

**STRUCTURAL CAUSES OF VIOLENCE: A CASE OF THE
POST-ELECTORAL VIOLENCE IN KENYA, 2007-2008**

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DECLARATION

This thesis is my original work and has not been submitted for a degree in any other University.



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Esther Navututu Sifuma

16/11/2011
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Date

This thesis has been submitted for examination with my approval as University Supervisor


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Dr. Ibrahim Farah

16/4/2011
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Date

Dedication

To my boys Giovanni, Djibril and Kevin. And to you Daddy for always believing in me.

Acknowledgements

First of all, I want to thank God for giving me the endurance to see this through.

This work would not have been done without the guidance of my supervisor Dr. Farah Ibrahim. I owe a great deal to Dr. Farah for being incredibly patient, understanding and encouraging me not to give up. I am also indebted to Dr. Mudida who introduced me to the idea of structural violence. Special thanks to Dr. Musambayi with whom I have travelled this intellectual journey since 2003! I thank Daktari, for showing me the way early on, and for seeing what I did not have the courage to see.

Of course, I would never have managed to get this project done without the incredible support that I got from the JKML library staff at the University of Nairobi. Particular mention goes to the staff at the Africana Section who went beyond the call of duty to assist me. I am also grateful to staff at IDIS for all their support. Special thanks to the organisations that took their time to respond to my questions. I also acknowledge with gratitude, the community people from Mathare, Korogocho, Naivasha, Burnt Forest and Kibera who agreed to talk to me despite all the reservations that they had.

Finally, I want to thank a group of special people each of who mean so much to me: my family, my Dad David especially for weaning me on the written word; my Mom Virginia for sacrificing so much for me; and my siblings for being such an extraordinary support system through it all. I can't forget my uncle Tim for so many special moments. To Becky and Njeri; where would I be without you two? Most important of all, my boys, Djibril and Giovanni for giving me such joy and making the struggle worth while and to my husband Kevin for making me do this!

Esther Navututu Sifuma,

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Abstract

Structural violence that is not addressed becomes like a pressure cooker which eventually explodes at the slightest trigger. This study investigates the sources of structural causes of violence using the post-electoral violence in Kenya 2007-2008 as the case study in the Kenyan society. In so doing the study explores the linkage between dysfunctional structures in society and the propensity for violence. The study aims to provide an overview of the 2007-2008 post electoral violence... The study is situated in the structural violence paradigm. The term structural violence has been ascribed to Johan Galtung whose seminal work '*Violence, Peace and Peace Research*' made a distinction between direct or physical violence and indirect or structural violence. Galtung opines that structural violence is inbuilt in structures and manifests itself as unequal power that results in unequal chances. It also manifests itself as poverty, hunger, repression and unemployment. As a result human beings experiencing structural violence have reduced quality of life as a result of the marginalization and unequal distribution of resources that goes in tandem with unequal decision making powers. The theory therefore, provides a deeper understanding of conflict going beyond the trigger causes of the post electoral violence in Kenya in order to understand the underlying causes and thus prescribe the real measures that resolves the conflict creating an enduring peace characterized by social justice. Both primary and secondary data were used in this study. Primary data was collected through the use of unstructured interviews. Secondary data was collected from books, journals, reports and newspaper articles. The study contends that the post-electoral violence in Kenya was caused by anomalous structures that did not address the concerns of many Kenyans such as equitable distribution of resources, access to land, discrimination of women, entrenched corruption and impunity, marginalisation of minority communities, poverty and unemployment among the youth. The study contends that while structural violence existed prior to 2007, physical violence broke out in 2007 due to the fact that Kenyan citizens had now become more aware of their rights and more empowered to fight repression. The study also finds that while resolution of the conflict calls for the overhaul of the defective structures, it is necessary to deal with the issues of justice through holding the perpetrators of the violence responsible for their actions. This requires a delicate balance between vengeance and justice. The study also finds that there is need for political will and vigilance from citizens and civil society organisations in order to ensure that the reform process needed to engender a peaceful and just society stays on course.

LIST OF ABBREVIATIONS

ACEG	African Centre for Economic Growth
ACTS	African Centre for Technology Studies
AFC	Agricultural Finance Corporation
AfriCOG	African Centre for Governance
ASAL	Arid and Semi Arid Land
AU	African Union
CCR	Centre for Conflict Research
CGD	Centre for Governance and Democracy
CHD	Centre for Humanitarian Dialogue
CIC	Constitutional Implementation Committee
CIOC	Constitutional Implementation Oversight Committee
CIPEV	Commission of Inquiry into the Post Election Violence
CKRC	Constitution of Kenya Review Commission
DRC	Democratic Republic of Congo
ECK	Electoral Commission of Kenya
FES	Fredrick Ebert Stiftung
FJDA-K	Federation of Women Lawyers-Kenya
GEMA	Gikuyu Embu Meru Association
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICDC	Industrial Credit Development Corporation

ICG	International Crisis Group
IDIS	Institute of Diplomacy and International Studies
IDSA	Institute for Democracy in South Africa
TEA	Institute of Economic Affairs
IEBC	Interim Electoral Boundaries Committee
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
IPPG	Interparty Parliamentary Group
TREC	Independent Review Committee
JSC	Judicial Service Commission
KADU	Kenya African Democratic Union
KAF	Kofi Annan Foundation
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KHRI	Kenya Human Rights Institute
KLA	Kenya Land Alliance
KNDR	Kenya National Dialogue and Reconciliation
KNHCR	Kenya National Human Rights Commission
KPS	Kenya Police Service
KPU	Kenya People's Union
KTN	Kenya Television Network
MP	Member of Parliament
NARC	National Rainbow Coalition

NGOs	Non Governmental Organizations
NLP	National Land Policy
ODM	Orange Democratic Movement
PEV	Post Election Violence
PNU	Party of National Unity
PSC	Parliamentary Service Commission
TJRC	Truth Justice and Reconciliation Commission
ToRs	Terms of Reference
UNDP	United Nations Development Program
WHO	World Health Organisation
WPA	Witness Protection Agency
WPAB	Witness Protection Advisory Board
YAA	Youth Agenda

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0 Introduction

Structural violence that is not addressed becomes like a pressure cooker which eventually explodes at the slightest trigger. The term structural violence has been ascribed to Johan Galtung whose seminal work '*Violence, Peace and Peace Research*' made a distinction between direct or physical violence and indirect or structural violence.¹ Galtung opines that structural violence is inbuilt in structures and manifests itself as unequal power that results in unequal chances. It also manifests itself as poverty, hunger, repression and unemployment. As a result human beings experiencing structural violence have reduced quality of life as a result of the marginalisation and unequal distribution of resources that goes in tandem with unequal decision making powers.²

Structural violence also works to deny individuals economic opportunities; social and political equality as well as their autonomy and freedom. Besides, structural violence manifests itself as gross violation of human rights in a diversity of ways including discrimination based on gender or ethnic affiliation that curtails optimum development by individuals.³ Societies experiencing structural violence exist in a state of unpeacefulness.⁴ This implies that even though there may not be any incidence of physical violence, there is no peace since peace cannot exist in

¹ See J. Galtung, "Violence, Peace and Peace Research," *Journal of Peace Research*, Vol. 6, No. 3. (1969), pp. 167-191.

² See Jeong, *Peace and Conflict studies: An Introduction*, (Aldershot: Ashgate, 2000) p. 20-22.

³ Ibid.

