

Review

Examining the Interplay Between Local Court Systems and Restorative Justice in Comparison to the International Criminal Court (ICC)

Oricho Otieno Dennis

Jesuit Hakimani Centre, Nairobi, Kenya. E-mail: dennis.oricho@fulbrightmail.org. Tel: +254 718 716 109.

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The article aims to compare the role that the International Criminal Court, as opposed to local courts is able to play in providing restorative justice in post-conflict societies. The author examines in detail the experience of the Rwandese 'Gacaca' courts, in order to demonstrate that local courts achieve better results than international or Western-biased criminal courts. The article further raises many useful insights that can throw some light on some of the current problems in Africa. While this traditional mechanism of the local court system demonstrates the wisdom that has sustained the local court systems, the modern African leaders appear to rebel against their roots through dictatorial rule that sentences the greater percentage of the population to a miserable life in pursuance of justice. It is within this perspective that the author noted that local tribunals of suspects can easily speed the trials which would cost the government dearly if international criminal courts were used. However, reconciliation and forgiveness remain pertinent challenges of local courts system because of the tensions that are eminent between victims, offenders and the community due to poor mechanism for reintegration for those found guilty.

Key words: Grand coalition, rigging, Gacaca, toxic leaders, impunity, genocide, restorative justice, local tribunal, International Criminal Court, perpetrators.

INTRODUCTION

With regard to genocides, modern technological developments give unprecedented access to weapons of mass destruction and it is precisely at this point that the psychological dimension of genocides acquires new importance and meaning. The 2007 Kenya presidential and parliamentary elections, like many times before, was a public event that remains introvert and autistic following the announcement of the results. The only matters that the world care about at this moment was who won the election between Raila and Kibaki which brought the main issue (the dispute between Raila and Kibaki) and the aftermath of numerous deaths referred to as genocide. Partisan and ethnic divisions as well as integrations in pursuing the so called winner capture world attention. Similarly, it is the security of our country where our interest for the rest of civilians ends. The presidential elections were followed as far as they concerned the State's attitude towards Kenya. Quite unusual, the president was sworn in at night in the State House and for two months, the state turns away from its responsibility to face the ugly truth about its being

accomplice in the worst war crimes of rigging and corruption, leaving behind mass deaths and displacement of many Kenyans from what they called home. Thus, it is hardly surprising that Kenya has been spared the wave of Railamania and Kibakimania and the faith in the "new dawn", which was expected to bless this sad and ugly country from poor leadership. Unlike the rest of key stakeholders in conflict, Kibaki and Raila were seen as nuisance and bad news following their hard line position not to dialogue for the sake of peace.

THE CONNECTION BETWEEN LOCAL TRIBUNAL AND ICC

At the epicentre, no intention to claim that Kenyans enthusiasm is justified and well-founded by the grand coalition that saw the president and the prime minister signed an agreement. One can be sceptical to say that the joy of many Kenyans at the moment is premature and even exaggerated. Nevertheless, it is necessary to expose the arguments of "pro" restorative justice that made

the author inclined towards it rather than towards International Criminal Court (ICC). Knowing well the official history of the ICC, and even more its other less known side, the emotions could not be resisted in the author that the scene of impossible, which was made possible run through the media that ICC is the best alternative, for the perpetrators of past election violence is a nightmare. It was truly fascinating to see the awaken Rwanda go to Gacaca philosophy after genocide of 1994, those long lines of voters determined to decide their political future (despite the fact that the Kenya elections are far from being direct ones). Charismatic and eloquent politicians are such figures that can make us cry out of despair when compared to our "statesmen". And finally, after the 'natural disaster' called Moi, it was not only easy to look at Raila and Kibaki through positive lenses but one gets desperate need to cherish hope and to believe in miracles. Some Kenyan leaders already used an interesting metaphor to describe the new situation of new leaders as jokers: As such, brightens and a big leap is needed to transform hope into change that Kenyans yearn for.

