

Experiences of Kenya's Complicated Political Transition and Possible Lessons for Zimbabwe's Democratic Transition and Consolidation

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Introduction

Zimbabwe and Kenya have for a long time been compared and contrasted in terms of their political history and post independence developments, even before the 2007/08 political crises in the two countries. Apart from Kenya and Zimbabwe sharing the destiny of being settler colonies which won their independence through armed struggles, the two countries seem to have inherited social and economic structures that have influenced the politics and transformations ever since. The post-election crises "bonded" the two countries further together and many Zimbabweans think that there is a lot to learn from the Kenyan post-crisis experience in all its dimensions, but particularly the political management of the transition from crisis to where Kenya is at the moment.

Kenya has embarked on a new journey of opportunity towards solving its four principal challenges of her governance problematique. **Institutional capture** of the state led to the entrenchment of the culture of **impunity**. Impunity having pervaded the state and society, followed serious **inequality** that has led to great **intolerance**, violence and insecurity. The four IS problematique should inform the democratic project in Zimbabwe too.

Zimbabwe is undergoing a very complicated and slippery political transition not very dissimilar to that of Kenya. It is institutional capture of the state in Zimbabwe that has led to an entrenched culture of impunity in the state and society. Impunity leads to lack of accountability and this leads to inequality in the nation. Those close to the state have access to economic, political and social goods that those who are outside the state may never access. These inequalities create a sense of grievance and injustice, which leads to intolerance and instability. This is the characteristic of a patrimonial state. Zimbabwe like Kenya and most African countries now live under the burden of patrimonial states which are largely deprived of political legitimacy given the narrow elite base they tend to serve at the exclusion of the majority of the population. The cost of sustaining such a state of affairs keeps increasing as its capacity to deliver on its social and political obligations diminishes.

Under such circumstances, it becomes necessary that an agenda of reforms, reconstruction and reconciliation is undertaken through national democratic projects. These are two challenges in constructing sustainable national democratic projects. The first challenge is on how to construct sustainable national democratic projects in situations where certain sections of the population have grievances against the ruling class whereas the ruling class have fears of losing power and influence. The second challenge, which is related to the first, has to do with the absence of national elite consensus in most African societies. The lack of national elite consensus explains the reason why the actions of the ruling class most of the time threatens not only the very survival of the nation-states but also even the every economic and strategic interests of the elite.

The National accord in Kenya offered the basis of the Kenyan national democratic project in its imperfect form and progress has been made. However dealing with institutional capture, impunity, inequalities and intolerance in order to achieve national reconciliation, democratic governance and economic development remains a huge headache for Kenya as it is for Zimbabwe, Kenya has a new democratic constitution which in itself offers a firm foundation for Kenya's transition whereas Zimbabwe is struggling with its constitutional reform agenda.

This paper has covered the following themes of interest:

- Performance evaluation of the Kenyan Grand Coalition;

- The constitutional reform process and its outcome;
- Issues regarding transitional justice and national healing; and
- Attitudes towards the next elections and the way forward.

The objective of this presentation is share the Kenyan experience on all these four themes with the hope that these reflections will add value to and energize the Zimbabwe democratisation processes.

Section two

PERFORMANCE EVALUATION OF THE KENYAN GRAND COALITION

The Grand Coalition Government was a product of negotiations and an agreement between the President's Party of National Unity (PNU) and the now Prime Minister's Orange Democratic Movement (ODM). The coalition was formed as a necessary step to avert the total implosion of the Kenyan nation after the dispute over the results of the presidential election spiralled into a civil war that saw more than 1,300 Kenyans killed and more than half a million other displaced from their homes. The agreement to share power was arrived at as a strategy of constructing a Kenyan national democratic project where the coalition government was to be a facilitator of the implementation and delivery of the much desired national reconciliation, democratic and just government and socio-economic development.

National Accord Agreement in summary tasked the coalition government with the following agenda:

Agenda one: To end hostilities, and the civil war, restore security, and restore rights and freedoms that were partially suspended during the crisis.

Agenda two: Humanitarian support including resettling the internally displaced persons (IDPs)

Agenda three: Resolve the political crisis through the establishment of a coalition government of national unity to spearhead reforms, reconstruction and reconciliation.

