand provides means of justifying both personal and structural violence (Galtung, 1989:174; Galtung, 1990:291)

The theory provides a framework within which the Kenyan post-election violence may be understood. The theory centers on unequal power relations that in turn lead to unequal distribution of resources. The relationship between land injustices and election related violence is well explained through this theory. More importantly, the theory of structural violence will be utilized to illuminate structures that limit people's agency in the context of land injustices. Structures or otherwise described as institutions by scholars such as Waldorf can either be formal or informal. Examples of formal institutions are constitution, judiciary while informal institutions include gentlemen's agreements, clientelism or neopatrimonialism according to Waldorf (Waldorf 2017: 43).

Lars Waldorf proposes the view of transitional justice as an institution or rules of the game applied to deal with human rights violations at transition. The proposition acknowledges that institutions, formal or non-formal, determine the efficiency of

transitional mechanisms. Transitional justice mechanisms designed in institutional weak settings perform poorly compared to those operating in strongly institutionalized settings. Similarly, investing in institutions guarantees non-recurrence. Therefore, transitional justice ought to emphasize the shift of rules of the game from impunity to accountability (Waldorf 2017: 43).

In the Kenyan context, the theory of structural violence is employed to discuss the statutory and legal provisions on land employed by the colonial and independent governments, neo-patrimonialism in the independent governments and the opaque presidential powers among other dictates of land distribution in Kenya. Robert Nozick emphasizes the historical nature of all human holdings. Granted that a truth, justice, and reconciliation commission aim at investigating past events that could have caused a particular, widespread sense of injustice, Nozick's theory is a suitable tool. Using Nozick's theory, this study evaluates the formation and performance of Kenya's TJRC. Specifically, the study uses Nozick's theory to gauge the commission's score on the component of justice.

A historical account of holdings is all about determining how individuals or a group of people ended up with certain properties or without certain properties. With great reliance on John Locke's labor theory of property, Nozick expounds the first principle of original acquisition as follows: how things ought to be appropriated in the first instance. The second principle postulates how properties can justly be transferred from one person to another (and by implication the parties can be groups of people). Nozick points out that just processes of transfer involves consent of the individual who cedes right of ownership

of a property. The final principle provides for rectification of violations of rights specified in principle one and two (Nnajiolor, 2016:172). In considering the mandate of TJRC, these two theories are complementary. While structural violence theory focuses on how structural processes of historical, legal political and cultural wreak havoc on human beings' agency (Stray-Pedersen et al (2017) and enjoyment of rights, entitlement emphasizes need for justice at individual and group levels.

Disruption of the customary patterns of land ownership in favor of individual ownership by the colonial masters, extensive land grabbing and the patrimonialism adopted by independent governments are analyzed in the light of the proposed principles of justice. Furthermore, the statutory practices adopted to reinforce the practices of land alienation will equally be subjected to analysis through the theory's lenses.

Furthermore, the theory appreciates that information constraints over the original acquisition may impede rectification. To counter such possibilities, the theory proposes a 'more patterned redistribution. 'Nozick in the third principle lays claim for restitution. Restitution finds expression in transitional justice. Amid criticism on the possibility of reversing the injustices, Nozick proposes an understanding of restitution from the viewpoint of what would have happened had the injustice not taken place. This is particularly important for this research which closely links the land injustices to continued patterns of violence (Nnajiolor, 2016:177).

### **1.10 Methodology**

In the nature of the subject under inquiry, desktop review was utilized. A systematic review was undertaken to enhance understanding of the land question in Kenya, the transitional justice mechanisms in relation to the objectives of the study. The findings made in other studies, in commissions such as Akiwumi, Ndung'u and Njonjo were referred to. The findings of the commission constituted the basis for understanding the land question and the socio-economic rights in general.

The research questions and problem statement were run through a google search. Relevant files will be downloaded. The main electronic databases relied upon were mainly google scholar, Jstor and Research gate. However, some books were hand-sought in the library. The physical copies in the library were useful to the extent that some information regarding land injustices and any other theme may not be digitized. Finally, the findings are classified in relevant themes to respond to the research questions.

Ultimately, the reference section will contain a full bibliography of information sources reviewed. Weaknesses related to desktop review include over-reliance on secondary information which in some cases may be wrong or outdated. After all, some information is collected and tailored for specific kinds of study.

## **CHAPTER TWO**

### **LAND AND VIOLENCE IN KENYA**

#### **2.0 Introduction**

To map out the relationship between violence and land injustices in Kenya, this chapter frames the land question by closely focusing on statutory provisions and procedures instituted by the colonial government to dispossess Africans of land. In view of this research's theory, statutory provisions in and of themselves can be forms of structural violence. To elaborate on structural violence in Kenya, this chapter will focus on use of state resources, powers of the president in land distribution, and ethnicity. A proper analysis of the three aspects will get as close as possible in explaining the extent to which the land question is connected to the perennial election related violence (Hansen, 2009:4; Mbai, 2003:52).

#### **2.1 Framing the Land Question in Kenya**

Before British occupied Kenya, there existed a customary system of land tenure. It would be incorrect to assume that customary practices were homogenous across all communities. There however were many similarities in land practices among the communities. The customary practices entailed overlapping claims of both individuals and groups. Use rights were mainly conferred upon an individual through appropriation which entailed initial inheritance. The rights were maintained through consequent use of the piece of land (Veit 2011:3).

The notion of initial clearance provides nuance to John Locke's theory which holds that man makes something from the state of nature his own by mixing his labor with it. Appropriation therefore did not disadvantage members of the community as it was entirely applicable where there was enough land. On the other hand, there were efforts to ensure equitable rights to land according to individual purpose. As such, different claims would be made to a specific piece of land. That being the case, one group would for instance use a piece of land for farming at a particular time as another group used the same piece of land to hunt but at a different time. In line with this argument, Ndege 2009:1 notes that communities in the pre-colonial Kenya were highly egalitarian and maintained reciprocity. He also observes that restriction on land use was on the basis of fertility and fodder.