In times of general euphoria it seems risky to be sceptical. The chorus of optimists gets wish to silence such warning voices, to label them as troublemakers, nonbelievers, cynics and toxic leaders. Toxic, because, toxic leaders are those who engage in numerous destructive behaviours and who exhibit certain dysfunctional personal characteristics (Blumen, 2005). Yet, the author has the urge to publicly declare the reasons for his concerns are that most leaders are toxic. The awakening of the Kenyans citizens is not a result of the persuasive power of Raila or Kibaki. It does not reflect any particular vision for a new just society. It has rather been a pain felt on their own skin that made them move. During Moi Regime, the public support was based on the fear and need for security unlike now that people are witnessing a mobilization process because of fear from the economic recession, poverty, reduced loans and credit cards limits. If Kenyans citizens get satisfied with their political spring soon and become content with Kibaki and Raila's election, then it will be a sure proof that democracy without people is still at place. This may be the ultimate proof of Kenyans theorists' thesis that elites have interest to keep the people happy, focused on their wellbeing and everyday small worries that is to keep them (politically) asleep. Because the moment things get worse they will be awoken, which is no good news for the elites. According to these theories, this makes elites more responsible and more efficient in providing for their citizens. The ordinary Kenyans have been living far beyond his/her abilities, let alone the fact that his/her needs are often created artificially by the media and commercial campaigns. Having been used to live in relative comfort, s/he is now not only worried but also scared for her/his living standard. The Africans elections clearly manifested people's great expectations but it is

still questionable how far their patience goes. Every reform is by default a long and painful process, and a colossal financial crisis is likely to create even more collateral damages and 'transitional' losers, before (and if) things turn to better. Austerity measures usually hit the least privileged - the countries from the former socialist block, with their long experience in 'economic reforms' can tell the best. In moments of celebrations over the 'right choice' of Kenyan citizens, one should pay attention to a couple of facts: the sitting president and the prime minister's victory were not as convincing as it looks at first sight. Bearing in mind the catastrophic Moi legacy of which Kibaki served as the vice president, it is surprising that as many as 48% of the votes went to Kibaki and some to Raila forming the root cause of the post election violence. The Kenyan voter has always been relatively easy to seduce, sometimes with declarations given on a high ethical ground, other times based on fear-mongering ethnic affiliations and in particular little kilos of corn flour and sugar. In each case it were the "others" (non-Luos, Kikuyus, Luyhas, Kambas to mention a few from the world periphery), who were paying the price of the Kenyan voting policy. The surveys showed clearly that these elections were a sort of an 'economic referendum', which means that majority of Kenyans are still prepared to live with their leaders which claim citizens life's sacrifices and exploitation as long as they keep low prices and relatively comfortable living standard. The lack of empathy is, of course, present within the Kenyan society that is based on huge social-economic disparities as something natural and in line with the dominant ideological matrix in Kenyans voting system. Thus, it may sound even idealistic to expect Kenyans to be more concerned about the rest of the people at the grassroots. As most of African politician seems to get their ways into power, most of them do not care about lower social strata. Raila and Kibaki "succeed-ed" to organize the most expensive electoral campaign ever, not only in Kenya but Africa at large. Despite their undeniable charisma and intellect, the real Raila and Kibaki is still a mystery. We are just about to know who they really are, judging from their moves and decisions (the names of potential cabinet members sound quite scary and rather corruption in key sections of government like Ministry of Education, Local Government, and Ministry of Finance where nature of accountability is questionable). What we can surely say at this point is that the myth of Raila and Kibaki has been born, due mostly to the media. Thus, this has not been a victory of the participatory but of tele-democracy in Kenya where impunity for top perpetrators into post election violence may never become a reality as the case of the Wagalla massacre, the murder of JM Kariuki, Dr. Robert Ouko assassination to mention a few. When the top perpetrators go unquestioned, then it is reasonable to go Gacaca and restorative justice way. Why is this so? Historically, Gacaca had no scholarly literature because it was not an institutionalized body, but

rather a meeting that brought together community members or families each time a conflict erupted. It was commonly practiced in rural settings on a type of grass known as *urucaca* and was managed by men with no women present probably because Rwanda is a patriarchal society. However, Rwanda currently boasts the highest number of women (44%) in any parliament in the world.

