Afro-Libertarianism and the Social Contract Framework in Post-Colonial Africa: The Case of Post-2007 Elections Kenya

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Abstract

This paper examines the shortcomings and possibilities of the social contract approach in relation to the Kenyan post 2007 elections political crisis. The author applies philosophical analysis to a practical situation, using Kenya as a case study in the context of the challenges of post-colonial nation-building. The author reflects on the "Afro-libertarian" politico-economic framework, in which communitarian and communal traditions with egoistic and profit-making individualist libertarian market rationality are tangled in a fragile, patrimonial state, with strong sub-national loyalties preventing the building of a united nation and a strong state.

The thesis of the paper is that if sustainable peace, social reconstruction and national unity are to be achieved, there is need to have an adequate understanding of the moral dimensions of the concept of "social justice". The focus has to be on the building of an impartial state, with a clear national agenda and strong ethnically and politically neutral institutions and processes.

Introduction

One main theoretical, and often also practical, approach in dealing with the legitimate power structure of a state is a shared agreement usually conceptualised as a "social contract". With the endorsement of this contract, the rational and autonomous citizens agree on being subjects of a central political authority, a sovereign. While there are different philosophical frameworks for the concept of the social contract, the main assumption is that the citizens are choosing the best overall solution for themselves in order to move from the "state of nature" to an organized society and an impartial state in order to avoid continuing conflicts and disputes over resources and power. In practice this contract can be signed at the inception of the independence of the state, after a conflict between the disputing or warring parties, and symbolically at every election. This article looks at the shortcomings and possibilities of the social contract approach, with special reference to the Kenyan post 2007 elections political crisis.

While the social contract framework cannot be directly applied to the current Kenyan political situation, it nevertheless gives an interesting point of analysis to the problems of the power sharing attempts between the different ethnic groups and classes of the heterogeneous Kenyan society. The country is now in a situation in which there are louder and louder demands to find a legitimate political authority that is more inclusive, participatory, accountable, and equally respects the rights of all the citizens (APRM 2006, 2008). The main thesis is that if sustainable peace, social reconstruction and national unity are to be achieved, there is need to have more comprehensive understanding of moral, social and economic dimensions of the concept of "justice". The focus has to be on the building of an impartial state with a clear national agenda and strong ethnically and politically neutral institutions and processes.

The Current Kenyan political context

Kenya is a multi-ethnic country, which has succeeded, since independence in 1963, to remain reasonably stable despite the wide spread political and economic turmoil in the Eastern and Horn of Africa. However, the December 2007 disputed general elections[1] brought the country to the brink of civil war. Neighbours turned into enemies in a protest of what they saw as flawed elections. Kenya went through a violent experience of post electoral chaos that led to the loss of over a thousand lives, displacement of more than three hundred thousand people, and destruction of property and infrastructure worth millions of dollars. The attempts by the state security agencies to control heavy-handedly the situation led to violations of human rights and democratic freedoms. Consequently, people's confidence in the political leadership and state institutions has further diminished, and the tensions between different ethnic groups remain high (see African Development Bank 2008; Amani Forum 2008; Human Rights Watch 2008; KNCHR 2008).

President Mwai Kibaki was swiftly sworn into office for his 2nd term after the election results were officially announced. However, for many Kenyans, Kibaki was no longer seen as a legitimate leader of the country. People's loss of trust in the leadership and in state institutions - particularly in the justice, governance and security sectors - had already made people from different ethnic backgrounds[2] to turn into sub-national political and communal solutions, including lawless ethnically based militia movements, criminal gangs and hooliganism.[3]

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[1] Few dispute that the election was fraudulent. The European Union, the Commonwealth, Kenyan elections monitors and other observers reported many anomalies and irregularities: unusually high voter turn out, lack of access to voting centers, names missing from registers, questionable voting hours, party agents disappearing at crucial moments, and the Electoral Commission of Kenya showing signs of manipulating the results.

[2] The largest ethnic group is Kikuyu, with 21 percent of the population, followed by Luo (15 percent), Luhya (14 percent), Kalenjin (11 percent), Kamba (11 percent), Kisii (6 percent), and Meru (6 percent). Smaller groups include the Embu, Maasai, Mijikenda, Samburu, Somali, Taita, Teso, Turkana, and others. About one percent of the population consists of Europeans, Asians, and Arabs.

