Truth commissions as a tool of transitional justice

Lessons from Kenya

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Introduction

Until recently, transitional justice (TJ) referred to a range of efforts to achieve accountability and redress in times of transition from state repression or conflict to democracy or peace in ways that promoted victims’ rights, civic trust, and the democratic rule of law. However, classic TJ mechanisms – such as truth commissions, special or international tribunals or courts, reparation programmes, and human rights-oriented constitutions – are now also recommended and used in contexts where no substantive transition has taken place. One example is Kenya, where various TJ mechanisms were introduced following the re-election of President Kibaki and the intense, but relatively short-lived, post-election violence of late 2007 and early 2008. The implicit rationale is that TJ can help counter deep-seated problems, such as a culture of impunity and historical injustices, and promote more peaceful and democratic politics – TJ mechanisms are thus increasingly used as a means to initiate, as well as to respond to, transition.

One of the most popular TJ tools are truth commissions – best understood as officially sanctioned temporary institutions that investigate past patterns of abuse (Hayner, 2002: 14) – with over 40 such bodies established around the world since the early 1970s. During and immediately after the Cold War, truth commissions tended to challenge official stories of violent state repression in countries emerging from authoritarian rule, with information largely gathered through field visits, personal testimonies and archival records. However, in the early 1990s, there was a shift to truth and reconciliation commissions (TRCs). The well-known South African TRC offered a new template for healing and closure through public hearings (Shaw, 2007: 190), where hearings allowed ‘individuals to tell their story from their own point of view, and to be heard’ (Commonwealth Secretariat, 2007: 43), and provided ‘a literal and figurative stage for South Africa’s political transition’ (Cole, 2010: xvi). Or, as the TRC Vice-Chairman Alex Boraine wrote of the first public hearing, ‘It was a ritual, deeply needed to cleanse a nation. It was a drama’ (2000: 98–99). Performative processes aided in this context by the use of religious narratives and provision of amnesty for full disclosure at a time of a negotiated settlement and new nation-building projects (Tutu, 1999).

However, while the TRC is often lauded internationally, it has also been criticised for its failure to incorporate some people’s preference for retribution and revenge, to tackle impunity, provide adequate reparations, and address underlying structural inequalities of wealth and power, as well as for its overtly religious approach (see, for example, Mamdani, 2005; Stanley, 2001; Wilson, 2000). The big question is whether South Africa justifiably substituted public truth-telling and a Christian-inspired idea of restorative justice for retributive and reparative justice.

Today, the choice of public truth-telling or punitive justice has been replaced by a new package approach that views truth-telling, prosecutions and reparations as complementary processes that can and should occur concurrently. This is evident in Sierra Leone, where a TRC – based largely on the South African model – ran alongside the Special Court for Sierra Leone, and also in Kenya, where the country’s ongoing Truth, Justice and Reconciliation Commission (TJRC) has run parallel to International Criminal Court (ICC) investigations, the inauguration of a new constitution, and various national and local peacebuilding and reconciliation efforts.

This paper focuses on the Kenyan TJRC in the context of a package and preemptive approach to TJ; the aim: to highlight key achievements, challenges, and lessons for future practice.

Kenya’s Truth, Justice and Reconciliation Commission

There is a general consensus that Kenya’s post-election violence of 2007/8 – which led to the death of over 1,000 people and displacement of almost 700,000 others in two months – was triggered by a disputed election, but fuelled by much deeper problems (Lynch, 2011). In turn, while the TJRC was established in the wake of this crisis, it was mandated to investigate a much wider range of abuses and historical injustices. This included massacres, acts of state repression, irregular land acquisition, perceptions of economic marginalisation, and causes of political violence and ethnic
tension, which occurred between Kenya’s independence on 12 December 1963 and the signing of a National Accord on 28 February 2008, as well as relevant precedents and antecedents (Kenya, 2008). This remit gave the TJRC the largest temporal and thematic mandate of any truth commission to date.

Kenya’s TJRC has the powers to recommend further investigations, prosecutions, amnesty for non-gross human rights abuses, reparations, and institutional and constitutional reforms. The TJRC Act also provides for an implementing mechanism and requires the Minister of Justice to give regular updates and provide reasons for any areas of non-implementation. Given that the final report is yet to be submitted, it is impossible to say what the Commission’s recommendations will be, or the extent to which recommendations will be implemented. Nevertheless, many civil society organisations (CSOs), government bodies and international partners hope that the report will be published soon and offer strong recommendations that would, for example, ‘be important as a foundation for the continuing healing and reconciliation process in the country’ (Ngari, 2012: 5).