Some of the similarities in customary tenure system alluded to include conceptualizing of land within a social system. In light of a social system, kinship ties determined both use and ownership rights of community members. The kinship ties promoted ownership of land along social identities defined by birth, incorporation among others. Thereafter, land was inherited by members of the family. This way, it was difficult for outsiders to lay ownership claims over the piece of land (Migot-Adholla et al, 1993:122).

Both land use and ownership were also determined by population pressure and abundance of land. For example, the common practice of leaving land fallow in order to regain fertility widely practiced in the customary arrangement was contingent on abundance of land and population pressure. In other instances, to ease population pressure and to avoid



landlessness, the customary land tenure encouraged the eldest sons to migrate to other areas under the control of their lineage or completely new places (Kanyinga 2000: 32).

Upon coming to Kenya, the colonialists disrupted the customary tenure system and justified the disruption through legal means. As noted in chapter one, laws may be used as tools of exploitation by governments to justify claims however atrocious. The following are some of the statutory practices and procedures used by the colonial government to administer land (Okoth-Ogendo, 1991:40).

Following the Berlin conference, the Imperial British East African Company was granted the mandate to administer Uganda and Kenya on behalf of the crown. The company facilitated deliberations that ultimately resulted in ceding of the 16km strip on Kenyan coast to the colonial government by the Sultan. However, the company was deprived of its mandate after some time and at that point Kenya became an East African protectorate. As a protectorate, British exercised direct rule over Kenya (Veit, 2011:2).

### **2.1.1 Colonial legislations in land dispossession**

To execute the plan of linking Uganda to the coast, the imperial government needed a strong economy from which it would draw resources to aid in construction of a railway line. However, there was a gap in legislation to facilitate acquisition of land for settlement in favor of the construction. In response to the gap in legislation, the 1894 land acquisition act of India was invoked to facilitate appropriation of lands occupying about one mile on either side of the Kenya –Uganda railway.

The 1897 East African Land Regulations like the 1894 act noted above were enacted through the foreign jurisdiction act. Through the 1897 East African Land Regulations act, the commissioner was mandated to give occupancy certificates on short term basis and for a renewable period of twenty-one years. The 1897 regulations were backed by the East African (lands) Order-in –council which empowered the commissioner to sell or lease ‘waste and unoccupied’ land in the protectorate.

The settlers expressed disaffection over the short leasing period noting that this discouraged them from making long term investment on land and thus curtailing their agency. This racial/class structured dissatisfaction led to passage of the Crown Land Ordinance No.21 of 1902. The 1902 ordinance permitted the commissioner to sell crown land to willing buyers as long as the piece was not beyond 1,000 acres. The settlers were not completely satisfied and demanded for absolute ownership of land. The 1915 Land Ordinance repealed the 1902 Land Ordinance. It declared crown land to consist of all land within the protectorate, including that reserved for natives. In addition, the 1915 Land Ordinance allowed the commissioner to lease land to the settlers up to a period not exceeding 999 years.

The 1915 land ordinance greatly disinherited Africans of their land. The act, argues Okoth-Ogendo, made Africans tenants of the crown at will. The ordinances did not only give security to the white settlers but also ensured that all land in the protectorate was under crown control. The ordinances had a great impact on how natives or subjects used land. The Native Trust Bill of 1926 proposed that some land be set apart for use by Africans only (Syagga 2011:15).

At the coast where slave trade took place, the control of land was concentrated on Arabs and Swahili people at the expense of the ex-slaves and the Mijikenda who were the original inhabitants. The colonial government reinforced this disparity by legislatively acknowledging the subjects of Sultan i.e. Arabs and Swahili as legitimate land owners. Moreover, the latter were allowed to register land as private property. Odhiambo-Mbai, 2003:158 notes that the reserves as administrative units evolved into locations and districts characteristic of the post-independent Kenya. The boundaries that marked reserves and hence locations and districts effectively divided the community into small ethnic groupings (Kanyinga, 2000: 11).

The settlers after securing rights to land focused their attention on acquisition of labor. The settlers introduced poll tax and hut tax among other forms of taxation. Due to heavy taxation, the idea of working on European farms for pay became a necessity for Africans. The African laborers moved into the highlands together with their cattle to work on the white farms. However, as time elapsed, farming on European land intensified and settlers could afford to pay workers to work in the same way African laborers had done.

On the other hand, the settlers claimed that farming practices employed by Africans were backward and contributed to soil erosion. For the sake of conservation, the settlers advocated for modernized farming practices. Therefore, African laborers were no longer in demand and had to return to the reserves. Unfortunately, by the time the laborers returned to the reserves, the reserves had been subdivided which left them as squatters (Okoth-Ogendo, 1978:382).

Political and economic unrest ensued over the dissatisfaction on how land had been subdivided and as a result the Mau Mau uprising was formed. Aside from the land-propelled instability, the Mau Mau movement was also fueled by the fact that Africans had taken part in the First and Second World Wars. In the world wars, Africans became aware of the colonialists' weaknesses. Their experience was an arsenal in the revolution against the colonialists.

The colonial administration was met with the challenge of containing the freedom movement. That notwithstanding, the administration was determined to maintain a status quo in land administration. According to Habeson, instead of land distribution, the colonial government tactfully laid emphasis on land use reform. In line with land use reform, a sharp focus was placed on developing Africans economically through agriculture to shift Africans' attention from the alienated land. The reforms were done under the Swynnerton Plan. The plan aimed at intensifying agriculture by among others addressing accessibility of land and technology in the reserves. In the plan, the settlers argued against the communal land ownership which they argued resulted in land fragmentation and increased land disputes (Habeson, 1971).