[3] Since the 1980's, militias have surfaced on the Kenyan socio-political scene. The origins of many of these gangs are partly cultural, partly ethnic and partly political. Before and after the 2007 elections, these gangs have been better organized and clearly more politicized. According to the International Crisis Group Report 2008, the extremists, informal gangs and militia groups are responsible for much of the over 1000 dead in post-election violence, while attacks and threats have been used to deliberately

After the disputed elections, the people in Kenya no longer believed that any formal institutional structures or processes could deal with the volatile situation that they saw not only as violent and insecure, but also profoundly unjust. The country was saved from falling apart mainly by the mediation efforts led by former UN Secretary General Kofi Annan, with the support of the international community (See Amani Forum 2008; Human Rights Watch 2008; IREC 2008; KNCHR 2008). These efforts led to the formation of a grand coalition government (GCG) in April 2008. This government includes both the former ruling coalition that came together under the name of *Party of National Unity (PNU),* as well as the former opposition coalition *Orange Democratic Movement (ODM).* This presented an opportunity for Kenyans to openly discuss underlying national issues and historical injustices in order to take forward related reforms and to give people hope on more equal power sharing between the ethnic groups.

High expectations were vested in the coalition government: it was expected to deliver stability, a new constitution, land reforms, peace and security and national reconciliation. However, despite this seeming reconciliation between the different parties – and particularly between the political elites of the two main protagonists, the situation across the country remains tense. The collaboration between the various stakeholders at the political level has turned out to be difficult. During its first year, the grand coalition government has failed to deliver most of the reforms expected from it, and to bring people (and peoples) together. It still appears that there are two governments in place, one pushing forward and the other pulling backward. Kenyans are increasingly dissatisfied with the GCG, and are more insistent in their request for truth and justice (African Development Bank 2008; APRM 2008; TI 2009)

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drive away minority groups from their homes and workplaces. If the grand coalition government fails and the formal security forces remain partially under the control of the executive, these groups are ready to provide their own "protection" against repression (by other groups), and hope for settlements through violence. The government of Kenya denies the sltrength of the groups, but is clearly concerned about how to deal with them. The question here is even more complicated and controversial, since the political elites are often claimed to have been participating in the organization and funding of these groups.

The result is that Kenya remains politically feeble, institutionally and ethnically divided and thus a fragile state.[4] *First*, the distrust between the different ethnic communities remains; *second*, the ordinary citizenry is now more and more openly starting to question the motives of the political elites; *third*, the political leaders are now arguing both between and within the different sides of the coalition. Both sides of the coalition are already looking forward to the next general elections in 2012, and strategizing for the future rather than dealing with the burning issues at hand.

However, ethnic divisions, the loss of public trust, and the sense of injustice in Kenya go much further back than the last general elections. Kenyans are demanding now - as they have done for decades - for a new "social contract" that deals exhaustively with ethnic imbalances, past injustices and persistent socio-economic disparities (NEPAD/APRM 2006, 2008)

Post-conflict justice and the social contract framework

In Kenya, as in many other African countries, emerging conflicts have their roots in injustices of the past. On the one hand, the colonial divide-and-rule strategy, and on the other post-colonial nation building within arbitrarily contrived borders that failed to properly deal with the region's ethnic diversity, cultivated deep-seated ethnically based mistrust and inequalities. For cultural and individual self-preservation, people learnt to support "their own", and to distrust "the others".

In most conflicts, greed and grievances relating to existing injustices are the main causes of violent clashes. Consequently, it is often claimed that the creation or restoration of justice must be the most important goal of post-conflict reconstruction (Addison and Bruck 2009, 15-30). Indeed, it is vital to acknowledge that any social contract that follows a conflict and is the foundation for sustainable peace must aim at a common vision of social justice. However, we too often look at the concept of

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[4] According to OECD/DAC principles, the criteria for fragile states are their poor governance, restricted administrative capacity, chronic humanitarian crisis, persistent social and political tensions, violence, and a history of civil wars - all this resulting in violent conflict, organized crime, migration and drug trafficking. All, but open civil wars have been present in post-independence Kenya.

justice from a mmerely technical point of view, as a rapid fix to overcome war. Such a perspective relates the notion of "peace" to "security", so that "lack of violence" replaces the wider dimension of "social justice" with the concepts of "law and order" (Hellsten 2009, 75-97).