⁴ See A. Curle, *Making Peace*, (London: Tavistock Publications, 1971).

a society where there is no social justice.⁵ The lack of overt violence may only be an effect of the hegemonic order imposed by a powerful state.⁶

It is important however, to note that like the pressure cooker, protracted structural violence eventually explodes resulting in violent resistance from the oppressed. When triggers such as an alleged stolen election as was the case in Kenya 2007 occur, it is very easy for physical violence to erupt in a society where there is prior existence of structural violence. The idea of structural violence therefore helps to understand the root causes of conflict in society. It helps us to look beyond the immediate grievances and instead focus on the structures that may be generating violence in the society. Then and only then can we achieve resolution of conflict.

1.2 Statement of the Research Problem

A country's economic, social and political structures should be such that they create an environment under which good governance is guaranteed. Failure of these structures often results in structural violence rendering the societies in which it occurs unpeaceful.⁷ Though individuals may endure the unpeaceful societies, physical violence will be inevitable if the situation is not corrected. This explains why Kenya, a country that was hitherto thought to be a haven of peace could seemingly so suddenly explode into deadly violence with the announcement of the presidential election results in December 2007.

The study seeks to investigate the contribution of the governance structures to structural violence in Kenya. The fundamental research question being investigated therefore is: in what

⁵ See Galtung's definition of peace in J. Galtung, "Violence, Peace and Peace Research" *Journal of Peace Research*, Vol. 6, no. 3 (1969) pp 167-191.

⁶ Jeong, *Peace and Conflict studies: An Introduction*, op. cit., p. 20-22.

⁷ Curle, *Making Peace*, op. cit.

ways did the defective governance structures generate the structural violence that led to the post electoral violence in Kenya, 2007-2008?

1.3 Objective of the Study

The overall objective of the study is to examine the nexus between structural violence and physical violence with a case study of the post-electoral violence in Kenya, 2007-2008. More specifically the study will:

1. Provide an overview of structural violence in Kenya;
2. Analyse the conflict management mechanisms for the post electoral violence in Kenya, 2007-2008;
3. Make recommendations on the most appropriate resolution mechanisms.

1.4 Literature Review

The literature review will be organized around the following thematic areas: conceptualization of structural violence; structural violence in Kenya; post-electoral conflict in Kenya 2007-2008; and conflict management.

1.4.1 Conceptualisation of Structural Violence

Johan Galtung defines violence as the cause of the difference between the actual and the potential somatic and mental realizations by individuals in society.⁸ Galtung has also characterised peace as either being positive or negative. Negative peace is that which exists in the absence of physical violence while positive peace is the absence of structural violence and

⁸ See Galtung, *Violence, Peace and Peace Research*, op. cit., pp. 168-171.

the existence of social justice.⁹ Galtung thus posits that structural violence manifests itself as the obstacle to the satisfaction of basic needs by human beings. Galtung enriches the conceptualisation of structural violence further in his analysis of cultural violence.¹⁰ He submits that cultural violence is any cultural aspect that can be used to legitimise violence in either its direct or indirect form.

Galtung distinguishes between direct and indirect violence as follows:

‘Structural violence needs not be perceived by its victims or involve physical violence. What it does constitute however is a system of differential, unequal access to means of closing the gap between the actual and the potential, where those at the bottom of some hierarchically structured rational system cannot by virtue of involuntary membership in certain ethnic, class, religious, gender and or other groups obtain fair access to the social, economic, political, educational, legal and other systems and corresponding resources typically enjoyed and presided over by the mainstream...’¹¹

Galtung adds an even more fundamental thrust when he opines that in situations of structural violence the power to decide over the distribution of resources is unevenly shared.¹²

Galtung develops the concept further by arguing that violence is an obstacle to the satisfaction of basic needs.¹³

For Groom, structures in society are responsible for conflict.¹⁴ He states further that structural violence connotes a situation in which overt violence is absent but in which structural factors have virtually the same compelling control over behaviour as the overt threat or use of

⁹ See J. Galtung, “Cultural Violence,” *Journal of Peace Research*, Vol. 27, No. 3, 1990. Pp. 291-305.

¹⁰ *Ibid.*, p. 183.

¹¹ Galtung, *Violence, Peace and Peace Research*, op. cit.

¹² *Ibid.*

¹³ See J. Galtung, “Twenty Five years of Peace Research: Ten Challenges and Some Responses,” *Journal of Peace Research*, Vol. 22, No. 2, 1985, pp. 141-158.

¹⁴ A. J. R. Groom, “Paradigms in Conflict: The Strategist, the Conflict Researcher, and the Peace Researcher,” in J. Burton and F. Dukes (eds.), *Conflict: Readings in Management and Resolution*, (London: MacMillan, 1990), pp. 71-98.

force.¹⁵ He further asserts that a society without structural violence is the only peaceful society as it's a just society.¹⁶

Adam Curle contributes to the debate on structural violence through his conceptualization of the dichotomy between war and peace.¹⁷ Curle argues that while societies can be in situations of either war or peace, they can also be in neither. He refers to this situation as unpeaceful. It is an unpeaceful society for the reason that the potential for the development for some members of society is impeded by the existing structures.

R. Gilman in his contribution to the discourse states that hunger and not war is the pressing issue for most of the world's population thus making it difficult to conjure a genuine peace that does not overcome the current global pattern of extensive poverty in the midst of plenty. Gilman therefore, defines structural violence as the physical and psychological harm that results from the exploitative unjust social, political and economic systems.¹⁸

Mwagiru argues that because structural violence is embedded in the structure of relationships it may not be immediately recognizable to actors.¹⁹ He argues further that the existence of structural conflict means that it is necessary to look beyond the immediate physical violence and take into account the structure that underlies social relationships since this might be the source of conflict.²⁰ Mwagiru additionally contends that structuralism explains relations in

¹⁵ Ibid., p. 92.

¹⁶ Ibid., p. 93.

¹⁷ Curle, *Making Peace*, op. cit.

¹⁸ See R. Gilman, "Structural Violence: Can we find Peace in a World with Inequitable Distribution of Wealth among Nations?" *The Foundations of Peace*, (IC no. 4), 1983, p. 3.

¹⁹ M, Mwagiru, *Conflict: Theory, Processes and Institutions of Management*, (Nairobi: Watermark printers, 2000), p28-29

²⁰ Ibid., p. 24.

society through the economic, political and geostrategic structures on which relations are based.²¹

Burton's Basic Human Needs Theory (BHN)²² also contributes to the study of structural causes of violence in society. It is anchored on the assumption that BHNs account for the deep rooted nature of protracted and intractable conflicts. These are the need for identity, recognition, security and personal development. E. R. Rubenstein underscores the theory's importance in his analysis that it permits conflict resolvers to make a distinction between interest based disputes and needs based conflicts that cannot be traded.²³ For Rubenstein, also critical is the fact that needs theory negates common notion that conflict is merely caused by a few manipulative leaders or the sheer existence of cultural and or ideological differences.²⁴ This resonates with Jeong's view that lack of institutional responses to essential needs or the denial of the development requirements generates conflict.²⁵

Ted Gurr's work on the theory of relative deprivation also resonates well with the works of Galtung on structural violence²⁶ and Burton on Basic Human Needs. He postulates that relative deprivation is the felt gap between value expectations and value capabilities. The greater the perception of structural violence the greater the relative deprivation felt by individuals and thus heightening the chance of political violence.²⁷

²¹See Mwangi, *Conflict: Theory, Processes and Institutions of Management*, op. cit., p. 39.

²² See J. Burton, *Deviance, Terrorism and war: the Process of Solving Unsolved Social and Political Problems*, (New York: St. Martin's Press, 1979).