The plan also discredited the inheritance practices among other practices on the basis that they contributed to land subdivision. To mitigate these, the Swynnerton Plan proposed land adjudication, consolidation and registration. The registration was formalized under the native land tenure rules established in 1956. The Swynnerton plan also proposed freehold system marked by issuance of title deeds. Titling as was argued in the Swynnerton plan was an attempt to make secure tenure for some African farmers. In

addition, with title deeds, African farmers could seek and acquire development loans (Habeson, 1971).

A state of emergency was declared and effected simultaneously with the proposed reforms. The state of emergency popularized villagization—a practice that restricted supply of food among other things to areas occupied by the insurgents involved in the maumau uprising. Villagization strikes great resemblance with concentrated camps where the targets are separated from the rest of the world. Villagization when used for counter-insurgency purposes seeks to win support of the group in which resistance takes place.

In the case of maumau, the villagization aimed at not only denying the maumau support from the local community but also winning the resisting groups mainly drawn from the kikuyu ethnic group to the colonial administration. It is during the state of emergency that land consolidation was undertaken. Land consolidation was punitive to the members of maumau in the sense that they could not lay claim on land they had previously held under the communal arrangement. By the end of the state of emergency, most maumau leaders had lost their land to royalists and prominent men in the community (Whittaker, 2015: 646).

The colonial government through African (suspension of land suits) ordinance prevented any litigation arising from 1956 tenure rules on formalizing registration. Accordingly, the first registration could not be challenged. This defied the second principle of rectification in Robert Nozick's entitlement theory. The principle provides for rectification in case property was unjustly acquired in the first instance. The first registration had taken part while the nationalist movement members were detained following the state of emergency.

The suspension of law suits ordinance therefore served as a punishment to the nationalist movement by denying them land (Syagga 2011: 17). The colonialists also hoped to contain the African uprising that threatened the colonial government through the swynerton plan. Africans would be engaged in agricultural activities leaving little time for political organization. The plan too rewarded loyal and politically conservative Africans. Shortly before independence, the colonial government proposed a land resettlement program. This was followed by establishment of Land Development and Settlement Board (LDSB). The resettlement plan employed the principle of 'willing buyer willing seller.' The interests of the resettlement program were however hijacked by British occupants and thus did not address landlessness. To ameliorate this, the one-million-acre scheme was set up. The million-acre scheme obtained loans from the World Bank, Germany and British governments to facilitate purchase of land by unemployed and landless Africans. It should be noted that the 'willing buyer willing seller' principle ignored indigeneity and historical claims (Kariuki, 2008: 149)

In independent Kenya, the legal and institutional framework of colonial administration was maintained. At the coast for example, Kenyatta entered into agreement with Sultan thus marginalizing the Mijikenda and ex-slaves. Okoth- Ogendo blames this situation on lack of clear ideological direction by the political elites to whom the government machinery was left. Devoid of a clear plan, Okoth-Ogendo argues that the leaders in Kenya as in other jurisdictions characterized by inequalities insisted on taking up settler rights and privileges (Okoth-Ogendo, 1978:377).

More importantly, attainment of independence did not result in land reclamation and distribution. Instead the post independent governments too were skewed towards sedentary practices and opposed to the pastoralist ones. The independent governments also paid little attention to the communal claims in favor of individual ownership of land. (Akech 2015:3).

### **2.1.2The role of Ethnicity**

The colonial governments displaced most of the communities living in central, Rift Valley and coastal Kenya to pave way for settler farming. The areas provided favorable conditions for farming. To regulate labor, the British administration introduced squatter system that attracted many Kikuyus to the white highlands in Rift Valley as squatters. The latter did not only receive wages from employment but also acquired use rights of the highlands. The Kikuyu ethnic group had practiced a sedentary way of life long before the arrival of colonialists thus placing them at a vantage point. This is to be contrasted with the pastoral groups who had originally occupied the Rift Valley. The concentration of Kikuyus in the white highlands continued over time.

When Kenya got independence, the land question was central and the major political parties i.e. KANU and KADU sought answers on who would occupy the white highlands .The government instituted land resettlement programs to resettle the landless people. Land previously held by the colonialists would be transferred to Africans through resettlement schemes. The million-acre settlement scheme for example was set up for the purpose of resettling the landless Africans. The resettlement schemes were given loans by the British to facilitate buying of land. Acquisition of land in the schemes was predicated

on a willing buyer, willing seller principle. Through the resettlement schemes, original occupants of particular areas could not automatically go back to their ancestral lands. This was replicated in many parts of the country and continues to inform conflicts more so during elections.

### **2.1.3 Presidential powers and land acquisition**

This section demonstrates how land injustices were perpetuated and sustained by an overbearing presidency. The section also highlights how successive presidents sabotaged any efforts at land reforms. With an overbearing presidency, power is concentrated in the man of the president as well as the institution of the presidency. This is usually attained through constitutional reforms and so on. In the case of Kenya, by means of constitutional amendments in 1963, the president replaced the queen and took up headship of both state and government.

The Westminster federal constitution was dropped at independence in support of a republican constitution that entrenched an imperial president. Through more constitutional amendments and manipulation of parliament, the position of the president was continuously fortified. This intensified the powers of the president in land control.

Jomo Kenyatta was represented by the provincial administrators who he gave powers over land transfers. For example, through Simeon Nyachae the then District Commissioner in Nyandarua, president exercised control over who benefited from the resettlement schemes. The Ndung'u report highlights that through Jomo Kenyatta's and Moi's presidential directives to the provincial administration the presidents ran other settlement schemes outside of the agreed resettlement framework. The two presidents



ordered resettlement of specific groups out of their personal initiative (Ndung'u 2014: 132).