Restoration of sustainable peace and national harmony, however, does not mean merely establishment of order, with institutional procedures and mechanisms of justice. In a conflict situation and particularly during post-conflict reconstruction, the concept of justice has much wider moral, social, and economic dimensions that have to be taken into account if the goal is to find a normative direction that can offer a way to lasting social harmony, national unity and a stable state. This means that the concept of justice in a post-conflict context needs to be considered in relation to local social ethics, ethnic relations, historical circumstances as well as traditional and international values (Addison and Murshed 2003; Hellsten 2009)

However, the traditional theoretical approaches to social contract tend to focus strictly either on "backward looking" or "forward looking" concepts of justice. A backward looking concept of justice deals with corrective elements of justice by focusing on retribution and reparation, and is thus concerned with the issues of accountability, punishment for and compensation of the offences committed (Nozick 1983). The forward looking concept of justice, on its part, examines how to find impartial processes and arrangements that can bring about social justice in a manner that prevents conflicts in the future. It focuses particularly on impartially enforcing the rule of law, and more equitable (re) distribution of public resources, including political power and public offices (Rawls 1971, 1993) If we want to make a social contract to work in reality, it is essential to realize that the concept of justice reaches both directions - to the past and to the future. Thus when justice is discussed in pre-conflict, conflict and post-conflict situations, we have to be aware whether we are referring to a backward- or forward looking concept of justice, or a combination of both.

Various organisations and commissions in Kenya are "looking for the Truth", investigating different types of violations of rights and entitlements in relation to the

past injustices.[5] While this is important, focusing merely on a backward-looking concept of justice can also be problematic in achieving sustainable peace. Historically, biased and unequal distribution of resources and consequent socio-economic disparities in Kenya - and particularly the injustices related to the ownership and allocation of land - are obvious and need to be dealt with. However, it is difficult to undo all the earlier wrongs in a manner that does not punish the innocent and hence create further grievances. Neither will it be easy to find a way to settle the demands of collective and community rights against those of individuals, particularly in the issues of land ownership. Internally displaced people are of particular concern in this context. The quest for truth and restitution has to go hand in hand with a united forward-looking national agenda, and the strengthening of the impartiality of state structures and services (APRM 2006, 2008)

In order to achieve national unity, public trust and sustainable peace, it is important to include both dimensions of justice into reconstruction and reconciliation: correcting the past injustices – as well as looking forward in building a more inclusive and equal society in the future. The backward looking elements of justice are important, because if people's grievances are not properly handled, the deals on power sharing reached at the top, between the rivalling political elites, will not be considered legitimate by the grassroots. It must be remembered that in many cases the attempts to reconstruct peace and harmony by "top-down social contracts" have resulted in unstable and weak states, which, for their part, have collapsed again. Examples could be taken from Somalia and the Democratic Republic of Congo (Addison and Murshed 2003)

Kenyans have been frustrated by the authoritarian political system based on "stick-and-carrot" policies. The citizenry voted across ethnic lines in the 2002 elections, hoping for a radical change in the governance style, and a more widely legitimized political leadership. However, while the democratic space appeared to increase after the 2002 elections that brought president Mwai Kibaki to power, the tribalism,

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[5] The African Union Panel of Eminent African Personalities and the Kenyan mediation team recommended setting up various Commissions to deal with the issues of truth and justice, such as the Independent Review Commission (IREC) on the weaknesses of the election processes, and the Commission of Inquiry on Post-Election violence (CIPEV). There is also the Act to set up The Truth, Justice and Reconciliation Commission (TJRC). Furthermore, civil society organizations are also persistently demanding an investigation into the truth concerning past and recent injustices.

cronyism, favouritism, and nepotism remained in political practice. The out-dated constitution and governance structures that gave almost absolute power to the presidency appeared to pull the new ethnically and politically "rainbow" government to the old networks of corruption. As the old saying goes, power corrupts, and absolute power corrupts absolutely: as time went by the old, often economically based, ethnic hostilities started to (re) emerge.

Today Kenya can be seen as a country without strong state institutions and fully legitimized political leadership. In addition, ethnic relations remain tense and violent clashes are possible. The power sharing deal works inefficiently, and the future of the GCG is uncertain. New ethnically based political alliances are already surfacing. Warnings that the next elections could lead to even worse violence if the long-term injustices are not dealt with have not taken the reform agenda forward. On the corruption front, too many central figures on both sides of the political divide have been implicated in scandals for anyone to seriously take Kibaki's 2002 election promise on "zero tolerance against corruption".