²³ See E. R. Rubenstein, "Basic Human Needs Theory: The Next Steps in Theory Development," *The International Journal of Peace Studies*, Vol. 6, No. 1, 2001, for a comprehensive analysis of the Basic Human Needs Theory.

²⁴ See R. E. Rubenstein and J. Crocker, "Challenging Huntington," *Foreign Policy*, 1994.

²⁵ Jeong, *Peace and Conflict Studies: An Introduction*, op. cit., p. 52.

²⁶ See section on structural conflict below.

²⁷ See J. D. D. Sandole, "John Burton's Contribution to Conflict Resolution, Theory and Practice: a Personal View" *The International Journal of Peace Studies*, Vol. 6 No.1., 2001.

Jeong reiterates the above sentiments when he posits that the failure of political systems to consistently meet people's social and material expectations can translate into a negative mood that instigates political action.²⁸ Also relevant is Jeong's argument that decline of one group relative to a reference group engenders deep resentment in conjunction with existing feelings of unjust disparity.²⁹ Jeong further notes that the feelings deepen when the said group experiences further decline in reference to the other's continued prosperity. When this is the case, violence will often be the means of expressing discontent by the aggrieved groups-the magnitude of it is often determined by the levels of deprivation perceived.

1.4.3 Structural Violence in Kenya

Mwagiru list the conflict generating structures in society as economic, social, psychological, religious and legal. He argues that these structures cause inequalities in various categories and sectors generating structural violence.³⁰ Mwagiru analyses the defectiveness of the Kenyan constitution with respect to the excessive presidential powers it provides for.³¹ He contends that such a defective constitution is usually maintained by the coercive tools of the state and the continued application of such constitution engenders conflict.³²

Mudida provides a comprehensive study of the constitution as one of the foremost causes of structural conflict in Kenya.³³ In addition to his analysis of the excessive powers of the

²⁸ See H.W. Jeong, *Understanding Conflict and Conflict Analysis*, (London, Los Angeles, New Delhi and Singapore: Sage Publications, 2008), p. 49-50.

²⁹ *Ibid.*, p. 50.

³⁰ *Ibid.*, p. 32.

³¹ See Mwagiru, "The Constitution as a Source of Crisis: A Conflict Analysis of Democracy and Presidential Power in Kenya," in L. Chweya, (ed.) *Constitutional Politics and the Challenge of Democracy in Kenya*, (Nairobi: SAREAT, 1999), pp. 173-195.

³² *Ibid.*

³³ See R. Mudida, "Structural Sources of Constitutional Conflicts: a Conflict Analysis of Constitution Making in Kenya, 1997-2005," Unpublished PhD Thesis, September 2008.

president, he makes a case for the fact that constitutional conflicts are generated by anomalous provisions with respect to the legislature, the judiciary, devolution, land property, public finance, amendment and transfer of the power of the constitution.³⁴ Kiai also contributes to the discourse in his study on why the Kenyan constitution needs an overhaul.³⁵ He points out the structural defects of the Kenyan Constitution.

The Njonjo report³⁶ identifies the problem of land in Kenya as being vested in the land question. The acquisition, ownership, and control of land have been major sticking points. This is because agriculture and pastoralism are a source of livelihood for over 75% of the population and a source of over 80% of all export earnings.³⁷ Even more important is the fact that in addition to being a factor of production, land defines and binds together social and spiritual relationships across generations. Land has also been a source of structural violence due to the disparities in ownership and gender discrimination in succession, transfer of land and the exclusion of women in the land decision making process.³⁸

The Institute of Economic Affairs study contributes to the land debate by asserting that because land is a limited resource, many landless Kenyans endure poverty, unemployment and

³⁴ Ibid.

³⁵ See M. Kiai, "Why Kenya Needs a New Constitution," in K. Kibwana, C. Malna and J.O. Onyango (eds.), *In Search of Freedom and Prosperity: Constitutional Reform in East Africa*, (Nairobi: Claripress, 1996). See also, M. Katumanga, "The Political Economy of Constitutional Amendments in Kenya, 1895-1997" *SAREAT Working Paper/IPAR Collaborative Paper 005/981* Nairobi, 1998 and H.W.O. Okoth-Ogendo, "The Politics of Constitutional Change in Kenya since Independence: 1963-1969," *African Affairs* Vol. 71, No.282 (January 1972), pp. 9-34.

³⁶ See generally, Republic of Kenya, *The Report of the Commission of Inquiry into the Land Law system of Kenya on Principles of a National Land Policy Framework; Constitutional Position of Land and the New Institutional Framework for Land Administration*, (Nairobi: Government Printer, November 2002).

³⁷ Ibid., p. 16.

³⁸ Ibid., p 32., see also G. Gopal and M. Saluni (eds.) "Constitution and Women: Gender and Law, Eastern Africa Speaks" (Nairobi: Quest and Insight, 1998), pp. 17-28, especially on the insights into the role of the Kenyan legal system in denying women access, ownership and control of land.

live in squalid conditions.³⁹ For instance, more than a third of the population of Nairobi lives on less than five percent of the land.⁴⁰ Okoth-Ogendo contributes to the literature on the land question in Kenya by arguing that Kenya inherited archaic laws and institutions based on 19th century European individualism and analyses the implications of the legacy to current practices.⁴¹

Similarly, the Ndung'u report,⁴² found that illegal and irregular allocations of public land carried out by successive regimes had led to a crisis in the public land tenure system. The report further states that settlement schemes that were established as a way of settling many landless wananchi were instead used to settle undeserving but politically well connected individuals thus creating cleavages in the areas where they were settled.⁴³ This has also led to continues protests from those that were unfairly denied settlement opportunity. Additionally, even though sixty percent of all land for settlement schemes is supposed to be set aside for local inhabitants, this has not been the case as alien inhabitants have been given preference therefore creating conflict with the locals.⁴⁴

Marginalisation of women by the system has also been a social source of structural violence in Kenya. Kibwana et al have done research on the subjugation and marginalisation of

³⁹ See W. Gatheru and R. Shaw (eds.), *Our Problems Our Solutions: An Economic and Public Policy Agenda for Kenya*, (Nairobi: IEA, 1998), p. 58-59.

⁴⁰ Ibid.

⁴¹ See, H.W.O. Okoth-Ogendo, 'Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya,' (Nairobi: ACTS, 1991).

⁴² See generally, Republic of Kenya, *The Report of the Commission of Inquiry into the Illegal/Irregular Allocation of public Land*, (Nairobi: Government Printer, June 2004).

⁴³ Ibid.

⁴⁴ See also J. Githongo, "The Political Economy of Land" *The Executive*, September 1995 and K. Murungi, 'Land and Ethnicity in Kenya,' mimeograph paper for a workshop on land and the environment , Nairobi, 1995, for similar arguments.

women in Kenya.⁴⁵ This gender discrimination and inequality hinders growth in all areas as women represent more than half of the Kenyan population. Similarly, a study by the IEA details the marginalisation of Kenyan women in different spheres including agriculture, education, the credit sector, health, politics as well as participation in the commercial and industrialization sectors.⁴⁶

Mullei provides a study of the nexus between poverty and corruption.⁴⁷ He defines corruption as the abuse of office for private gain especially prevalent when institutions are weak. With corruption therefore, only a few people in society especially the elite in government benefit at the expense of the masses that are denied equal chances for self realisation. Mullei further opines that corruption deepens poverty, exacerbates inequalities and creates economies with skewed structures. For this to change, Mullei argues that, there must be concerted effort in fighting corruption.⁴⁸

Wanyande, Omosa and Chweya⁴⁹ identify the governance issues in Kenya as governmental representation and accountability, respect for rules and ethics, just distribution of resources and the moderation of social and public relations. The crisis of governance has therefore always been a source of conflict even during the colonial era, then pitting Africans

⁴⁵ See K. Kibwana (ed.) *Women and Autonomy in Kenya: Policy and Legal Framework*, (Nairobi: Claripress, 1995)

⁴⁶ Op Cit. Institute of Economic Affairs, *'Our Problems Our Solutions: an Economic and Public Policy Agenda for Kenya*, pp 267-282.