Agenda four: Deal with the underlying problems of the nation that led to the crisis including

- a) To deal with corruption and enhance accountability in public affairs
- b) Carry out comprehensive land reforms
- c) Carry out fundamental constitutional reforms to establish a democratic constitutional dispensation
- d) Undertake institutional reforms especially as regards the police and security sector, electoral commission, parliament, and the judiciary. Parliament and the public service based on the principles of good governance articulated in the new democratic constitution
- e) Deal with past injustices, facilitate transitional justice and embark on national reconciliation
- f) Deal with entrenched poverty and regional and other inequalities
- g) Deal with unemployment and particularly youth unemployment

These items of agenda in the national accord therefore form the basis of a national democratic project. To the civil society in Kenyan which was the main force shaping these agenda through lobbying the Kofi Annan-led Panel of Eminent African Personalities outline from the word go that the Accord was a pact underpinning an agenda of **reform**, **reconstruction**, and **reconciliation** which was necessary for Kenya's **renewal**.

The Grand Coalition was to be the facilitator and implementer of the National Accord whereas the people of Kenya through their various platforms were to play both the refereeing and monitoring roles to ensure that the government performed its mandate under the National Accord. The African Union through its Panel of Eminent African Personalities was given a unique Monitoring and Evaluation status in this epic process of national renewal in Kenya.

The success stories so far

Under the National Accord framework, Kenya has made progress towards democratic consolidation and political reforms. However the National Accord agenda is far from being delivered upon. In a performance report released by the Panel of Eminent African Personalities led by Dr. Kofi Annan in March 2010, the Panel generally noted that without a sound constitutional foundation, the political, institutional, legal and socio-economic reforms such as land reforms envisaged under the National Accord could hardly be realizable.

The successful referendum that ratified a new constitution held on August 4, 2010 therefore marked a major milestone in the democratic consolidation in Kenya. The delivery of the new constitution is therefore the most glowing of the successes of the coalition government.

Factors influencing the performance

Apart from the ratification of a new democratic constitution, the performance of the coalition government has been dismal. The civil society, the private sector and the democratic movement outlined that for the coalition government to perform in delivering the agenda of the National Accord, there was need to have in place a clean, lean effective, accountable and responsive (CLEAR) government.

A clean, lean, accountable and responsive government is significant if Kenya is to witness progress on the delivery of the National Accord agenda. Overall the following assessment illustrates the state of the coalition government in Kenya:

- a) The grand coalition government is largely not clean; evidence published by governance and accountability think tanks and bodies in Kenya show that more than 60% of the cabinet consists of ministers on both the PNU and ODM sides who have been involved in corruption, who have been accused of misuse of office, individuals who have been involved in the violation of the rights of Kenyans or condoned the same. It is public knowledge that some Cabinet Ministers are suspects who may be on the list of the International Criminal Court; Parliament has been used as a forum for corrupt dealings where huge bribes are offered to MPs by corrupt ministers and interests to obtain votes from them.
- b) The coalition government is not lean; Kenya's 42 minister-cabinet is a recipe for poor government performance. Such a bloated cabinet and government turns out as highly wasteful with nearly 75% of the national budget being allocated to sustaining government operations and administration apart from being highly wasteful. Yet as expected, large government is always non-effective because coordinating 42 ministries that are perceived as either ODM or PNU trophies is futile. The coalition government is highly fragmented, that has fertilised a climate of factionalism, mediocrity, nepotism and cronyism. It has been said that the glue that holds a coalition government together is theft of public coffers. The coalition has been called a coalition of impunity.
- c) The coalition is largely no effective; the coalition government has failed to implement the reform agenda as it blames the lack of a new constitution. With a new constitution, it has started to emerge that there is lack of political good will to undertake painful reforms, which will affect individuals in government or their friends. The much rumoured about harmonized PNU-ODM Manifesto has never been published so the people of Kenya simply do not know what the policies of the coalition government are. The 5-year Development plan based on the vision 2030 does not seem to be the basis of government policy whatsoever. This lack of effectiveness has become one of the greatest justifications for the demand for a credible free and fair election in August 2012 to usher in a government that can deliver the National Accord agenda in full. Most Kenyans do not believe that the coalition government is capable of delivering the National Accord agenda.
- d) The Grand Coalition government is largely not accountable; corruption cases that are reported frequently in the media, government audit reports and through civil society investigative reports are never dealt with. Both vertical and horizontal accountability is hardly enforced. Public officials involved in corruption at the local councils, parastatals, in ministries or at State House hardly get punished. They are instead rewarded.