Ethnicity, patrimonialism and "Afro-libertarianism"

While negative ethnicity played a central role in the violence during the campaigning as well as after the 2007 elections, the political framework is more complex than mere issues of communal or cultural identity. It has its roots in persistent inclusion and exclusion, usually based on ethnic divisions, power struggles and biased (re) distribution of public resources. This has created structural injustices and long-term socio-economic disparities. Historically, bad governance has gradually created a very unequal society that has public trust neither in the impartiality of the state institutions, nor in those who are holding the highest offices (APRM 2009). In fact, Kenya is now a class society in which the political elites hold the power as well as vast fortunes, while the people in the grass roots often survive below the poverty line. What is worse, the emerging middle class focuses more on business and improvement of their own quality of life than on changing the system to be more accountable and equitable to all.

Even the violence after the 2007 elections is not a unique phenomenon in Kenya. Since the establishment of a multi-party system in 1991, Kenya has witnessed violent conflicts during election times. This violence is linked to long-standing grievances, and the failures of governance that run deeper than mere electoral politics. Kenya has a history of extensive corruption and systemic abuse of office by public officials that has resulted in a situation in which encouraging statistic about economic growth co-exist with depressing figures of poverty (approximately a half of the population still lives on less than two USD a day). Political contexts have become all the more charged because of what is at stake: those who achieve political power benefit from widespread abuses of office, irregular acquisition of land, the corrupt misuse of public financial resources and politically motivated manipulation of ethnicity and, in general, the culture of impunity (APRM 2006, 2008).

All the above mentioned forms of bad governance occur at the expense of groups that are out of - and outside of - power at a particular moment. Besides political manipulation of ethnicity, the socio-economic disparities result in tensions between different groups, increasing distrust in the government, which remains partisan and self-interested, but maintains power with the support of the leaders' kin. Political elites use ethnic identity, encouraging an "them-against-us" mentality, thereby diverting attention from the real problems of governance (See also KNCHR 2008 on ethnic hate speech and ethnic agitation; Hagg and Kabwanja 2007 on the role of ethnic identity in a conflict). This situation could be dubbed as "Afro-libertarianism". This refers to a politico-economic setting which I have in another context labelled as "libertarian communitarism" (Hellsten 2008, 155-169). "Afro-libertarianism" could be described as a mixture of African communitarian cultural traditions and patrimonial hierarchies integrated with the Western individualistic politico-economic framework. In the context of Afro-libertarianism, the self-interest of a rational profit maker of classical (or neo-) liberalism is set in the context of communitarian traditional solidarity, with social duties and networks.[6] Communitarian solidarity creates biased loyalties, where neo-liberalism calls for market rationality, but the

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[6] Another typical feature of "Afro-libertarianism" is that the political and business elites (often composed of the same individuals) have adopted the free-market profit- making ideology of libertarism, while the grass-roots have to heavily rely on the communitarian solidarity in order to secure their collective benefits.

political authority is still based on patrimonial relations. Here patrimonialism refers to an authority relationship in which the leader controls an administrative staff selected from his relatives, and based on personal loyalty to him. Through this administrative apparatus the sovereign compels obedience from subjects, rather than persuading compliance from participating and autonomous agents. In such a social context, political rights and economic rights come together, and political power often includes also the command of vast public resources. Property rights or political rights for any group do not exist impartially or independently of the sovereign.

Communitarism and related patrimonialism within the context of globalization have created the socio-economic setting of Afro-libertarianism. This mixture of cultures sees the expansion of the traditional social contract framework from individuals to social collectives ("communities"). In the crude Hobbesian form of social contract, only individuals were understood to sign the agreement for their *personal* self-preservation (Hobbes 1996). In sharp contrast to the Hobbesian framework, in the Afro-libertarian context we have not only individuals, but also groups of people who do not trust each other, but need to agree on some central authority in order to move away from "the state of nature" characterised by continuous war of everyone against everyone.[7] In this collective context, however, the authority that in the Western liberal tradition is granted to the independent individual sovereign is now kept by a particular (ethnic, tribal, regional, religious, etc.) group/community as the "social extension" of the sovereign.

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[7] On the Hobbesian original Social Contract framework, see Hobbes 1996. On post-colonial political theory in Africa see Ahluwalia 2001, Wiredu 1996. On communalist political theory in Africa see for example Nkrumah 1970, Nyerere 1968.

With regard to the original concept of the social contract, the impartiality of the political authority is both the foundational starting value as well as the final aim to be realized. However, as the communitarian critics of individualist social contract theory have noted, the subjects of social contract thinking are not autonomous individuals but people who are always tied to their circumstances, historical, social and cultural contexts (see for example Walzer 1980, 1983; MacIntyre 1984), and thus, the original starting position for the contract fails to be neutral.