⁴⁷ See the various papers in A. Mullei (ed.) *The Link Between Corruption and Poverty: Lessons from Kenya Case Studies*, (Nairobi ; ACEG, 2000).

⁴⁸ See also, Chweya et al. *Control of Corruption: Legal Political Dimensions, 2001-2004*, (Nairobi, Claripress, 2005), see also, P. Anassi, *Corruption in Africa, the Kenya Experience*, (Victoria: Trafford, 2004) on corruption as a serious impediment to social, economic and political development in Kenya.

⁴⁹ See P. Wanyande et al (eds.) *Governance and Transition politics in Kenya*, (Nairobi: University of Nairobi Press, 2007) pp 1-20

against the colonial regime. At present time, the crisis of governance pits the citizenry against existing administrations and against each other. For Katumanga and Omosa;

‘...the population had to contend with assassinations, economic marginalisation of communities, institutionalised corruption and an authoritarian rule that excludes most citizens from the mainstream political processes...this has bred resistance through mobilisation of ethnic groupings to challenge established regimes and thus spawning polarisation and conflict...’⁵⁰

Katumanga and Omosa argue further that the successive leadership in Kenya has been a study in poor governance with Kenyatta’s fostering exclusion while Moi’s fostering destruction of institutions. The Kibaki government on the other hand remains self seeking and self destructive, all of them therefore, being sources of structural violence. They conclude that institutions governed without recourse to the rules give way to state patronage.⁵¹ Consequently, those outside state power dream of nothing but capturing power in order to access the instruments of patronage. This makes elections a zero-sum game that amplifies the potential for conflict if they are perceived as being unfairly conducted.

1.4.5 Post Election in Kenya: 2007-2008

As the conflict is fairly recent, there is a dearth of academic literature on it. Nonetheless, Mwagiru provides a detailed account of the negotiation process that took place during and after the cessation of violence.⁵² Mwagiru also provides a strategic map of actors and the issues or trigger causes of the conflict.⁵³

⁵⁰ See K. Katumanga and M. Omosa, “Leadership and Governance in Kenya” in Wanyande et al (eds.) *Governance and transition Politics in Kenya*, (Nairobi: University of Nairobi Press, 2007) pp 55-80. P. 55-56.

⁵¹ Ibid., p.77

⁵² See M. Mwagiru, *The Water’s Edge: Mediation of Violent electoral Conflict in Kenya*, (Nairobi: IDIS,2008).

⁵³ Ibid., p.1-10.

Reports from various commissions of inquiry set up by government⁵⁴ such as the Commission on Post Election Violence (CIPEV) led by Justice Phillip Waki and the Independent Review Commission to Investigate the Electoral Commission of Kenya (IREC) led by John Kriegler and civil society organisations⁵⁵ such as the Human Rights Watch, Kenya National Commission on Human Rights (KNHCR) provide an account of the events that led to the violence outbreak. Additionally, Susan Mueller⁵⁶ provides a study of some of the interests that were at play during the conflict.

1.4.4 Structural Conflict Resolution Management

Vayrynen posits that violence is easier to prevent and resolve at an earlier phase when the issues are still specific and hence more amenable to transformation; the number of parties to the conflict is limited, thus reducing its complexity. Additionally, early measures are more cost effective than late efforts.⁵⁷ Vayrynen argues further that conflict prevention should target the root causes of the violence. This implies having a comprehensive approach that targets the underlying political, social, economic and environmental causes of conflict.⁵⁸

The above resonates with Ramsbotham, Woodhouse and Miall who posit that conflict resolution is essentially about overhauling the conflict generating structures.⁵⁹ Adam Curle also

⁵⁴ See for example, Republic of Kenya, *The Report of the Commission on Post Election Violence*, (Nairobi: Government Printer, 2008) and Republic of Kenya, *The Report of the Independent Review Commission to Investigate the Electoral Commission of Kenya*, (Nairobi: Government Printer, 2008).

⁵⁵ See for example, International Crisis Group, "Kenya in Crisis," Nairobi/Brussels, *Africa Report* No. 37, 21 February 2008; KHRC, *Violating the Vote: a Report of the 2007 General Elections*, (Nairobi KHRC 15 September 2008) HRW, *Ballots to Bullets: Organised Political Violence and Kenya's Crisis of Governance*, Vol. 20, No. 1 (A), March 2008

⁵⁶ See, S.D. Mueller, "The Political Economy of Kenya's Crisis," *Journal of Eastern African Studies*, Vol. 2, No. 2, 2008, pp. 185-210.

⁵⁷ See, Vayrynen, "Towards Effective and Cost Effective Conflict Prevention: a Comparison of different Instruments," *International Journal of Peace Studies*, Vol. 2, No. 1, 1997.

⁵⁸ Ibid.

⁵⁹ See, O. Ramsbotham, T. Woodhouse and H. Miall, *Contemporary Conflict Resolution: the Prevention, Management and Resolution of Deadly Conflicts*, (Cambridge: Polity, 2005), p 118-131.

offers a similar argument that the way out of structural violence is to change the structure that is responsible for conflict and that that change is achieved through overthrowing the structure responsible.⁶⁰

Zartman defines conflict resolution as the elimination of underlying conflict generally with the agreement of the parties.⁶¹ He defines conflict management as the elimination, neutralisation or control of conflict while management is about making multilateral outcomes more attractive than unilateral ones to the different parties.⁶²

John Burton posits that only when the whole person and the total environment in which the person lives become the focus of analysis can there be an identification of the real problems that lead to social conflicts and the subsequent resolution of conflicts amongst members of society.⁶³ The source of the problem has to be ascertained and eliminated. Prevention and correction of social behaviour must be targeted towards the environment as opposed to the deviant who actually needs rehabilitation.⁶⁴ Burton further argues that;

“...conflict resolution means terminating conflict by methods that are analytical and that get to the root of the problem. Conflict resolution as opposed to mere management or ‘settlement,’ points to an outcome that, in the view of the parties involved is a permanent solution to the problem.”⁶⁵

⁶⁰ See Curle, *Making Peace*, op. cit., p. 1-2.

⁶¹ See I. W. Zartman, *Ripe for resolution: Conflict and Intervention in Africa*, (New York and Oxford: Oxford University Press, 1989), p. 8.

⁶² See, I. William Zartman, “Conflict and Resolution: Contest, Cost and Change,” *Annals of the American Academy of Political and Social Science*, vol. 518. Resolving Regional Conflicts: International Perspectives (Nov. 1991), pp. 11-22, p 13.

⁶³ See, J. Burton, “Introducing the Person into Thinking about Social Policies,” *International Journal of Peace Studies* (Spring 2001), Vol. 6, No. 1.

⁶⁴ J. Burton, “Conflict Resolution as a Political System,” In V. Volkan et al (eds.), *The Psychodynamics of International Relation: Volume II: Unofficial Diplomacy at Work*, (Lexington, MA: Lexington Books, 1991), p. 72.