The objective of traditional Gacaca was to reconcile the disputing families or relatives as the Rwandan community believes that disconnected relationships of relatives bring shame on their families and reduce social cohesion. A good example is that, at community level, Gacaca was chaired by a dignified person or community elders (*Inyangamugayo*), literally meaning persons of integrity who bring people together with no biases. The traditional Gacaca process is thus, a community conflict transformation system grounded on relationship building and respect of the community members to put things right. The system emphasizes reparation of the victims which in rural home includes beer, money, cows, goats or dry food especially when someone's domestic animals have destroyed another person's farm. The reason Gacaca and restorative justice are considered as the best option than ICC is because both prioritize forgiveness and provide a safe environment to the offenders to communicate to the victims. Based on the impact, Gacaca helped not only the victim and the offender to heal, but also their families because of the respect imbedded in the connectedness, togetherness and sameness in Rwandan community. Kenya, being a communitarian society, it is only wise that local tribunal is put in place. Likewise, there are common sayings in Rwandan community, "*Ntawubaho ntabantu afite*" meaning that none survives without people or we depend on other people for survival. The same concept was epitomised by a renowned African Scholar in his African Egalitarianism Philosophy that, *I exist for, with and in the WE and vice versa as epitomized in the African philosophy of egalitarianism: I am because we are, and since we are, therefore, I am (Mbiti, 1978)*. The concept that brings to our mind that God loves diversity. God made a diverse world. We are to walk into difference rather than surround ourselves with people who are the same. This is what Jesus modelled with his life in the choice of disciples as the epicentre of rebuilding relationships. As clearly stated, a transformational approach recognizes that conflict is a normal and continuous dynamic within human relationships (Lederach, 2003). These are the core traditional values that guided Gacaca in Rwandan community. It is however significant to note that Gacaca existed alongside the conventional retributive judicial system and is not exceptional if justice and reconciliation is to be achieved. Why not do the same with Kenya. Do Raila and Kibaki owe the Kenyans something towards Justice and reconciliation? And how shall they reconcile the electoral promises given both to the poor and to the rich? The

former may delegitimize, but the others may oust him. It is not too premature to conclude that there will be no dramatic changes if the public go ICC way instead of restorative justice way. Zehr, (2002) in his little book of Restorative Justice, defines restorative justice as a process which involves the possible extent at which those who have a stake in a specific offence to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible. Based on Zehr's definition of restorative justice, Gacaca and restorative justice are both community grounded and respect oriented. They use collective thinking and work together to repair broken relationships and put things right without shaming the offender. They both use family members of victims and offenders to solve the conflict amicably with an aim of win-win solution. They both support the idea of reparation over punishment and court system. They provide space for the victims and offenders to communicate. The victims and offenders exist in Kenya not in Hague. However, it would be right to highlight the fact that traditional Gacaca system was changed into what Clark (2007) has called *Modern/Hybrid* Gacaca after the 1994 genocide to assist the Rwandan Government to try genocide suspects of categories two and three. The two categories comprised suspects who were involved in killings, conspiracies, looting and property damage. Having examined how traditional Gacaca resonates with restorative justice, this work would like to explore how the modern Gacaca also connects and disconnects with restorative justice.

MODERN GACACA AND RESTORATIVE JUSTICE

After the 1994 Rwandan genocide, the new government inherited what Mamdani ((2001) calls a guilty population. About 130,000 people were imprisoned for perpetuating genocide, a number that flooded the national prisons. The government's capacity was overstretched to feed and maintain genocide suspects in prisons. In addition, most professional lawyers had been killed in genocide and the remaining few would take long to try these suspects by the use of conventional courts. The Rwanda Government introduced Gacaca law in 2001 which divided genocide suspects in four categories, but Gacaca was designed to deal with the second and third categories. The aim of the government to resort to Gacaca was to speed trials, reconcile Rwandans, and to put an end to the culture of impunity and to use its local traditional dispute mechanism to solve its problems. In doing so, Gacaca divided hearings into two administrative levels with different duties. The first administrative level known as cellule examined the crimes committed in the cellule (village) during war and genocide from 1990 - 1994. This level produces four lists. The first list contains the names of those who lived in the cellule before October 10, 1990, a time when the war broke off between

the former government and Rwandese Patriotic Front (RPF) which took over power in 1994. The second list contains those who were killed in the cellule in the above period. The third compiles the injuries done to individuals or damages to people's property in the same period. The fourth category compiles suspects and their categories. The cellule level hears only category three and secteur level deals with category two and also receives appeal from categories two and three. Category one cases were handled by the public prosecutor's office (Clark, 2007).

It is in this perspective Clark (2007) argues that Gacaca is distinctive among other post-conflict judicial systems because of its use of mass population in pursuing and carrying out justice. In the choice of the judges, Gacaca judges must be Rwandan citizens above 21 years old with high levels of integrity, with no ethnic sectarianism and should have never been imprisoned. Likewise, Kenyans want a truth commission, but a credible one, not an institution with suspect's characters. The judges should come purely from the local community with no prior employment with government or NGO or with police and should not have practiced law. Unfortunately, Mr. Bethuel Kiplagat is facing rejection from Kenyans, given the charges of complicity in the Moi Regime that have been levelled against him. The Wagalla massacre, for example, has left Mr. Kiplagat tainted. According to Clark, these criteria are based on the determination that the Gacaca process should be conducted at community level with no legal and political influences. It is estimated that about 170,000 judges operated in the Gacaca process with about 35% being women judges at cellule level. Women served as judges and also members of the general assembly. Gacaca judges carried out different roles such as inviting witnesses to come and testify in the general assembly, issue warrants and punish those found guilty. Each cellule court is managed by nine judges and five deputies who work in the absence of judges. The nine judges work in four phases: in the first phase, the assembly convenes to plan a schedule for hearing and compile all lists from that cellule. In the second phase, the assembly convenes for judges to provide detailed evidence on each suspect accused, and the accused is provided an opportunity to react on the evidence brought against them. After the general assembly has heard, the president passes the judgment after a consensus is agreed upon by all judges. The sexual cases were conducted in private with one judge and a witness to hear the case. It is also important to note that the Ministry of Internal Security should provide security personnel to protect the general assembly and Gacaca judges during the hearing process. This is an area that needs to be looked into.