In many African countries, not only are communal ties, responsibilities and expectations strong, but also the whole political culture is set within the context of communitarian traditionalism integrated with globalization with Western influence. Old values and demands of communal solidarity are mixed with the principles of self-interested market libertarianism that aims for the maximum and immediate personal and economic benefits, and creates strong "old boys networks" and other communal sub-national loyalties. In such a context, neither the sovereign nor its subjects are autonomous or neutral. Consequently, the legitimacy of the state tends to remain superficial. The state is not built as neutral, and the government (and the individuals in it) favour their own kin. As long as the conflicts and inequalities between the various communities are not resolved, the sovereign can only rule by authoritarian means (Hellsten 2008, 155-169).

In such a situation, autonomous decisions by either the sovereign or the citizenry are not possible. The result is "a double hostage situation", in which the sovereign remains dependent on his or her ethnic support, while the electorate is under continuous pressure to support leaders from their own communities in order to expect to get at least some benefits "back home". The famous "hostage syndrome" develops, and the victims start to team up with their capturer.

As a result of the developments outlined above, room is created for Dirty Hand politics[8] that is the core of political realism, justifying the use even of unethical means

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[8] The "dirty Hands" approach to governance refers to the acceptance of the use of means that might be considered unethical, when needed to reach certain political

to political gains (Cody 1991). In practice, the result tends to be a culture of impunity, and leaders learn to "get a way with murder" without having to take public responsibility, because their supporters from the same communal background think that this is the only way to protect their collective interest - since if there is a power shift, the new leaders would (be forced to) use the same means to guarantee their own support. The supporters, for their part, expect handouts and other favours in exchange.[9]

The upshot is a vicious cycle of biased distribution of power and resources. The evident partiality of the sovereign and the weakness of the state lead to struggles to get one's "own man" into the government. Even after the 2007 election crisis, the hottest debates that were tangled around the coalition government were about who gets what position, and who is left out. After the national accord between Mwai Kibaki and Raila Odinga in February 2008, the stalemate on how to share ministerial portfolios was immediate. Kibaki's Party of National Unity (PNU) and Odinga's Orange Democratic Movement (ODM) found it hard to share political power, cabinet as well as civil service posts, equally. Instead of focusing on the distributional issues and social justice that could heal, unite and reconcile the country, the different sides continue to argue about balance in official positions.

This situation also partly explains why the grand coalition has had a difficult time finding its political direction. The coalition government is bloated to inefficiency. From 222 MPs, 94 altogether are in the government that has 42 ministers and 52 assistant ministers, including the President, Prime Minister and two deputy prime ministers. This extravagance was rationalized (though not logically and ethically justified) with the demand of "all inclusiveness". Those who did not make it to the government fiercely complain that they - and their respective communities - had been

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goals. For more on Dirty Hands in political ethics - and the conflict between idealistic and realistic political ethics - see Coady 1991.

[9] In Kenya many people go directly to political representatives from their regions to ask for favors and business deals. Impartial appointments or contracting becomes very difficult, because people coming from a certain region or ethnic group expect to be favored by "their man" in the office - and they anticipate the best deals to be given to them and not to anyone from elsewhere – no matter how much more cost-effective or fairer these deals would be.

side-lined, and insist on forming a "grand opposition", despite the fact that other members of their political coalitions are already in the government.

This principle of "all inclusiveness" has come to cost the taxpayers extensively. Despite the government's plea for external support for the reconstruction priorities and humanitarian aid, political elites are ready to spend millions of Shillings on the new ministerial posts, while the country is suffering from famine and needs more funds for health care, education and other basic state services.

The ODM side has openly complained that it has been short-changed in the power sharing deal, but there is a danger that if *The National Accord* were to be renegotiated, the whole coalition could fall apart. The increasing dissatisfaction of the citizenry is also a factor that the CGC cannot risk, and this also restrains discussions on early elections (APRM 2008, TI 2009)

How the "Prisoner's Dilemma" in a Collective Context Leads to an Anti-reform Agenda

In an individualist context of the Hobbesian model of social contract, individuals may overcome conflicts and constant war by surrendering some of their "unlimited natural rights" to the political control of the neutral sovereign. However, in the collectivist context of Afro-libertarianism, individuals, including the sovereign, are not neutral. This means that since the sovereign's authority is seen - almost inherently - to be partial/partisan, it is more difficult to find an agreement on acceptable rulers. Thus there is either a quick rotation of power, or the power is held onto by force and with "dirty hands" tactics in accord with realistic neo-Machiavellian politics and self-interested pursuits of the libertarian economic rationalism.