⁶⁵ Ibid.

John Burton's work on conflict prevention is also necessary in understanding the need for anticipation and therefore avoidance of conflict through structural reform.⁶⁶

Mwagiru argues that there is a difference between conflict resolution, settlement and management.⁶⁷ He argues that settlement is anchored in notions of power while resolution rejects power as the dominant approach to managing conflict. He argues that settlement hardly addresses the causes of conflict only focusing on readjusting and regulating conflict relationships. Conflict resolution is important as it stresses the importance of addressing needs which are neither negotiable nor in short supply. Parties can therefore re-perceive and refocus their needs.

Mudida posits that having proper institutions for good governance and regulation is vital for overcoming intra-state conflicts as this ensures that human needs are adequately met thus minimizing the relative deprivation felt and consequently eliminating structural violence.⁶⁸ It is similar to Burton's assertion that conflict resolution is in the long term a process of change in political, social and economic systems in order to satisfy human needs.⁶⁹

1.4.5 Justification of the Study

This study is justified on both academic and policy grounds. The gap in the literature is to be found in the lack of specific studies that situate the post electoral conflict in Kenya particularly for the period under study of 2007-2008 in the structural conflict theory. The study aims to fill

⁶⁶ See, J. Burton, 'Conflict Prevention as a Political System' *The International Journal of Peace Studies*, (Spring 2001), Vol. 6, No. 1.

⁶⁷ Mwagiru, *Conflict: Theory, Processes and Institutions of Management*, op. cit., 38-42.

⁶⁸ See R. Mudida, 'The Security Development Nexus: A Structural Violence and Human Needs Approach' in K. Brockman, H. B. Hauck and H. Reigeinth (eds.) *From Conflict to Regional Stability: Linking Security and Development*, (Berlin: DGAP, 2008)

⁶⁹ See Burton, *Conflict Resolution as a Political System*, op. cit. p. 71

that. The study also comes at a critical time when Kenya is only just emerging from conflict and policy makers are grappling with the wherewithal of healing the nation.

The relevance of this study is therefore anchored on the fact that it will shade light on the real causes that led to the 2007 post election violence in Kenya. It will be useful to policy makers as it will emphasize the need for addressing the underlying causes of conflict if positive peace is to be attained. It is expected that this study would highlight the need for comprehensive conflict resolution mechanisms as opposed to mere settlement in order to engender a lasting peace.

1.5 Theoretical Framework

The study will be anchored in the Structural Violence Theory that is nested in the peace research paradigm. Relatedly, the study will refer to the Basic Human Needs (BHN) theory.⁷⁰ The theoretical framework is necessary for the definition of the scope and variety of conflict in order to put the Kenyan post election conflict into perspective.

The peace research's relevance is hinged on the fact that the central idea of the study-the idea of structural violence is anchored in the paradigm. It gives us the conceptual definitions for the key concepts of violence and peace and allows us to look beyond the trigger causes of the post election violence in Kenya to the underlying structural causes. This allows for a prescription of the real antidote to the problem which is structural reform.⁷¹

The BNHs theory is significant as it recognizes and legitimizes the needs of all social classes and ethnic groups in Kenya. It implies that for conflict to be prevented the needs of all must be met as opposed to meeting the needs of one group at the expense of others...

⁷⁰ Ibid.

⁷¹ Groom, *Paradigms in Conflict: the Strategist, the Conflict Researcher, and the Peace Researcher*, op. cit., p. 93.

Additionally, this helps to move the conflict from zero-sum as was the case in the Kenyan conflict to win-win as goals are no longer viewed as being mutually exclusive.⁷² It ties in well with the peace research paradigm as the lack of access to the basic human needs is viewed as manifestation of structural violence.

1.6 Hypothesis

The study is centred on three main hypotheses.

1. Anomalous structures generated structural violence in Kenya;
2. The defective 1963 constitution created structural violence in other sectors of Kenyan society;
3. Resolution of the post-electoral violence in Kenya requires an overhaul of the structures responsible for the violence.

1.7 Research Methodology

The study will use both primary and secondary data. Primary data will be used in order to obtain up to date information on the study subject. Aside from analysing different constitutional documents, policies and constitutional review acts, the researcher will also conduct interviews with key players in different sectors of the Kenyan society including land, constitution, women's agenda economic experts and civil society organizations engaged in governance.

⁷²ibid.

The sample will be carefully selected in order to target persons that have a track record in their fields and therefore most likely to have knowledge in their areas of specialisation. The study will therefore use the unbiased non probability sampling methodology. This is especially because focus will be on obtaining in depth information as opposed to making generalizations. This methodology will also allow for known differences in the population.

The data will be collected by use of interviews using unstructured interview schedules. This is because the interviews are expected to garner more in depth data that may not be captured by use of a questionnaire. The smallness of the sample will also work in favour of using interviews. The researcher intends to carry out the interviews personally in order to capture the exact information that is required for the study.

Secondary data will also be extensively used. This will be obtained from documents from various organizations and commissions of inquiry set up to investigate the electoral conflict. This will include the report of the Waki Commission, the Kriegler Commission, the Report of the Kenya National Human Rights Commission, the report of the Kenya Human Rights Commission, The Report of the International Crisis Group, the Report of the human Rights Watch as well as other relevant organizations. Also data from books, articles, journals and the internet and newspaper reports will be analysed in order to obtain theoretical foundations of the study and so as to outline the development of key issues.

Data Analysis

The data analysis will be qualitative in nature with the data obtained being analysed in order to identify patterns and relationships. This is because the study is qualitative and does not therefore require quantifiable data.

1.8 Chapter Outline

The study will be divided into the following five chapters.

Chapter one introduces the concepts of structural violence and gives an overview of the entire project. Chapter two provides an historical study of structural violence in Kenya from the colonial era to post colonial Kenya. Chapter three presents the case study while chapter four provides a critical analysis of the issues emerging from the case study. Lastly, chapter five is a recapitulation of the study giving a summary of the key findings and the recommendations.

CHAPTER TWO

A HISTORY OF STRUCTURAL VIOLENCE IN KENYA

2.1 Introduction

Chapter one established the foundation of the study through the definition of structural violence. This foundation also served to situate the post-electoral violence in Kenya in the structural violence paradigm. The post-electoral violence of 2007-2008 in Kenya serves as the case study for this project.

Chapter two seeks to discuss the history of structural violence in Kenya. This discussion is undertaken in thematic areas. These are the colonial era and post-colonial Kenya. This discussion sheds light on the systematic collapse of the governance realm in Kenya as orchestrated by the different governments engendering structural violence.

2.2 The Growth of Structural Violence in Kenya

The magnitude and speed of the violence that ensued following the announcement of the controversial presidential election results of December 2007 shocked both Kenyans and international observers alike. This was easily Kenya's worst political crisis since independence. In the aftermath of the violence over 1000 people were killed and more than 300 000 displaced.⁷³ By early February, 2008 the Kenyan economy had lost over 100 billion shillings in damages to the infrastructure; and in loss of revenue from an economy that had virtually ground to a halt.

⁷³ ICG, 'Kenya in Crisis' *Africa Report* No. 37, 21st February 2008.

Observers opined that it would take perhaps another 20 years for the country to fully recover from the damage caused by the violence.