Oluoch 2010:16 refers to the first president as the chief architect of land transfers. On working holidays, the president made pronouncements that led to resettlement of his kinsmen. The president argued that the allottees were justified to get land as they had participated in fight for land through maumau. In addition, the president exercised wide discretion in allocation of Z-plots. The Z-plots were 100-acre piece of land with a farmhouse. President directed allocation of the Z-plots to prominent people who would maintain the beauty of the plots. Finally, the president too made grants to individuals and corporates at will.

President Jomo Kenyatta used land as a means of cementing his support base and expanding political alliances. Moi's administration faced unique circumstances. Most of the land had been distributed by the time Moi took up leadership. It became a common practice for original owners to be evicted out of their land forcefully. The land would then be allocated to new owners who pledged allegiance to the president. On the other hand, land set out for schools and other 'public interest' functions was irregularly privatized. Klopp 2000:4 refers to land-grabbing mania to describe the intensity of the irregular practices witnessed in land administration during Moi's regime.

Political liberalization underscored the need for divergent views and hence multipartism. In the 1990, political liberalization was widespread. Moi's regime faced both internal and external pressure to install multipartism. External aid was often tied to multipartism so that it became increasingly difficult for Moi's government to receive international aid.

Yielding to pressure, Moi led the repeal of section 2(a) of the constitution making Kenya a multiparty state (Klopp 2000:5).

Multipartism expanded spaces to accommodate dissenting voices from the dominant KANU party. To build his support base, Moi relied on distributing land to his loyal supporters. Similarly, the elections became more competitive with multipartism and hence the need to solidify support. Land remained an attractive factor of political patronage as it received less scrutiny from the international community. Ndung'u report indicates that from the end of the 1980s onwards, "Land was no longer allocated for development purposes but as political reward and for speculation purposes."

## **2.2 Cause –effect analysis between land injustices and violence in Kenya**

Berry 1993:105 finds a strong association between security in land tenure and the overall socio-political security. The single most emotive issue of land has been studied in relation to violence in Kenya by scholars such as Sam Kariuki, Karuti Kanyinga. Arising from the studies, is the finding that land is the single major cause of violence in Kenya. The act establishing TJRC highlights this causal relationship. This section attempts a more in-depth cause-effect analysis to locate the conceptual nexus between land injustices and election related violence.

To better comprehend the relationship between land injustices and election related violence, we utilize a host-guest lens. Most Kenyans identify with different parts of the country as their original homes. In other words, as a result of the boundaries imposed during colonial times, ethnic groups lay territorial claims over certain regions in Kenya. For instance, the central region is closely associated with Gikuyu community, the Rift

valley with the Kalenjins and so on. However, there is not guaranteed uniformity in the ethnic composition of these areas. The non-uniform composition gives rise to a host-guest arrangement with the former referring to the main group constituting the area and the latter referring to other subgroups settled in the region (Jenkins 2012:578).

The host in most cases imposes rules on the immigrants and may feel threatened whenever the immigrant deviates from the set rules. Active participation by the emigrants on politics is often interpreted attempts by the emigrants to dominate over the host. This is more so the case where having a member of one's ethnic group in elective political posts is viewed in terms of economic prosperity. The hosts therefore fear that emigrants may eventually have more access to land among other benefits. Violence in Kenya is also experienced in parts where immigrants take a different political trajectory from the hosts. Memorable incidents of violence during transition and multiparty politics in 1991, 1992, 1997 and 2007 best demonstrate this point (Jenkins 2012:583).

In a bid to win elections, the KANU leaders employed majimboism as a divisive political tool in the 1997 elections. The indigenous groups were made to believe that land would be returned to them after the expulsion of the 'outsiders.' Paragraph 85 in Akiwumi report reads , 'the foregoing account of land administration in Kenya constituted a classical landscape crying out to be exploited, as happened in many cases, for political reasons, in the promotion of tribal clashes' (Akiwumi, A.M. 1999).

In the years stated above, the hosts displaced the immigrants arguing that they should go back to their original homes. In some cases, hosts use violence to prevent the emigrants from voting or even campaigning. Violence may be meted through gangs which are

largely supported by the political elites to push for a certain political end. Examples of such gangs are Mungiki, taliba, Baghdad boys Saboat Land Defense Force and Mombasa Republican council. It may also be argued that unequal distribution of resources creates unemployment which pushes youths to join armed groups with promise for pay (Klopp & Kamungi, 2008:12; Akech 2015:8).

In the case of 2007 post-election violence, the forest area in Rift Valley that was burnt had hosted kikuyu families. The particular area was formerly acquired by the kikuyu ethnic group through settlement schemes in 1965. The use of violence to attain political ends is not unique in Kenya. The colonial government relied on violence to expropriate African land and labor. On the other hand, the freedom fighters (maumau) in struggle to take back land employed violent tactics against the colonial masters.

The epicenters of violence such as Kuresoi/Molo exemplify the salience of land issues. In keeping up with the imperial mode of production, Kenya places great significance on land as a factor of production. Agriculture as commonly held is the backbone of Kenya's economy. This significance is however downplayed by ethnic manipulation. Ethnic politics are mainly focused on individuals and mainly the political class in relation to getting power. The politics of who and not what best define ethnic politics (Biegon 2018:14).

Some scholars such as Biegon hold that ethnic based politics are diametrically opposed to issue based politics. In view of this position, politicization of ethnicity weakens institutions and political processes. On the other hand, ethnic politics stand in the way of enhancing political processes and institutions. For instance, ethnicity compromises,

electoral processes by ensuring that the political leaders are more of ethnic kingpins and less of competent leaders (Biegon 2018:16).