In the Kenyan case, as Kinyanjui and Maina (2008) have observed, the free market economy has directly influenced ethnic relations. When the market and economic power was gradually centralized to a particular ethnic group, it further enforced the ethnic discontent and distrust. When finally the economic and political power is concentrated in a particular region and ethnic community, the rebellion for more democracy and resource sharing is likely to break out, particularly during the elections period.

In such a setting, any contractual agreement remains weak. Since it is the different (interdependent) groups - rather than autonomous individual citizens - that are represented in the government, the result is overwhelming pressure on whoever has the political authority. The ones in power tend to use all means available to guarantee

continuity of the benefits to their supporting groups, instead of focusing on the public good. Simultaneously the groups outside and without power are in constant "ethnic opposition", just waiting for their chance to take over the power and turn the tables around. Again we see "pseudo-democracy" at work". Democratic processes provide the stage, but the real battles are fought behind the scenes. People participation is used manipulatively to fight the real battles on the ground when political support is needed, or where there is need to show once might in front of the others, as the Kenyan situation has shown us once again. Simultaneously the political leaders and elites make their own deals with each other in a manner that will personally benefit them most in any given circumstances.

As Kwasi Wiredu (1996) has explained, there is a crucial distinction between decision by majority vote and decision by consensus attained through a reasoned deference to the position of a majority. The first is decision in spite of the minorities; the second is one inspired by the majority. In the first case, opposition survives decision; in the second, decision incorporates at least the goodwill of opposition. In Kenya, the formation of the grand coalition was a consensus solution that brought together the interests of the politicians from both sides of the divide. However, as to whether or not it really brought together the interests of the people is a debatable issue.

In Kenya, politically-related violence is often blamed on multipartism. However, the problem is in lack of political direction and political commitment. Political parties have been mere vehicles to public positions, without any substantive national and/or developmental agenda, values or vision that could bring different ethnic groups to work seriously together. The fact that parties are more ethnically than ideologically based allows political manipulation of ethnicity in pursuit of self-interest. Where there is no state impartiality or effective state services, in people's minds government becomes the almighty political power that is expected to deliver benefits and services. Partial and partisan government in a country that lacks efficient state structures maintains socio-economic disparities. In this type of patrimonial states, leaders learn to believe they are above any ethical or moral demands - and in general the rule of law. Unfortunately, it is partly the citizenry itself that allows the culture of impunity to continue in order to ensure that their "own kin" stay in power.

Charles Khamala (2007) notes that in a typical African context, self-interested rationality is set in a collective milieu, and this creates a different type of prisoner's dilemma scenario from the kind associated with individualistic Western societies[10]. In the African context, individuals who act rationally to advance their own self-interest will together sacrifice individual autonomy for the greater good of their restricted communities. In Kenya, many voters experience vicarious kinships with their elected members of parliament, and tend to elect clansmen or other relatives to articulate or represent ethnic interests at national fora. No competent candidate from a smaller ethnic group, community or clan is likely to emerge victorious, unless coalitions between the smaller ethnic groups are made. The merits of the candidates' political ideology, agenda or programme remain of secondary interest at best, and downright irrelevant at worst. This creates a political context in which ideologies or planning for a comprehensive national political agenda become futile.

While the ethnic criteria used to select the individual's best interests appear irrational from the perspective of Western individualistic voting theory, in the African electoral context a voter from a large ethnic group or clan lives well by not asking how his or her vote will provide the maximum impact to himself/herself, but rather by calculating how the collective interest might best be achieved by a tribalized leader. Voting patterns thus usually reflect candidates chosen from big ethnic groups or regions, who are considered more likely to advance the parochial rather than abstract, wider national interest. Political coalitions are formed on the same principle, by bringing together ethnic groups that cannot manage to get enough loyalty votes within

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[10] The "prisoner's dilemma" is in the area of game theory, and describes a situation in which local optimization leads to the worst possible outcome globally: Two prisoners are questioned separately about a crime they committed. Each may give evidence against the other, or may say nothing. If both say nothing, they get a minor reprimand and go free because of lack of evidence. If one gives evidence and the other says nothing, the first goes free and the second is severely punished. If both give evidence, both are severely punished. The overall (globally) best strategy is for both to say nothing. However not knowing (or trusting) what the other will do, each prisoner's (locally) best strategy is to give evidence, which is the worst possible outcome (Black 2005).

their own ethnic support base, but need other smaller communities to expand their scope of ethnic support. As a result, formal development policies are likely to be subordinated to the demands of the patronage politics of rewarding relatives or members of their own - or supportive -ethnic communities with public offices and resources in order to maintain their power base. This, for its part, entrenches and perpetuates patterns of historical injustices, and effectively resists any reforms that are aimed at building impartial state structures (Khamala 2007, 9).