While some sections of the media and other observers were quick to blame the alleged rigging of the general election for the conflict, keen observation of the Kenyan society and its evolution as a state points to the fact that the rigged election results were but a trigger of physical violence to a conflict that had been simmering for decades. With this in mind, the study of the history of structural violence in Kenya is in essence the study of the history of the contraction of civil and political liberties of Kenyans over the years through the systematic destruction of governance structures by successive governments rendering them violent. This narrowing of the democratic space is what eventually led to the unprecedented violence of 2007-2008.

2. 2. 1. Colonial Kenya

British rule in Kenya was established in 1895, when a protectorate was declared over the territory previously occupied by the British East Africa Company (BEAC).⁷⁴ The colonial masters then imposed governance structures to the Kenyan colony. The native Africans were not consulted and subsequently had no decision making powers in matters of state administration. The legitimate participants in Kenyan politics outside of the official bureaucracy therefore, were the settlers, missionaries and Indian immigrants. The presence of these groups in the political arena was a function of the resources of power they possessed to compel the administration to take account of their position.⁷⁵

⁷⁴ See J. Kenyatta, *Kenya: The land of Conflict*, (IASB Publication No. 3), p . 3.

⁷⁵ B. Berman, *Administration and Politics in Colonial Kenya*, (Ann Arbor, Michigan, London: University Microfilms International, 1994), p. 164.

As John Burton made the observation, from the earliest, human beings were ruled by the strong. In other words there are those who have the right to rule and those that have the obligation to obey.⁷⁶ Given the vast differential in power, the settlers exercised far greater influence than the Africans or even the Indians who occupied a marginal albeit recognized position in the political system.⁷⁷ As late as 1944 the Legislative Council had only one token African representative Eliud Mathu, despite the fact that white people made up only about 19 000 of the population as compared to the over 3 000 000 Africans.⁷⁸

The social, economic and political structures were such that one section of the community was living lavishly, a minority of foreigners really, while the vast majority of the native Africans were plagued by poverty and repression. An examination of settler lifestyle revealed a reality synonymous with high living, extravagance and promiscuity even during the depression.⁷⁹ Africans on the other hand, suffered under the yoke of forced labour, imposed taxes and loss of their ancestral land. Berman observes that the white settlers used any means at hand to advance their interests including shady financial deals, land speculation and the use of their entrée to government through the legislative and executive councils to influence government actions in ways that resulted in large personal profits.⁸⁰ A number of individuals with powerful personal connections that made them virtually unchallengeable were able to lie, connive and cheat their way into vast financial and land holdings with virtual impunity.⁸¹

⁷⁶ J. Burton, *Conflict: Resolution and Prevention*, (London: MacMillan, 1990).

⁷⁷ Ibid.

⁷⁸ Kenyatta, *Kenya, the Land of Conflict*, op. cit.

⁷⁹ Berman, *Administration and Politics in Colonial Kenya*, op. cit.

⁸⁰ Ibid., p. 166.

⁸¹ Ibid.

Settlers displayed an intense racism towards other communities.⁸² They had a particular disdain for Africans whom they viewed as nothing other than savage, ignorant and incompetent children. They regarded the Africans' inferiority as a genetic, therefore, unchangeable position.⁸³ This was tantamount to Galtung's concept of cultural violence.⁸⁴ Cultural violence was being used to legitimise structural violence by the settlers.

There was an inherent lack of social justice in the style and manner of European rule. This was characterised by gross violation of Africans' human rights. Their total disregard for Africans led to the alienation of vast tracts of prime agricultural land from the Africans who were then squeezed into congested reserves and later forced to work on the settler farms as sharecroppers and or squatters. For instance, vast tracts of Maasai land were alienated in 1904 and 1912 in Laikipia and later a total of 32 000 hectares were appropriated a for a settlement scheme in Nandi after World War 1. Eventually, 7 million acres representing a third of the arable land in Kenya was reserved for white settlement even though only 5 million was actually occupied by Europeans.⁸⁵ This was through the Kenya Order in Council that came into force on March 1st, 1939 making it illegal for Africans and Indians to own land in the highlands.⁸⁶

Berman describes it precisely in his observation that settler enterprise was built on the backs of African sweat and was then justified by the assertion that the labour was necessary for the development of the economy and good for Africans because it brought them into contact with a higher civilization.⁸⁷ This need for labour led to imposition of tax. Previously, Africans had not developed a money economy and the medium of trade was batter. Imposition of taxes which had

⁸² Ibid.

⁸³ Ibid., 167.

⁸⁴ See J. Galtung, 'Cultural Violence' *Journal of Peace Research*, Vol. 27, No. 3, 1990, pp. 291-303.

⁸⁵ Ibid., p. 187.

⁸⁶ Kenyatta, *Kenya the Land of Conflict*, op. cit., p. 3.

⁸⁷ Berman, *Administration and Politics in Colonial Kenya*, op. cit., p. 188.

to be paid for with money, meant that the Africans had to go to work on European farms, whether they liked it or not, in order to earn the money requisite for the payment of tax. Kenyatta observed that while Africans had to bear the back-breaking taxes imposed by the British, they accessed no services. For instance the British did not provide any education services for African children.⁸⁸

Following on the heels of the tax imposition was the colonial government's introduction of the Registration Ordinance of 1915, where all males above 15 years of age had to carry an Identification Card popularly referred to as the kipande. The kipande system enforced the restriction of movement for Africans within Nairobi municipality. Africans resented the kipande for it was but a mark of their serfdom. It was really just a mark of discrimination against Africans for which Europeans, Indians and Arabs were immune. Penalties for lack of compliance were severe.⁸⁹

The African's social and political freedoms were ruthlessly curtailed. They were denied the most basic democratic rights and civil liberties. The administration considered the organised pursuit of political goals by Africans to be unnecessary and premature.⁹⁰ The instruments of control of Africans included chiefs, tribunals, the legal system and the African colonial elite. Throughout the colonial period, there were recurrent charges against the chiefs of extortion, bribery, general corruption and abuse of power. The legal system was particularly brutal to the Africans, for instance under section 110 of the Criminal Procedure Ordinance, and Section 8 of

⁸⁸Kenyatta, *Kenya the Land of Conflict*, op. cit., p. 5

⁸⁹ Ibid., p. 190.

⁹⁰ Berman, *Administration and Politics in Colonial Kenya*, op. cit., p. 227.

the Native Authority Ordinance, it was illegal for more than five Africans to assemble without permission.⁹¹

Writing at the height of colonial repression Kenyatta made the following observation about the colonial structures:

...their foothold is secure, it would be impossible to turn them out without a bloody insurrection. Africans do not want an insurrection, what we do want is a fundamental change in the present political, economic and social relationship between Europeans and Africans... it is not in human nature, it is not even physically possible to submit for ever to such complete oppression, and the Africans make their claim for justice now in order that a bloodier and more destructive justice may not be inevitable in time to come...⁹²

As predicted by Kenyatta, the repressive regime did lead to several confrontations with different communities. The earliest African political formations were in the form of ethnic associations such as the Kikuyu Central Association. These emerged in reaction to the severity of the British rule and the oppression of the natives. Some of the grievances were: increased taxes; unpaid compulsory labour on public works; forced labour on settler farms; kipande system, and most significantly, land alienation.

The most prominent of the uprisings was the Mau Mau rebellion comprised mainly of Kikuyu guerrilla fighters from Central Kenya. Colonial authorities and their apologists described the Mau Mau as a fanatic, atavistic, savage religious cult consciously created and manipulated by a group of unscrupulous power hungry leaders.⁹³ It was said to be rooted in mass psychosis affecting an unstable tribe freed from the anchoring confines of tradition. Contrary to this popular and yet utterly prejudiced belief, factors underlying the militancy in Kikuyu politics have

⁹¹ Kenyatta, *Kenya the Land of Conflict*, op. cit.