- e) The government is largely not responsive to the needs of the majority of the people; extra-judicial killings by the police remain rampant, general unemployment, poverty and lack of quality services continues to characterize the public sector.

In this context of a Grand Coalition government with these qualities, the hope for sustained reforms, reconstruction, reconciliation and therefore national renewal has remained fickle. Kenyans are generally being cumulative as they make steps forward.

Section three

THE CONSTITUTIONAL REFORM PROCESS AND ITS OUTCOME;

Kenyans voted in an historic referendum on August 4, 2010 where 70% of the electorate endorsed a Proposed Constitution that was a product of many years of tensions, costly riots, mass action, negotiations and political showdowns. The new constitution was then promulgated by the President on August 27, 2010 at the historic Uhuru (Freedom) Park in front of several Heads of State and Government and nearly a million Kenyans.

The constitutional review process was intended to give life to twelve constitutional principles that were at the heart of the Kenyan democratic struggle. They included the following:

- I. Sovereignty of the people to ensure vertical and horizontal accountability
- II. Supremacy of the Constitution
- III. Indivisibility and inalienability of the human rights
- IV. The Rule of Law and equality before the law
- V. Access to justice
- VI. Fair representation of all Kenyans on the basis of equality
- VII. Separation of Powers between the branches of government
- VIII. Checks and Balances
- IX. Devolution of powers
- X. National cohesion; and
- XI. Tolerance and inclusivity of Kenyans
- XII. Popular participation of the people in the governance of their nation

The success of the constitutional review process can be attributed to the combination of the following eight main factors:

- a) The post election crisis created an impetus for reforms in a way that it had not been witnessed before. The lack of a firm constitutional basis for stable and democratic government caused concern to all sectors of the political economy. It was clear that stability without democratic institutions of governance was no insurance business and privileged minority in Kenya and within the international community.
- b) The cohesiveness of the democratic forces necessitated the asking of the correct questions:
 - How best to collect the views of the people
 - How to most effectively negotiate and draft the text of the constitution to reflect a sustainable political settlement
 - How to most effectively ratify and promulgate the constitution

The 1997 –2005 process collapsed because the wrong questions were posed. Then the key question was on how KANU and the Opposition parties could control the review process so that the constitution could be made in the image of the ruling class. Maybe this is the Zimbabwean problem. The choice of the COPAC strategy poorly responds to the need for effective people participation, drafting and negotiations as well as ratification and promulgation.

- c) The Kenyan process was liberated from the PNU-ODM political contestations by way of giving the powers to the Committee of Experts and the Council of reference (constituted by non-parliamentary stakeholders) to direct the drafting and negotiations on the content of the constitution. The role of parliament was limited to enacting the enabling law, appointing the members of the Committee of Experts and debating the final product from the Committee of Experts.

- d) The Committee of Experts under the law was empowered to use the views collected and collated from the people from the earlier process. This was important to ensure that the process was cumulative and founded on the views of the people. The process was therefore deemed to be people driven although the notion was not fully provided for.
- e) Kenya accepted the participation of three foreign experts from within the African Continent. They were Prof. Christina Murray (She was involved in the South Africa constitutional review process), Prof. S Sempembwa (former chairperson of the Review Commission, Uganda) and Dr. Chaloka Beyani (Zambian, Constitutional Law Professor at the London School of Economics). The three brought massive resources and credibility to the process.
- f) The civil society and non-state actors who were largely represented in council of reference secured the process from political risk and sabotage. Technical and strategic working partnership with the Committee of Experts proved decisive. The President and Prime Minister offered leadership in a way that the anti-reform forces found it too costly and risky to stand against reforms.
- g) The international community by supporting the democratic forces in Kenya and through lobbying of the political actors made it possible for the constitutional review to be possible. The support from the international community helped build capacity amongst the various drivers of the constitutional reform process in a significant way, hence contributing to a level of independence among the various actors.
- h) The military in Kenya has remained professional and has played a very stabilising role in the political transition process albeit from the background. In the height of the political crisis, the military stepped in the middle of the violence that was consuming the nation and put a halt to the madness. This has helped to keep the Kenyan political reform process largely as a civilian endeavour of state formation and transformation.