However, despite clear achievements and potentials, the TJRC has also faced numerous challenges, which offer important lessons for future truth commissions.

First, the TJRC’s mandate was an impossible task for a single body to achieve within two-years. Not only was the TJRC to look into a wide range of abuses and injustices over a 44-year period, as well as relevant precedents and antecedents, but it was also tasked with promoting peace, justice, national unity, healing and reconciliation among the people of Kenya. The time-frame was understandable given that people wanted the Commission’s recommendations to feed into the 2013 election to help prevent a repeat of the post-election crisis of 2007/8, but a choice should have been made – either the Commission should have been tasked with doing less, or it needed a much longer time-frame. Even then, people’s expectations about what one commission could achieve would have had to be carefully managed.

The TJRC was also given inadequate funds, a problem that was particularly acute during the critical initial phases of its work. Indeed, for much of its first year, the Commission faced a financial crisis and had only two employees – a director of communications and director of research – in addition to the original nine commissioners.

The Commission was also undermined by a credibility crisis, which stemmed, in large part, from wrangles over the chairman Bethuel Kiplagat. In short, critics argued that described, leading many testimonies to lack the emotional depth that gripped participants and observers of the South African TRC. This was in contrast to women’s forums, which were characterised by songs, dancing, and open microphone sessions where the level of trauma and grief was often all too vivid.

Nevertheless, while alleged perpetrators were generally unwilling to admit wrongdoing at public hearings, and there was public criticism of the TJRC’s communication and management capacities and low attendance levels in some areas, victims clearly valued the opportunity to tell their story and be heard by an official body, and many community members were happy that the TJRC had come ‘down to the ground’. In interviews with TJRC witnesses, many placed particular emphasis on the importance of reparations of some form – a finding supported by interviews with civil society organisations and an International Centre for Transitional Justice (ICTJ) report on victims reparative demands entitled ‘To live as other Kenyans do’ (2011).

In addition to listening to individuals directly, TJRC researchers – tasked with writing much of the final report – consulted secondary literature, non-governmental and government reports, and various archives. The Commission also set up a database and hired consultants to write reports on specific thematic issues, such as militias, ethnic violence and land.

How Kenya’s TJRC investigated past crimes and wrongdoings

The TJRC was established through an Act of Parliament in 2008, commissioners were appointed in August 2009, and the Commission started its work in November 2009. Initially, the TJRC had a two-year mandate, but commissioners successfully applied for a six-month extension, then another three-month extension and, in August 2012, applied for a further six to nine-month extension.

In terms of its activities, the Commission first trained and deployed statement takers across the country, leading to the collection of 40,098 statements and 1,529 memorandums – the largest number of any truth commission to date. From April 2011 to March 2012, the Commission held public and in camera hearings and women’s forums in 35 locations, as well as adversely mentioned people’s hearings, which were largely conducted in Nairobi, and thematic and institutional hearings in Nairobi. Through these hearings, the Commission heard directly from 696 witnesses, with those selected cast as ‘window cases’ for a much larger number of victims, stakeholders, and adversely mentioned persons.

The different types of hearings and forums varied significantly in their performative dimensions. Thus, public hearings were staged as quasi-judicial occasions with significant time often given to community or thematic memorandum, which allowed for a range of issues to be covered relatively quickly. The downside was that such representatives often appeared divorced from the injustices described, leading many testimonies to lack the emotional depth that gripped participants and observers of the South African TRC. This was in contrast to women’s forums, which were characterised by songs, dancing, and open microphone sessions where the level of trauma and grief was often all too vivid.

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Kiplagat should be summoned before the Commission rather than chair the process, and that his appointment was an attempt to undermine a popular quest for justice. Under pressure — but only after the vice-chair had resigned — the chairman stepped down, but later returned to work despite initial resistance by fellow colleagues. Critics also raised questions about the suitability of several other commissioners, sections of the TJRC Act (particularly those relating to amnesty) and, as time progressed, the quality of the TJRC’s work and its ability to meet its mandate given relatively high levels of public scepticism, limited human and financial resources, and a dwindling lifespan.