⁹² Ibid. p 22.

⁹³ B. Berman, and D. Lonsdale, *Unhappy Valley: Conflict in Kenya and Africa, Book Two: Violence and Ethnicity*, (Nairobi: EAEP, 1992), p. 225.

been identified as: the increasing deprivations resulting from rapid socioeconomic development in the colony which among the people of Kenya fell disproportionately on the Kikuyu.⁹⁴ This came on top of existing grievances such as alienation of land by settlers; attack of Kikuyu traditions such as female circumcision by the missionaries; internal conflicts over the roles of appointed chiefs; and the harassment and repression of Kikuyu political activity in the 1930s by the colonial authorities.⁹⁵ All of the above amounted to immense structural violence.

2.2. 2. Post colonial period

Politics and administration in post colonial Kenya demonstrated a powerful continuation of the colonial legacy. The statist and authoritarian administrative structures continued to thrive. The trappings of bourgeois democracy were slowly eroded during the 60s and 70s as the ruling class gradually consolidated an immense amount of power to the executive.⁹⁶ This nurtured a powerful central government and a powerful executive. The executive became the vehicle for economic development and social engineering and continued to overshadow the legislature and the judiciary. Corruption, a vice perfected by the colonial regime, was persistently being accepted as part of the administrative and political scene. This served to perpetuate structural violence on the masses thus creating Adam Curle's state of unpeacefulness.⁹⁷

Since the early 1980s Kenya experienced a systemic looting of public coffers and dismantling of existing institutions by a politically correct bourgeoisie. This was accompanied by the ethnicisation of employment opportunities, and growing a large number of unemployed

⁹⁴ Ibid., p. 228.

⁹⁵ Ibid., p. 229.

⁹⁶ N. Swainson, *The Development of Corporate Capitalism In Kenya 1918-1977*, (London, Ibadan, Nairobi: Heinemann), p. 183.

⁹⁷ A. Curle, 'Making Peace,' (London: Tavistock, 1971).

persons.⁹⁸ This situation served to exacerbate poverty in Kenya where over half of the population lives below the poverty line and 500 000 are pushed below that poverty line every year.⁹⁹

Political exclusion bred resistance through mobilisation of ethnic groupings to challenge the established regime thereby spawning social polarisation, conflict and marginalisation.

Ultimately, the state of the political and economic conditions in Kenya prior to the post electoral violence of 2007-2008 was largely a function of the character of the post-colonial political leadership.¹⁰⁰

2.2.2.1 Kenyatta Administration:

Jomo Kenyatta became Kenya's first president after independence. Unfortunately, the only change that occurred in post colonial Kenya was the reconstitution of the bourgeoisie. This is so because although a new government took over, the new leaders led by Kenyatta chose to retain the violent structures that had been set up by the colonial establishment. Consequently, Kenyans begun experiencing a radically different and largely authoritarian leadership from what they had hoped for in the fight for independence.

Odhiambo-Mbaya has identified three distinct destructive characteristics of the Kenyatta administration.¹⁰¹ The first is the systematic amendments of the constitution that transferred power from other arms of government to the executive. Secondly he weakened party politics but co-opting KADU members and killing the opposition and later making it impossible for KPU to

⁹⁸G. Njeru, and J. M. Njoka, "Political Ideology in Kenya" in P. Wanyande et al (eds.) *Governance and Transition Politics in Kenya*, (Nairobi: University of Nairobi Press, 2007), p. 21-53.

⁹⁹ Dictionary.com defines the poverty line as the minimum income level used as an official standard for determining the proportion of the population living in poverty.

¹⁰⁰Njeru, and Njoka, *Political Ideology in Kenya*, op. cit., p. 56.

¹⁰¹ See, C. Odhiambo-Mbaya, "The Rise and Fall of the Autocratic State in Kenya" in W. Oyugi et al (eds.) *The Politics of Transition in Kenya: from KANU to NARC*, (Nairobi: Heinrich Boll Foundation, 2003), pp. 51-95.

operate. Thirdly, the executive usurped the powers of the local authority especially in regards to acquisition and control of resources.

Lastly, Kenyatta had a nepotistic and ethnic approach to the Africanisation of the public service. According to Odhiambo-Mbayi, Kenyatta failed to use the criterion of merit in allocating positions within government. Instead, he replaced a majority of the departing whites with members of his own community-the Kikuyus. Upon closer observation, one realizes that those that benefitted were not necessarily the general Kikuyu community but those considered closely related to the members of the inner core. These were mostly children of former chiefs and home guards during the Mau Mau period. This assured absolute loyalty to the government. The loyal officers exercised the enormous powers that had been transferred from other branches of government to the executive on behalf of the president. Ministers, Assistant Ministers and other cronies were appointed to statutory boards of government marketing agencies, and state owned corporations.¹⁰²

Due to the prevalent anomalous structures the Kenyatta's administration was faced with several crises. Katumanga and Omosa¹⁰³ have identified these crises as; the crisis of identity; the crisis of resource allocation and distribution; the crisis of institutional penetration; and the crisis of participation. In the first instance, there was a crisis of identity as Kenyans tended to identify themselves with their ethnic communities. Ethnic nationalism was therefore threatening the development of a Kenyan national identity. This was exacerbated by the perception that the government favoured only members of the Kikuyu community.

¹⁰² J. D. Barkan, "The Rise and Fall of a Governance Realm in Kenya" in G. Hyden and M. Bratton (eds.) *Governance and Politics in Africa*, (Boulder & London: Lynne Rienner Publishers), pp. 167-192.

¹⁰³ M. Katumanga, and M. Omosa, "Leadership and Governance in Kenya," in P. Wanyande et al (eds.) *Governance and Transition Politics in Kenya*, (Nairobi: University of Nairobi Press, 2007), pp. 55-80.

Kenyatta used the state as an instrument of personal accumulation of wealth and like his colonial predecessors sought to use state machinery to access resources to regime friendly zones. And as stated above, the nepotistic and ethnic oriented system of resource allocation precipitated the crisis of resource allocation. For instance, in land redistribution, only those individuals that were close to the administration benefitted. Many of the Mau Mau veterans who had fought the colonial regime in order to regain their alienated land were forgotten. They therefore, became landless peasants reduced to squatting on other people's land. The refrain of eradication of poverty, ignorance and disease was merely the mantra used to harangue the proletariat and lumpens into supporting the administration¹⁰⁴.

Pursuit of Sessional Paper Number 10 of 1965 contributed a great deal to polarisation of ethnic identities. Instead of addressing ethnic disparities the paper added ethnic and class orientations to expand the disparities due to the provisions that development would be concentrated only in those areas perceived to be more productive. To quote,

...One of our priorities is to decide how much priority to give in investing in less developed provinces. To make the economy as a whole grow as fast as possible, development money should be invested where it will yield the largest output. This approach will favour developing the areas having abundant natural resources, good land and rainfall, transport and power and the people receptive and active in development...¹⁰⁵

In the spirit of Sessional Paper No. 10, selected areas received preferential treatment to the detriment of others. This developed the basis for polarized ethnic identities and obvious disparities. Several corporations were created in order to access resources to certain regions. These included the Agricultural Finance Corporation (AFC); Cooperative Bank of Kenya and;

¹⁰⁴Ibid.