These factors finally combined to bring to a closure a more than three decade long endeavour for the search for a democratic constitution.

Section four

ISSUES REGARDING TRANSITIONAL JUSTICE AND NATIONAL HEALING

The central objective and spirit of the whole reform agenda in Kenya is to transform Kenya from an administrative predator state into a democratic and developmental one. The administrative state structure that was inherited from the colonial administration has undermined the national aspirations and values of the people of Kenya. The administrative state was designed to give power to a limited number of people, which leads to the institutional capture of the state, impunity and massive inequalities. These have led to great divisions in the Kenyan nation along ethnic, political, regional, racial and ideological and class lines.

The administrative state structure has for nearly five decades of independence been operated as a predator state which essentially applies the machinery of the state to deprive citizens of rights and freedoms. The socio-political divisions have created a national that is at war and in conflict with itself.

With a captured state system and the attendant culture of impunity, those who offer competition or threaten the ruling class always suffer great violations and deprivations. In Kenya whole ethnic communities who did not vote in large numbers for the sitting presidents face ethnic cleansing, forcible displacement from ancestral lands, gross human rights violations and even massacres.

Rights activists and opposition politicians in Kenya were subjected to political assassinations, torture, humiliating assaults, detentions without trial and economic deprivation of opportunity. There are many Kenyan exiles abroad to show for this era of state terror.

Political transition therefore has to engender transitional justice pillars which include a) the need for criminal prosecutions through mechanisms including the Special Tribunal for Kenya and trials within the International system such as through the International Criminal Court b) truth telling mechanism c) memorialisation processes and honouring of victims of injustice d)

institutional reforms and reconstruction e) constitutional reforms and f) rehabilitation, restitution and restoration

Within the National Accord framework, Kenya did form a Truth, Justice and reconciliation Commission (TJRC) that has failed fundamentally to move the process of healing and reconciliation forward. Kenya has also established a National Cohesion and Integration Commission (NCIC) whose main objective is to promote national dialogue and education as well as punish those who promote hate speech and other acts of incitement among citizens based on ethnic, religious, racial or political identities.

The success of the agenda of national healing and reconciliation requires that all the pillars of transitional justice outlined above are applied together since national healing is a product of steps taken by the state to establish the truth about what happened to citizens, give justice to victims and take steps to ensure that such injustices and violations will not happen in the future. Healing is not a task but an outcome of tasks.

In the Kenyan example, the coalition government has failed to give the leadership required to heal the nation and ensure that a cohesive nation emerges from the several decades of colonial and post independence violations, deprivations and injustices.

The failure of the TJRC, headed by Ambassador Kiplagat can be attributed to four factors

- a) The TJRC is not seen as independent since it is controlled by the government through funding and appointment of Commissioners. Legally, a successful mechanism ought to be independent of the government of the day
- b) The chairperson, Ambd. Kiplagat was a top official of the KANU administration who is said to have participated in the commission or omission as regards violations. The officials of a truth and reconciliation process must be people who command the respect of the nation and who are known to be committed to the transitional just aspirations of a nation
- c) The scope and mandate of such a mechanism must be realistic. In the Kenyan context the TJRC was asked to deal among others with economic crimes where the public lost billions of dollars through various financial scams. While economic crimes need to be investigated, TJRC is not best suited for this.
- d) The whole idea of the power to grant amnesties to violators or suspects of violations and injustices that is provided for in the law establishing the commission has deprived the process of an important character- that of ensuring that the TJRC is not used to cleanse criminals.

Section Five

ATTITUDES TOWARDS THE NEXT ELECTIONS

Countries that are emerging from conflict or that have suffered authoritarian rule for a long period under a patrimonial and predator state such as Kenya should not see elections as the most important step towards effecting political and democratic transition. Meaningful political transition into democracy requires that the building blocs within a national democratic project are carried out. Without fundamental reforms to the state structure, elections risk becoming a ritual where one group of the elite replaces the other elite as a formal succession or change of guard without substantive democratic change. Such elections can further delegitimize the state rather than strengthen it. Such elections can end up weakening national cohesion and the integrity of the nation.