In general, Kenya's "winner-takes-it-all" system provides the executive with almost absolute power and full control of public institutions, including Parliament. While almost everyone recognizes the flaws of this system, change is hard to come by, and the reforms are usually done in piecemeal amendments, because the existing legal and institutional framework has been gradually (re) constructed by the self-interested leaders in order to guarantee them absolute, sovereign power. Thomas Hobbes' observation that "Covenants without swords are but words" applies to the Kenyan situation. Memoranda of Understanding on power sharing (between individual leaders) are easily disregarded after the winner of the elections is clear. Thus political coalitions tend to be short-lived. We need only to recall what happened when president Mwai Kibaki came to power under the National Rainbow Coalition (NARC) in the 2002 elections against the former president Moi's long time ruling party KANU's candidate Uhuru Kenyatta. The MoU had promised that the new coalition would urgently deliver a new constitution, that would share executive powers in a manner that would give the rivalling ethnic groups more equal shares. This never happened, and the ethnic tensions and distrust built up among the political elites, as well as among the ethnic communities across the country.[11]

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[11] Hobbes in *Leviathan* (1651, chapter 17) "Of the Causes, Generation, and Definition of a Commonwealth" explains *why* and *how* individuals join together in civil states (or commonwealths in his terms): For the laws of nature, as justice, equality, modesty, mercy, and in sum, doing to others as we would have done to, of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like. And covenants, without the swords, are but words, and of no strength to secure a man at all.

Feminist critique and gender in post-conflict reconstruction

The top down social contract approach such as the pre-2002 Elections MoU and the National Accord after the botched 2007 elections between the Kibaki and Raila camps also tends to ignore social context and grass-root concerns. In addition to this, it also easily disregards gender inequality. Women have in theory and in practice been marginalized in political life, and violations of women's rights are often ignored or belittled.[12] In Kenya this is also the case, yet in general women are the ones who suffer the most in and from conflicts. This happens even during times when the conflicts are not yet full-blown violence, but appear in the form of disparities and structural injustice. In a libertarian communitarist context, women do not have a serious place in the political scene. They can and are used in political games, but in the end they tend to remain at the losing end. Women are in double jeopardy: their rights are often violated due to their gender *and* due to their ethnicity, political opinion, or social status (Zuckerman and Greenberg 2004).

The paradox is that in introducing gender equality as part of a peace agreement, women's situation in society may in fact deteriorate rather than improve. Women's rights might be "justifiably" suppressed in the name of the common good of their own community or in the name of preserving traditional values. The attempts to introduce or support gender mainstreaming might even lead to (violent) resistance by traditional societies (and this resistance might even come from women with a traditional view of their own gender-based roles). In Kenya the role of women tends to be undermined by ethnic concerns. While there are now more women in parliament than before[13], the

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[12] Violence against women is not just a by product of war, but often a deliberate military strategy, with women particularly targeted in ethnic cleansing campaigns, as occurred in genocides in Bosnia and in Rwanda, for example.

[13] In the 2007 Kenyan elections, 15 women got elected and 5 nominated to the parliament of 222 MPS - an improvement from the 2002 elections, in which only 10 got elected and nominated. Still Kenya is far behind in women's participation in politics in the region, with its under 10% female MPs, whereas Uganda and Tanzania are at 30% and Rwanda over 50%.

leadership is still firmly in the hands of men. Women are also used by the ethnically based political parties - to "do the dirty job", or collect the ethnic and maybe also some female support, though many women still do not vote for women. If a woman wants a political job she needs to be loyal – not to her "sisters", but to her masters in the political game plan.