These problems prompted — and were then reinforced by the fact that — many CSOs criticised the process, with vocal Nairobi-based organisations mainly opting to have limited periods of strategic engagement. In addition, many donors opted to focus on other processes, and government officials largely stepped back from a process that had initially been pushed by civil society activists and foreign mediators. As a result, limited civic education was conducted by non-TJRC actors, while the TJRC’s civic education programme started late due to funding and staffing issues and was then largely overtaken by the need to plan and manage public hearings. Together with the high levels of interest sparked by other developments — most notably the new constitution and ICC investigations — these problems also meant that there was limited media coverage or public debate of TJRC’s proceedings.

Indeed, the fact that the TJRC ran concurrently to ICC investigations proved significant for a number of reasons. First, due to limited civic education, an overlap in the ICC and TJRC’s mandate, and some similarities of process, there was some confusion about the differences between the two bodies. Second, ongoing proceedings at the ICC — together with continued advocacy in some quarters for the establishment of a Special Tribunal to convict mid- and lower-level perpetrators of post-election violence — clearly put some people off talking to the TJRC. Yet, while the ICC may have led people to talk less openly about their involvement in the post-election crisis, the same cannot stretch to all areas of the TJRC’s mandate.

Nevertheless, people proved unwilling to publicly admit to wrongdoing regarding any injustice. Moreover, while the Commission has powers to recommend amnesty for non-gross human rights abuses, it has not yet opened an application process, due, in large part, to a belief that very few people will apply. This assumption is given credence by the limited threat of prosecutions; a fear that admission would negatively affect future lives, especially one’s ability to stand for public or political office; and by the fact that there was very little public excitement surrounding the TJRC process and thus little incentive to come forward given the potential negative repercussions.

This lack of excitement is partly due to a long history of commissions of inquiry that have documented the country’s violent and unjust past but failed to initiate change. Moreover, the belief that the TJRC would just be another commission of inquiry was bolstered by the longwinded saga over the chairman, associated credibility crisis, and low levels of public knowledge and debate. Such scepticism was further expounded by visible changes resulting from the 2010 Constitution — such as the public vetting of judges — and fears that the Constitution would be undermined, as well as by the public workings, international character, unpredictability, and potential impact of the ICC, which confirmed charges against four leading Kenyans (including two presidential aspirants) in January 2012. Developments that collectively ‘upstaged’ the TJRC’s public processes.

In this context, the TJRC’s requests for extensions and further extensions and non-publication of a final report on 3 August 2012 after statements that the report was finished, raised fears that it was being doctored or delayed so as not to impact upon the 2013 election campaigns of well-connected candidates.

In the face of such challenges, it is important to recognise and commend the unrelenting passion and commitment of most TJRC staff members. Their hard work and range of activities conducted have brought dividends, and the final report can still provide an important overview of past injustices and valuable recommendations. Nevertheless, the TJRC has clearly not been the Commission that its staff or the Kenyan public initially wanted it to be.

Some lessons

The Kenyan example supports conclusions reached by analysts of previous truth commissions regarding the critical importance of ‘nuts and bolts’ factors; such as committed sponsorship, clear management, sufficient staffing, generous and timely funding, and strong civil society support (see, for example Hayner, 2011).

The case also demands more consideration be given to what a truth commission is supposed to achieve and how. Is the main aim to document the truth and offer recommendations? If so, why have public hearings? If public hearings are important, for example, for catharsis or as a ritual for cleansing the nation or for increasing public awareness of past abuses and means to display official acknowledgement and engagement – then how can one ensure that they have such effects?

A key lesson from the Kenyan case is that, first, a truth commission should never be expected to achieve everything. Second, it highlights the critical importance of credibility, excitement, and popular buy-in, and the difficulty of achieving these aspects if a truth commission is perceived to be a continuation of past practice (especially if there has been no substantive transition) or a pale copy of equivalent processes in other contexts. In this regard – especially for hearings where their public nature is meant to be part of their added value — more consideration needs to be given
to people’s perceptions and to approaches that can enhance the performative impact of a truth commission’s work. This could include approaches that emphasise difference – for example, the inclusion of foreign commissioners clearly encouraged some people to interact with the TJRC – or cultural or religious practices that resonate with local people, the power of which was evidenced through the TJRC’s women’s forums (also see Kelsall, 2005, on ritualistic aspects of the Sierra Leonean TRC). In short, more attention needs to be given to how people can come to believe in, and thus enliven, public processes.

Finally, while performative dimensions can clearly heighten public interest and engagement in truth commissions in the short term, the impact of such displays of action and change will surely diminish if a commission’s work and outputs are not seen to help secure, or initiate, a substantive, relevant and demanded transition in the medium to longer term.

Reference


Endnote

1 See http://ictj.org/about/transitional-justice

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