In Kenya, the return of Multiparty politics in 1990 and the subsequent first multi-party election in 1992 showed that state formation and transformation may not be achieved through elections alone. Multi-party election did not transform the monolithic character of the administrative and predator state that had evolved since Kenya's independence in 1963. The opposition parties attracted 63% of the election combined but KANU with its control of the state machinery emerged the winner with 37% of the vote at the presidential level but with 51% control of parliament. The 1992, 1997, 2002 and 2007 elections were indeed preceded by debilitating and cynical state sponsored ethnic based political violence and terror whose aim was to ensure that the opposition strongholds never had the ballots cast.

Once a national democratic project is put into place, which underpins a democratic transition, the objective of the subsequent elections is to facilitate the formation of a democratic government through which the will of the people shall be materialised.

The enactment of a democratic constitution in Kenya shall now hopefully offer the opportunity for electoral reforms which shall ensure that the management, environment and system of elections is democratic, inclusive, accountable and fair to all.

It is expected that the two years from August 2010 to August 2012 will offer Kenya the ample space to establish a credible and dependable Independent Elections and Boundaries Commission (IEBC), delineate boundaries in a fair manner to ensure that the representation of the people and interests is as fair as possible. It is also hoped that the reforms shall create a political and socio-economic environment where fair political competition is tenable.

Under the new constitution, the general election in August 2012 shall witness the balloting for six public officials in one day. They shall include the Member of the County Assembly, the Member of Parliament, and women member of parliament from the county, senator, governor and the President of the Republic.

Noting the need for massive civic and voter education to prepare the electorate to meaningfully participate in the electoral process, it is expected that the Electoral Commission, civic, faith based and professional organisations shall step up efforts to ensure effective programming of voter and civic education.

Section six

CONCLUSION AND REFLECTIONS ON THE WAY FORWARD

- I. Monitoring and enforcing accountability in government must be made a systematic process that is carried out by political non-state actors. In Kenya this has been largely successful except that the entrenched culture of impunity makes it to secure behaviour change and governance.
- II. The state cannot be left to reform on its own. It is the role of forces outside and inside the state to escalate the demands for reforms. This requires a deliberate construction of democratic movement that galvanises the energies to force democratic negotiations about the future of our democracies be it in Kenya or in Zimbabwe. Innovative strategies for ensuring sustainable reforms can only be realised if reforms are held within a political and transitional justice framework where reforms are broad rather than confined to some formal changes that do not open up the state to concerted reforms.
- III. In Zimbabwe like in Kenya, democratic reforms and political transition shall not be sustainable without a through going transitional justices agenda where public and private citizens, officers and groups get to account for violations and injustices that may have been committed in the past. A new democratic state and cohesive nation cannot be expected in countries where victors' justice is the order of the day and where impunity has taken root.
- IV. There is need for the Inclusive government of Zimbabwe to be sustained even with its inherent limitations until the national democratic project is delivered.
- V. It is our view that elections in Zimbabwe before 2013 shall not add value to the Zimbabwe democratic deficit. It is feared that elections before 2013 may precipitate a return to the multiple socio-economic, humanitarian and political crises that were witnessed in the aftermath of the 2008 elections.
- VI. It is hoped that the democratic forces in ZANU-PF, MDC, civil society, the private sector and other sectors of the political economy shall adopt an attitude of 'no reforms no elections'. Reforms here must mean both reforms on paper and in the real world. Reforms cannot happen if the only logic of the political actors is power for the big boys. Those in power must be convinced including through positive sanctions to embrace and champion reforms for the sake of the people and the nation.
- VII. SADC must construct a better national democratic reform framework for Zimbabwe than the current one. In the 1989 Poland political Transition example, the President

was offered assurances and immunities and Western European countries invested economic incentives into the reform pact that saw the end of the monolithic one-party state rule. This is important seeing as is the case that unlike Kenya, the international community seems ready to leave Zimbabwe to suffer on the ropes for longer. In the Kenyan case in the wake of the post election crisis, the international community made it clear that Kenya was too important to be left to Kenyans alone.

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