Leaders motivated by their own personal interests may present an argument that in a post-conflict situation, "justice" has to be introduced step by step - by keeping the gender dimension for a later date, after national-level violence is reduced and national unity is achieved. This creates a yielding duty to gender equality. Impartiality and justice, however, cannot be introduced in a partial fashion. If the reconstruction of the society is to be based on justice, all types of structural violence should be taken into account at the same time. Failing to do so prevents comprehensive reform from a forward-looking perspective of justice. Women's rights should not be based on demands that ask "gender equality" to wait until other types, purportedly more pressing aspects of justice are realized. In practice in many places, this has led into a situation in which all other constitutional rights and freedoms come first, with the struggle for gender equality yielding to the pursuit of "religious freedom", "freedom of negotiation", "freedom of association", "freedom of expression", and/or ethnic inclusion. This means that the realization of all these rights and freedoms requires that the promotion of women's equal rights be set aside - if it would offend religious minorities, cultural traditions, etc. Women's rights and gender equality then has to yield to other "human rights" - and to wait for a more suitable and less explosive time to be introduced to the post-conflict society. This cannot provide for inclusion of the disadvantaged, which entails full impartiality and respect for the rule of law in general. We need to focus on the human potential to be actualised – even, and particularly, in the situation in which some groups appear less advantaged than others (Eade 2004; Keating and Knight 2004).

If we paid more attention to the struggles of women, and to the feminist critique pointing out these, we could learn that the concept of justice has much wider scope than is often recognized. Justice means admitting as well as correcting structural injustices, whether they be social, cultural, ethnic, institutional, political or gender based. Feminist approaches to peace note that the traditional social contract thinking

focuses on "negative peace", that is, the absence of violence and warfare, while, as Betty Reardon (1996) explains, the feminist conception of peace and security focuses more on "positive peace". "Positive peace" is a concept presented originally by Johan Galtung (1975), and means an absence of structural violence, which is much more than merely a laying down of arms. Structural violence involves exploitation, penetration of the autonomy of those at the bottom of society, fragmentation and marginalization. The way in which power relations – including gender – are configured at the end of any conflict will affect post-conflict reconstruction and the likelihood of sustainable peace, impartiality and participation in making and realising a truly inclusive social contract.[14]

In Kenya, the quest for positive peace would mean that we need to understand how and why certain communities (ethnic, women, religious, disability, etc.) have been marginalized, and to whose advantage. In other words, it actually explains the Truth in quest for justice. However, it also insists that we recognize that this marginalization is in reality not based on certain characteristics of certain communities or individuals, or due to a lack of some other characteristic that is used to claim that they do not have "leadership qualities", but rather that particular groups of people use various kinds of "rationalizations" as justification to keep the power exclusively to themselves.

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[14] Many of the countries experiencing actual or latent conflicts have never experienced "development" in the sense of social justice, Democratic Republic of Congo being a prime example of such a situation. Societies in these countries cannot return to "democracy" with the help of a social contract, because democratic institutions need to be grounded in local realities, and in order to be fully participatory must evolve over time and cannot be merely set from above. However, external agencies involved in peace-making and reconstruction tend to focus not on local capacities, but on their own interventions (what can they do to prevent conflict and enhance development as they see it?) In many cases, these agencies do not appreciate the impact that the role of gender relations has on "the ability of traumatized, poor, and ill-educated populations to play their full role in the post-conflict reconstruction".

Conclusion

In Kenya, members of various communities demand for "justice" in its various forms. However, the idea that justice needs to promote impartiality is not easily understood. Since political unrest is partly due to past injustices, the root of true reconciliation is assumed to be in "righting the wrongs". The real problem is the lack of shared visions and values entailing forward-looking strategies for social justice that promotes public good and national unity, instead of relying on sub-national loyalties. Thus the nation remains divided, and the state weak. There is no public trust in partisan and self-interested governments, or in inefficient state structures with often (ethnically and/or regionally) biased (re) distribution of resources, corruption, waste of public funds, and unequal service delivery. Therefore, hand in hand with finding out "the truth", there is need for a comprehensive plan for forward-looking impartial distributive justice, as well as the rule of law that will treat the citizens equally. The challenge is to get people to believe that it is worthwhile to work together towards a shared national agenda, rather than for narrow communal benefits. The focus has to be in removing structural inequalities and on positive peace, which requires both institutional reforms and new attitudes and commitment to public ethics, as well as a resolute fight against corruption. Achieving sustainable peace is about building a strong, impartial and "election-proof" state that provides for all its citizens equally, not about a government that tries to embrace all rivalling factions of society – or merely the ambitions of the political elite.

In order to give people ownership in the reconstruction of an impartial framework for social justice, there is need to pay more attention to the bottom-up approach to peace-building. Only then will we foster a climate of interrelated understanding among ethnic, cultural and religious divides from which violence has stemmed in the past, and redirect people's focus towards social justice and the shared public good. This can reduce the tendency to identify "the evil other" which has shaped the consciousness of many communities and nations, thereby damaging peaceful coexistence in so many places.

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