In respect to punishment, Gacaca law stipulates that individuals who decline to testify at Gacaca courts or provide false testimony are subject to three or six months imprisonment. The suspects in category two who plead

guilty and confess during hearings are subject to 12 -15 years with a possibility of reducing their sentence to a half for community work. Those who plead guilty and confess before trial are subject to 7-12 years, also with a possibility of a reduction of the sentence to serve in community work. The community work includes constructing houses for victims and road construction, among others. Despite fair punishment, it became apparent that orphaned or abandoned children were being warehoused, and the trauma of what had preceded their arrival was being compounded by horrible conditions of their new setting (Lederach, 1997). However, this work of punishment does not provide a conducive environment for healing and reconciliation between victims and offenders because offenders work alone. Also some genocide victims complain that this punishment is soft for the genocide suspects. This explains the level of tension and animosity that still exists between the victims and offenders in some communities. As a result of this tension, the offenders have remained shamed and humiliated because of guilt for their atrocities. Consequently some genocide suspects have continued to kill some victims who serve as witnesses in Gacaca hearings due to fear of returning to prisons, whereas some suspects spent a decade before they were released for Gacaca trials. According to Ibuka, an umbrella association of the genocide survivors in Rwanda, approximately 1770 genocide victims and witnesses were killed from 2000 - 2006. Also 44 victims have been killed by genocide suspects since January 2007 to August 2008. The genocide suspects continue to kill victims who served as witnesses in the Gacaca courts for fear of facing justice. The sporadic killings of victims have been termed by Ibuka as a continuation of genocide. These killings result from the conspiracies of genocide suspects due to shame and guilt about how the community perceives them. They have therefore developed negative social solidarity which continues to threaten the lives of victims. This has not only re-traumatized the victims of genocide, but also has intimidated victims when called to testify against genocide suspects in Gacaca trials. Therefore, some genocide suspects go unpunished which affects delivery of justice and promotes a culture of impunity. Likewise, the killings of the genocide victims is becoming a national security threat which is very complex because Gacaca courts have no capacity to protect victims, nor can the government provide security to each victim in the whole country. No wonder, some Kenyans are supporting ICC for perpetrators of post election violence in Kenya. Zehr (2002) argues that restorative of justice aims to provide opportunity for victims to participate in decision making, to create a healing space and to develop measures that could deter future crimes. He however contends that for the goals to be achieved, the victims should participate in the justice system that provides them with satisfactory solutions. The offenders should acknowledge and take responsibility for their actions. He also argues that the

results of justice system should repair the broken relationships and address the causes of the crime while meeting the needs of victims and offenders. Restorative justice emphasizes that the outcome of the justice system should leave the victims and offenders reintegrated into community. Rooted from this argument, the author totally supports local tribal and restorative justice for the case of Kenya in order to rebuild the damaged relationships through people's storytelling of past experiences. Based on the goals of restorative justice and local tribunal, modern Gacaca combines restorative and retributive justice. It includes some forms of restorative justice such as involving community members in information gathering about victims who perished in genocide and those who killed, involved community members as judges, and as members of the general assembly in Gacaca trials which do not happen in the ICC. When relationships collapse, the centre of social change does not hold. And correspondingly, rebuilding what has fallen apart is centrally the process of rebuilding relational spaces that hold things together (Lederach, 2005). However, the fact that Gacaca trials punish and imprison the genocide suspects, it dilutes the meaning of restorative component. But it is worth mentioning that its trials have continued to use win-lose approach which affects the process of healing and reconciliation. Also, Gacaca, being politically monitored and controlled, it loses the meaning of community ownership and thus conflicts with restorative justice. As such, local tribunal has its underlying limitations but based on complexities involved in post-genocide societies after massive violence, it is crucial that the government becomes involved in local process to provide security for the judges and the general assembly because of the strong tensions and emotions that still exist between victims and suspects.