The colonial practices surrounding land lay foundation for perpetual violence witnessed around election years. Evictions of many Africans through manipulative and fraudulent means such as stealing contravened the first principle of acquisition. By the same token, resettlement plans such as the million acre schemes founded upon the principle of willing buyer and willing seller as well as involvement of land buying companies violated the second principle of rectification as some groups were unduly favored.

Violence is more pronounced during election years when politicians promise to resolve the land injustices in case they are elected in different political positions. Therefore, there is a close relationship between land injustices and violence in Kenya often manifested in election violence. Other factors as ethnicity are secondary and are pegged on historical injustices.

## **CHAPTER THREE**

### **FACTORS THAT INFLUENCED PERFORMANCE OF TJRC IN REDRESSING LAND INJUSTICES**

#### **3.1. Introduction**

This chapter examines the performance of truth justice and reconciliation commission on the land question. To do this, the mandate and findings of TJRC on land are referred to. This is followed by a simple analysis of the constitutive legal frameworks of the commission, and records affiliated to the commission. Finally, the study explores the theoretical and practical challenges of responding to economic, social and cultural violations such as land through existing mechanisms of transitional justice.

The Truth Justice and Reconciliation Commission (TJRC) in Kenya is an important milestone in the efforts of transition in Kenya. TJRC represents one of the truth commissions with an expansive mandate of about 45 years. This combined with unique features such as inclusion of economic violations in its mandate, explicit reference to justice set the Kenyan TJRC apart from many truth commissions around the world.

The 2007 post-election violence was the most immediate trigger for transitional efforts in Kenya. Under the auspices of African union panel of Eminent African personalities, the Kenya National Dialogue and Reconciliation process (KNDR) framework was conceptualized. The framework led to the National Accord and Reconciliation Act (Accord) that contained four agenda items. 1. Immediate efforts geared towards stopping violence and restoring fundamental rights and freedoms 2. Immediate means of addressing humanitarian crisis, promoting reconciliation and healing 3. Means of

overcoming political crisis 4. Addressing long term reforms for example constitutional, legal and institutional reforms, land reforms and so on.

The agenda items resulted in a number of political settlements. In response to agenda four, the Commission Into Post-election Violence (CIPEV) was set to enquire into the causes of violence, establish where responsibility lay and propose the way forward. As part of its recommendation, the commission proposed a special tribunal made up of international and national judges to try those found most culpable. Of greater significance in this discussion and in line with agenda four was the enactment of Truth Justice and Reconciliation Act (TJR Act, 2008) and establishment of the commission thereof.

There are unique features in the Truth Justice and Reconciliation Commission that set it apart from other commissions in other parts of the world. The following paragraphs will focus on these features that had great significance on how the commission responded to the land question. The features include: a reference to the pre-independence period, explicit mandate to deal with economic violations and the inclusion of justice in the commission's title.

### **3.1.1 TJRC on economic violations**

The inclusion of economic violations in the mandate of TJRC sits in stark contrast with many truth commissions where the economic violations are not distinguished from the rest of the violations. Other commissions such as the South African Truth and Reconciliation Commission did not include such a mandate. The TJR Act specifically required TJRC to investigate economic crimes including grand corruption and exploitation of natural resources and the action taken, if any(Slye,2017:2).

In line with economic violations, the commission was expected to find out the reality or otherwise of perceived economic marginalization of communities. The commission in accordance with the TJR act was also required to inquire into the irregular and illegal allocation of public land.

### **3.1.2 TJRC reference to the colonial period**

Article 5 of the TJR Act stipulates the objectives of the commission. The act charged the commission with the responsibility of establishing an accurate, complete and historical record of violations committed between 12 December 1963 and 28 February 2008 (Act No. 6 of 2008, article 5).

The findings of TJRC are described in two phases i.e. the colonial period and the post-independence period under the three presidents Jomo Kenyatta, Daniel Moi and Mwai Kibaki. For the sake of this research, the colonial period is particularly significant in the sense that it was characterized by massive land dispossession and enactment of policies that greatly influenced some of the conflicts witnessed in the country (CRECO, 2012).

### **3.1.3 TJRC on justice**

The inclusion of the term justice in the commission's title and terms of reference is particularly important when viewed in light of historical land injustices. Presumably, justice would be attained from implementation of the recommendations of the commission. In this case the commission was empowered to suggest ways and means that would be employed to respond to gross human rights violations. In addition, the commission was empowered to give recommendations for prosecution of perpetrators of violations.



Consistent with the truth versus justice dichotomy, some commissioners held that it was only through pursuing justice that national unity and reconciliation could be realized. In addition to the truth versus justice debate, explicit reference to justice signaled a commitment to accountability and combating violence. Strictly focusing on historical land injustices, it is important to interrogate what form of justice TJRC served (Slye, 2017:5).

Both restorative and retributive justice were anticipated by the commission. Through establishing an accurate and historical record of human rights and economic violations, by recommending reparations the commission aimed at restorative justice. Wachira et al, 2014:86 notes that truth commissions in most instances lay a basis for reparations and reconciliation more than any other transitional mechanism. Reparations are viewed as, ‘tangible forms of justice to victims.’ The 2005 UN Basic Principles and Guidelines (UNBPG) on the right to a remedy and Reparation for victims of Gross violations of International law and serious Violations of international Humanitarian law recognize reparations as means of promoting justice by redress.