IDEALISTIC FRAMEWORKS ANALYSIS

The careful analysts have noticed that the Kenya Government approval of Mr. Bethuel Kiplagat as the chair of Truth Justice and Reconciliation Commission (TJRC) has raised some eyebrows due to his past history, character and integrity in reconciling Kenyans. Demagoguery is a usual part of any campaign in Kenya: however, Kenyans do not want to lie, and the worst the social plight, the bigger the expectations are. For the citizens who have legitimate concerns in the Kenyans reconciliation process, justice will determine their lives and destinies. Hence, the choice of TJRC and use of local tribunal is of paramount to Kenyan reconciliation process. While Raila has been critical towards Hague tribunal punishment, he has never said it was wanting as Kenyans are responsible for gross violations of international humanitarian law. This is enough good reason for caution not to go for International Criminal Court as an option. As such, many Kenyans are asking themselves what is to be done now. The hope is with

local tribunal and restorative justice as well as the possibility for some further forensic investigation. First and foremost, local tribunal may not meet the victim's needs of reparation holistically, but it will serve better purpose than ICC. It will however hold some suspects accountable for their actions, though healing and empowerment are still unattainable since it is a long term process. Local tribunal may need to focus on psychological healing processes which should help the perpetrators suspects to heal from shame and restore the relationships of the people already damaged. To some extent, local tribunal shall provide a conducive environment for healing, review shame of perpetrators and re-traumatisation of the victims. Re-traumatisation may increase because of sporadic killings of witnessed in 2007/2008 from police force and militarised youths which would frighten victims to testify against some suspects and leave them unpunished. The Government needs reconciliation programme of the victims and suspects, speedy trials and an end to a culture of impunity. As a matter of fact, reconciliation is a long term process that does not work with force, and some of the suspects may confess if their sentences are reduced, but not because they choose to show remorse. Individual reconciliation happens between two individuals: when the victim feels sense of healing and forgiveness of the perpetrator. The culture of impunity has not been deterred in Kenya because to a larger and lesser extent, some suspects are left untried because of fear of witnesses to testify against them. Conspiracy among perpetrators is so high that it is hard to identify those who have continued to escalate violence. However, the local courts, with speedy trials which answer the objective of the government's need to speed trials than ICC, do not underscore African values and practices.

CONCLUSION

The prospects of local and international tribunal do not look very encouraging, at least seen from a prism of a citizen of a faraway region. At present, all we can see is the old tendency of exaggeration that transforms into uncritical exaltation: when truth shall be known all Kenyans shall breathe fresh air of new dawn. This truth must come from them not from outside. They shall be relieved from another historical shame: they can trust that the history of impunity and power dominion will be issue of the past. As already said, the Kenyans nation looks divided along partisan lines. Yet, the political opponents were impressed by their fail-play, at least once the results were announced. It is something impossible to see in our young democracies with different understanding of electoral democracy and with lack of political culture, where political battles resemble real wars and involve real hatreds and divisions. But on the other hand, our problem may be in the fact that we truly believe in political ethnic identities regardless of the electoral results. The critical

and dissident voices, however, differ slightly: some people have spoken about existence of the rich and the poor as a big disparity. Actually, the truth, justice and reconciliation must treat people equally. By and large, the Rwandan genocide fundamentally served as epicentre that destroyed the social structure of Rwandan community which characterized the post-genocide Rwanda with high levels of mistrust, fear, trauma and animosity.

Thus the country sustained severe ethnic divisions which have shaken the community relationships. But through Gacaca, relationships have been bestowed. The author would argue that it is a complex task to apply local tribunal and restorative justice after massive atrocities but Kenya stands a better chance venturing in local justice than turning into International Criminal Court. This work has attempted to describe the traditional Gacaca and its relationship to restorative justice and how the *modern* Gacaca implements both restorative and retributive justice in current trials of genocide suspects. The author would conclusively note that local trials of genocide suspects would speed the trials which would cost the government dearly if international conventional courts were used. However, reconciliation and forgiveness remain the challenges of local court system because of the tension that is eminent between victims and suspects. It is important therefore to note that some victims and offenders from the grassroots, following the author's peace building workshops, have shown signs of forgiveness, though their statistics is unknown. One would

candidly believe these people could help their counterparts to start the journeys of reconciliation. It is thus recommended that Kenyan Government should use an integrated peace building approach that includes psycho-logical healing which addresses traumas of both victims and offenders through educational programs which could create empathy between the communities.

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