In terms of establishing a complete record, the TJRC is criticized for presenting an incomplete account of violations. The fuller appreciation of the findings on volume 2 B on land may only be made when read alongside with the dissenting view of the foreign commissioners. Upon submission of the final report, the foreign commissioners published a dissenting opinion. In the dissenting opinion, the foreign commissioners noted that the chapter on land volume 2 B was altered. Some of the paragraphs on land had been deleted. This is mainly because the chapters directly mentioned Kenyatta’s family as

involved in land injustices. It should be noted that despite a provision for publishing a dissenting opinion in the TJR act, the dissenting opinion was left out when publishing the main report.

In the dissenting opinion, the foreign commissioners included the original content before alteration. Paragraph 203 in the original report pointed that Jomo Kenyatta grabbed public and private land which he distributed to his relatives. A specific instance is referred to when Kenyatta gifted his son Muigai with a large piece of government land on his wedding day.

Paragraph 231 noted that between 1996 and 2003 land of about 30,000 acres was offered by the Criticos family at a lower rate to aid resettlement of landless people. Instead of resettling the coastal people as intended, the government irregularly settled people from upcountry. The process of resettlement was largely interrupted by the then president and local MP. Paragraph 250 explained how local communities in Tiwi and Diani became squatters after president Jomo Kenyatta irregularly acquired trust land meant for the local communities. Paragraph 261 further explained that president Jomo Kenyatta aided settlement of kikuyu tribe on settlement schemes meant for the local communities.

Failure to publish the dissenting opinion by the foreign commissioners contravened the procedures of the commission established by the commissioners in Naivasha. According to the procedures, any commissioner had a right to dissent as long as it is done within forty-eight hours after the submission of the final draft.

### **3.1.4 The implementation mechanism**

An implementation mechanism was an important innovation of the TJRC provided for in the founding act. The provision was informed by the experience of other commissions in other parts of the world and other commissions of inquiry in the country. In most cases, the findings of commissions were simply ignored. Disregarding of the commissions' findings has the impact of downplaying a commission's work and disappointing the masses. The report indicated therefore that the recommendations of the commission were mandatory and implementation of the same would be monitored.

The broader transitional dynamics that influence truth commissions insist on search for individual responsibility. The search for individual culpability is in line with the earliest forms of transitional initiatives such as Nuremberg and Tokyo trials. Unfortunately, the model of individual responsibility may not adequately respond to structural violations that include land injustices. Jonah Galtung to a substantial extent elaborates that identification of direct perpetrators in the case of structural violence is often difficult. The theory of structural violence instead provides for a focus on patterns that harm people by preventing them from realizing their potential (Galtung 1969:168).

On the other hand, the temporary character of truth commissions also poses practical challenges to resolution of economic violations. The history of land injustices goes back to the colonial period as explained earlier on. The likelihood of land injustices being resolved conclusively by a truth commission whose mandate was about four years was low. Perhaps the significance of Truth Justice and Reconciliation Commission lay in

recommending land reforms to avert the possibility of violence in future. Such reforms included but were not limited to the 2010 Kenyan constitution.

More specifically, there were concerns around the credibility of the commission's chairperson, lack of political goodwill as well as interference of the report by officers from the office of the president all of which interfered with the performance of TJRC on land. There were allegations that the chairperson was involved in some human rights violations as a civil servant. His appointment according to some critiques was an attempt by the government to cover up for state involvement in human rights violations. The chairperson was named in the Ndung'u report on account of acquiring many government houses. Importantly, the commission's report has a section detailing the suitability and credibility of the chairperson. This section records an instance where the hearings on Wagalla massacre were canceled upon a brief deliberation between the chairperson and the officer in charge.

During the operations of the commission, the chairperson stepped aside as he was investigated for the allegations made. While the chairperson was away, the CSOs such as KTJN supported the commission in crafting a reparation framework for the victims. On returning, the chairperson could only take part in reviewing the commission's report but not writing. The chairperson was however not allowed to review chapters on political assassinations, massacres and land (Songa, 2018:30).

There were constant calls for the chairperson to resign from within and without the commission. For example, Desmond Tutu too called on the resignation of TJRC's chairperson. The allegations leveled against the chairperson not only tainted the

commission's image but also delayed the initial operations of the commission. Similarly, the deputy chairperson Betty Murungi resigned from the commission citing incompetence of the chairperson. The allegations too raised public dissent as members of the civil society and reputable human rights organizations declined to take part in the commission's work. Eventually the donors too pulled out hence paralyzing some activities of the commission.

In sharp contrast, the success of Truth commission in South Africa is often attributed to the leadership of the chairperson. The leaning towards forgiveness by the commission is highly reflective of the chairperson's inclination towards religion. Desmond Tutu held that true reconciliation was predicated on forgiveness and that true forgiveness depended on true confession.

Political good will in no small measure affected the effectiveness of the Truth Justice and Reconciliation Commission in Kenya. During its tenure, the commission complained of inadequate financial support to fulfil its mandate. In addition, the commission was denied access to some documents that were important forcing the commission to employ informal means to acquire the documents. Besides appointing Bethuel Kiplagat to chair the commission despite the concerns raised, the government did not replace the deputy chairperson, Betty Murungi upon her resignation. Political goodwill concerns also played out in the South African case. The South African Truth and Reconciliation Commission was accused of witch hunt by the national party and the Inkatha freedom party. The commission was involved in legal tussles by the national party that raised concerns that the commission from its findings was likely to discredit it (Simpson, 1998:9).

Prior to submission of the report by TJRC, the office of the president insisted on getting a copy in advance. This interference led to the amendments introduced in chapter 2 of volume 2B on land injustices. The National Assembly also amended the TJR Act and most especially the implementation framework. The amendment was such that the implementation of the report would depend upon consideration by the National Assembly. The progressive implementation mechanism had before amendment provided for implementation of the recommendations of the commission in six months after publishing of the report. As a matter of concern, failure to consider the reports impacts negatively on provision of reparations to the victims of post -election violence.

The first principle of justice in acquisition as in Robert Nozick's theory of entitlement requires an account of how people came to acquire property in the first place. The requirement to inquire into the irregular and illegal allocation of public land by the truth commission in Kenya in a manner suggests fulfilment of the above stated principle of justice of acquisition. The mandate may be interpreted as a genuine attempt towards giving an account of how people acquired land in Kenya.

The first principle was violated in many ways. The TJRC highlighted unavailability of reliable data to track state expenditure on social programs and infrastructure for the areas identified as economically marginalized. For instance, certain regions of North Eastern had been excluded from poverty and health surveys. This was also the case for some rural areas for instance in the Rift Valley. Secondly, distortion of the chapter on land effectively affected the record of injustices available.

The third principle in the entitlement theory provides for rectification of any injustices emanating from unjust acquisition and transfer. The third principle in resolving in historical injustices provides for compensation in case property was acquired or transferred unjustly. Unavailability of the records of injustices as noted therefore affected the possibility of rectifying the historical injustices. This is besides the fact that the implementation mechanism established to ensure implementation of recommendations was interfered with further expounding on the practical challenges of transitional justice in resolving economic violations. Be that as it may, the repercussions of TJRC's effectiveness in handling the land question impact on different groups with varying intensity.

## **CHAPTER FOUR: DISCUSSION OF THE STUDY FINDINGS**

### **4.1 Introduction**

In this chapter, major findings of this study are discussed. This research found a strong link between land injustices and land violence in Kenya. The land question in Kenya is with no doubt the most emotive especially because most of the Kenyans rely on land for their livelihoods. The impact of land injustices as established in this research do not impact on all people uniformly. The TJRC established a list of vulnerable groups who suffer violations of human rights rather disproportionately.

It is not feasible to provide an entire account of how land injustices impact all the vulnerable groups. Therefore, this chapter focuses on how redress/ failure to redress land injustices by TJRC impact women and pastoralists but more specifically the Maasai. This chapter engages with the research question: how does TJRC's performance on land question impact on vulnerable groups in Kenya?

Jonah Galtung holds that structural violence is defined by inequities and injustices embedded in social and institutional structures within societies. Structural violence relates closely to social justice which seeks to offset structural violence through responding to inequality in access to opportunities, privileges and wealth. This chapter will also through Galtung's theory offer a demonstration of how inequality of land administration is systematically reinforced by different structures to the disadvantage of women and pastoralists (Galtung, 1969).



## **4.2 Land Injustices and Women**

Before colonialism, access to land was pegged on initial clearance of bush. One would claim to own land upon clearing a bush. According to the gender division of labor then, clearing of bushes fell in the domain of men. Needless to say, women would access land through their relationships with their male counterparts such as daughters, wives and so on. This explains the land inequalities that existed in land division then. In the contemporary society, inequality in access to and control over land is perpetuated and sustained through capitalism and neocolonialism. Capitalism for instance promotes social stratification in the society thus gender differentials in land distribution (Wambui 1991: 109).

The arrival of colonialists heralded land tenure changes under the aegis of 'reforms'. However, before major reforms were instituted, demarcations were created between reserves and white highlands. African males were forced to move to the plantations to provide labor. This interfered with the previous arrangement by expanding the role of women as agricultural producers in the reserves (Ikdahl et al, 2005:85).

The period that followed witnessed major land tenure reforms that sought to replace the customary system with the Torrens title system. In accordance with the latter, processes of adjudication, consolidation and later registration were undertaken. Wambui 1991:121 explains that women were rarely represented in the adjudication committees. It is therefore no surprise that registration of land was mainly done under male heads of the family. To emphasize this point, unmarried girls would be allotted land with a view that their sons would inherit it for continuity of the clan (Wambui 1991: 116).

The reduced women's rights to land did not reduce their burden in agricultural production. The colonial administration in collaboration with African male heads ensured customary practices discriminating against women's access and control of land found their way to the incoming statutory provisions (Wambui 1991: 110).

Some scholars such as Kameri-Mbote and Perpetua Wambui hold that the "reforms" did not only reinforce gender inequalities in control of land but also introduced new ones. The process of formalizing informal norms that determined access to and control over land had far-reaching implications on the proto-rights of women to land. In the process, the proto-rights of women were significantly eroded. In the aftermath of the so-called reforms few women could enjoy access and use of land. Other reforms introduced such as growing of cash crops had the effect of marginalizing the labor value of women. Though the rights of women to land were eroded during the reforms, the burden of women as agricultural producers was not reduced.

The TJRC however lacked express mandate to deal with patriarchy that is majorly responsible for the unequal access and control of land among women. This ensures that women continue to suffer the disproportionate effects of land injustices which are exacerbated by the election related conflicts in Kenya. On more practical note, failure to resolve land injustices means that the aspects that engender structural violence, born from the transition from proto-rights to constitutional rights and the pervasive patriarchal norms and values, persist.

### **4.3 Land Injustices and Pastoralists**

The TJRC report acknowledges loss of land by the minorities through colonization, nationalization and privatization. The commission found that pastoralists had suffered land loss, forced evictions, land fragmentation and increased poverty levels. Pastoralists too experienced strained relationships with the neighboring communities who they were in constant conflict with.

In addition to the legislations enacted to appropriate and dispossess Africans' land at colonial period, the Maasai were made to sign two agreements in 1904 and 1911. In the 1904 agreement, the Maasai were moved to a reserve in Laikipia. The colonial administration indicated that, 'so long as Maasai as a race shall exist,' then they would retain the reserve. However, this assurance was not the case as the 1911 agreement nullified it. The Maasai were moved from Laikipia to Southern Maasai Reserve. During the two evictions in 1904 and 1911 many lives were lost (Hughes, 2006:3).

The following section discusses two elements closely linked to dispossession i.e. privatization and the associated theme of individualization. The section also highlights attempts to extinguish customary land practices in favor of statutory practices.

#### **4.3.1 Customary land practices in pastoral groups**

Most pastoral groups derive access, control and ownership rights from their customs and norms. The pastoral way of life is well suited to the communal ownership practices that were well stipulated within the Maasai community. However, the colonialists assumed that the communal way of life was built upon open access. Open access refers to 'a regime of unrestricted privilege but no duties.' In line with this definition, open access

explains a system where the regulations on common property resources had failed. As a result, the customary practices and legislations were relegated to an inferior position in the hierarchy of legislations (Wachira 2009: 56).

Colonialists linked pastoralism to overgrazing, overstocking and thus loss of land productivity and biodiversity. In place of pastoralism, the colonial administration imposed a sedentary lifestyle to increase agricultural production. This is despite common knowledge that pastoralism is a resource management with institutions that cumulatively control resources leading to sustainable development (Homewood et al, 2009:337; Migot-Adholla, 1991: 159).

### **Privatization**

Upon independence, Maasai proposed recognition of their status as the original occupants of parts of the Rift Valley where they were originally located. This was not adhered to as the independent government encouraged formation of land buying companies which mainly benefited the kikuyu ethnic group (Koissaba, 2016: 200).

The first efforts in the line of individualization were enactment of consolidation legislations such as the land control act of 1967 and the land adjudication act of 1968. During the consolidation, the Maasai districts were closed and hence movement was curtailed. The closure of boundaries meant that the Maasai could not move freely with their livestock in search of pasture and water. In addition, Maasai were excluded from the adjudication process and hence lost land.

Other infractions included conversion of communal lands to group ranches. Group ranches were founded and structured on the model of white settlers' ranches which continued into the independence. Scholars view the existence of white ranches beyond independence as an act of imperialism. The group ranches encouraged collective ownership. In that case, registration was done under representatives of group ranch members (Wachira, 2009:298; Koissaba, 2016: 200).

The group ranches, as the independent government held would contribute to commercialization of production, better environmental management and improvement of the pastoralists' wellbeing. However, there was little consultation with the Maasai over establishment of the ranches. Worse still, the group ranches defied the manner in which Maasai manage and establish boundaries.

According to the TJRC report, the group ranches led to not only de facto discrimination but also dispossession of land. The report also faults complicated procedures of communal ownership employed in the ranch in accordance with the (Group Representatives) Act (GRA). The report to this end proposed restitution to redress the loss of land (Volume IIC: 160).

However, as time passed some influential representatives sought to lease/ sell pieces of land for personal benefits. This initiated demands to subdivide the group ranches. There too were political persuasions to disband group ranches in favor of individual titles. Subdivision and consequent individualization of group ranches saw outside communities buying some pieces of the land (Wachira, 2009:76). Arising from the structural and legislative processes, large proportions of pastoralists were rendered landless. Therefore,

in a fundamental sense, pastoralists were marginalized and further impoverished (Kipuri & Ridgewell, 2008; Nyanjom, 2014). There are far reaching impacts of vulnerability associated with curtailing pastoralists' rights to land such as: low standards of living often below the national and international poverty lines. This arise from the fact in addition to being dispossessed their ancestral land, pastoralists were forced into a land tenure system that is founded on modes of life and values that are incompatible with pastoral life and values of communal land. As a result of the interruption, some pastoralists though unskilled move to the urban slums. Ownership gaps in pastoral land increases poverty in the sense that members of the pastoral community lack collateral to take up loans and engage in enterprising farming.

## **CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATIONS**

From the foregoing chapters, socio-economic concerns in a post-conflict setting are of primary concern. Socio-economic violations constitute a large percentage of what causes conflict in the society. The civil and political violations are majorly manifestation of the socio-economic violations. It remains imperative therefore that significant efforts are put to ensure redress of socio-economic violations by societies pursuing justice and reconciliation efforts and consequent democratic consolidation.

Post-conflict societies embark of transitional justice efforts to bring to and end period of conflict and to usher in stable societies. Transitional justice mechanisms are modelled along international law. They are highly legalistic in their approach to mass atrocities after the period of conflict. Transitional justice mechanisms therefore are drawn to searching responsibility for violations meted with the individual as the main subject. In addition, modeling of transitional justice along international law draws them to identifying specific perpetrators of violations.

Unfortunately, socio-economic violations are unlikely to fit be resolved through purely legalistic means. Socio-economic violations are often meted against people by structures in the society making it difficult to establish individual culprits. In addition, they may be meted against a particular group and in most cases the most vulnerable of all. Be that as it may, the Kenyan Truth Justice and Reconciliation exhibited special features that may be adopted by other commissions to respond to country specific conditions. For example, an

explicit mandate to look into economic violations as in the Kenyan case may improve on the ability of transitional justice redressing socio-economic violations.

Despite the foundational and secondary factors that come in the way of truth commissions redressing socio-economic violations, truth commissions should be empowered to make sound recommendations on how societies may redress socio-economic violations. Post-conflict societies should accompany the temporary transitional justice efforts with longer lasting reforms that address socio-economic violations. The long lasting reforms must take into account the systemic and widespread nature of socio-economic violations as well as the fact that vulnerable groups suffer disproportionately the effects of socio-economic violations.

The study also recommends that transitional efforts invest in proper civic education to clarify the mandate of transitional justice mechanisms. Civic education should entail the exact objectives and capabilities of transitional justice to avoid disappointment upon completion of transitional efforts.



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