¹⁰⁵ See, Republic of Kenya, *Sessional Paper Number 10 on African Socialism and its Application to Planning in Kenya*, (Nairobi: Government Printer, 1965).

the Industrial Credit Development Company (ICDC) ¹⁰⁶. The general perception was that the Kikuyu community was gaining more from the government since they had proximity to the capital and since the president himself was Kikuyu. As Throup and Hornsby put it, under Kenyatta, the Kikuyu came to dominate business and commerce, the civil service, many of the professions and, of course, politics¹⁰⁷. This bred resentment from the other communities that felt marginalised and alienated thus fanning ethnic tensions.

Deficiency in institutional penetration was manifested by lack of adequate infrastructure especially in the Northern Frontier Districts. This reinforced an identity crisis. It was no wonder that the region was plagued by irredentist conflicts popularly known as the shifta wars. In this regard, the Kenyatta administration was unable to deconstruct the existing colonial structures conversely failing to build a state responsive to the needs of the citizens as well as being accountable to them.

Several constitutional amendments were made during the Kenyatta administration. These amendments were done purely for political expediency but the ramifications were such that Kenyans continued to pay the price long after Kenyatta's demise in 1978. These amendments reinforced the brutal structures that sown the seeds of discontent that explain the fermentation of the 2007 post election violence. Okoth-Ogendo noted that between 1963 and 1969 alone, there were 10 constitutional amendments.¹⁰⁸ Okoth-Ogendo noted disturbingly, that the amendments were used in some cases, to solve political problems of a private and indefensible nature.

¹⁰⁶ M. Katumanga, "The political Economy of Constitutional Amendments in Kenya, 1895-1997," *SAREAT Working Paper*, 005/1998

¹⁰⁷ D. Throup, and C. Hornsby, *Multiparty Politics in Kenya*, (Nairobi: EAEP, 1998), p. 26.

¹⁰⁸ H. W. O. Okoth-Ogendo, "The Politics of Constitutional Change in Kenya since Independence, 1963-1969" *African Affairs*, Vol. 71, No. 282, January 1972, pp. 9-34.

Muigai is even more scathing in his criticism. He contends that the amendments were opportunistic, self serving and manipulative of the existing constitutional order. To Muigai, this served to continue with enthusiasm, the colonial public law tradition of subjugating the people and containing political dissent.¹⁰⁹ For instance, the Local Government Transfer of Functions Bill of 1969, transferred core functions and resources from the local government to the central government. This strengthened the presidency putting Kenyatta directly in charge of the allocation of resources in the local authorities. To further develop the authoritarian rule a number of re-enactments such as: the Outlying Districts Act- CAP 104, the Special Districts Act-CAP 105, the Public Order Act CAP 56 and the Chief's Authority Act CAP 128¹¹⁰ were done. To Mamdani, the amendments heralded the rebirth of the colonial state. Hence, Mamdani reckons that at independence, the state had only undergone deracialisation as opposed to democratisation.¹¹¹

Kenyatta continued to tinker with the constitution whenever personal motivation and political expediency called for it. In 1967 for instance, there was the Constitution of Kenya Amendment Act No. 2 that called for the succession of the president by the vice president thus effectively blocking any chance of Tom Mboya ascending to power. Ironically, this was a reversal of an earlier amendment-Amendment Act No. 28 of 1964 that had been intended for Jomo Kenyatta Odinga. The ruling elite engaged in a game of destruction using the constitution to sort out their disagreements. The ban of KPU in 1969 turned Kenya into a de facto one party state that allowed Kenyatta an uncontested political space enabling him and his ethnic Kikuyu confidants to amass political power for the control and regulation of the state. The provincial

¹⁰⁹ G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, Unpublished PhD Thesis, September 2001.

¹⁰ See Katumanga and Omosa, *Leadership and Governance in Kenya*, op. cit.

¹¹ M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, (Princeton, Princeton University Press, 1996).

administration largely composed of the Kikuyu became the main institutional tool for civil control and regulation.¹¹²

The Kenyatta government has been extolled for its ostensible sound fiscal and monetary discipline as well as sound management of public affairs that seemingly engendered Kenya's highest rates of economic growth in nearly all sectors.¹¹³ Available figures show that during the first decade, 1964-1973, the country experienced 6.6% economic growth the highest in post independence Kenya. In comparison, the period 1980-1985 had a growth rate of 4.1% and 1990-1995 had 2.5%.¹¹⁴ Lamentably, this growth does not tell the story of the glaring disparities in growth that were widening in the different regions depending on how close to power the regions were. These disparities effected the development of a national mood of discontent with the status quo, especially among the communities on the periphery of the access to national resources seemingly only feasible through the capturing of state power and more precisely executive power through the presidency.

2.2.2.2 The Moi Government

The impact of bad governance in the post colonial period was most evident during the Moi era, 1978-2002. The consequences were an economy that nearly collapsed with per capita incomes falling to a paltry 1.5% per annum and living standards correspondingly reaching dire levels. At the height of Moi's repressive rule in the 90s the economic growth rate had fallen to as low as

¹¹² K. Kanyinga, "Political Change in Kenya" in P. Wanyande et al (eds.) *Governance and Transition Politics in Kenya*, (Nairobi: University of Nairobi Press, 2007), pp. 81-106, p. 87.

¹¹³ Njeru and Njoka, *Political Ideology in Kenya*, op. cit.

¹¹⁴ Ibid.

between 0.8% and 1% per annum which was half the rate of Sub-Saharan Africa combined and one third that of Uganda at the time.¹¹⁵

From the onset, Moi declared that he would follow in the footsteps of his predecessor Jomo Kenyatta hence the Nyayo Philosophy. His leadership was thus characterised by perpetuating the flawed legacy that he had inherited from Kenyatta.¹¹⁶ This legacy involved political patronage, political killings,¹¹⁷ detentions and restrictions on freedoms of speech and association. He used his power to ensure that Kalenjins benefitted disproportionately on national resources in relation to the communities outside power. This was reminiscent of Kenyatta ensuring that Kikuyus were unduly benefitting from national resources. KANU thus became a vehicle for promoting Kalenjin interest.¹¹⁸

Although Moi nurtured ethnicity, he ironically banned all existing ethnic associations most notably the Gikuyu, Embu and Meru Association (GEMA).¹¹⁹ In an attempt to deconstruct Kikuyu capital Moi engineered the collapse of several institutions associated with Kikuyu investments including: the Rural Urban Credit Company; Continental Bank; Pioneer Building Society; United Finance Bank; and Tropical Building Society.¹²⁰ The Kikuyu continued to lose out state-mediated economic opportunities to Asians and a few Kalenjin front runners¹²¹. President Moi's administration attempted to deny many Kikuyu business men opposed to the

¹¹⁵ Ibid., p. 45.

¹¹⁶ See, Human Rights Watch, *Divide and Rule: State Sponsored Ethnic Violence in Kenya*, (New York: HRW, November 1999), p. 18.

¹¹⁷ Most notably was Robert Ouko former Foreign Affairs Minister. Although a Commission of Inquiry was set up to investigate his murder, the truth remains unknown.

¹¹⁸ Human Rights Watch, *Divide and Rule: State Sponsored Ethnic Violence in Kenya*, op. cit.

¹¹⁹ Barkan, *The Rise and Fall of a Governance Realm in Kenya*, op. cit., 179.

¹²⁰ Katumanga and Omosa, *Politics and Governance in Kenya*, op. cit., p. 69.

¹²¹ P. O. Asingo, "The Political Economy of Transition in Kenya" in W. Oyugi et al (eds.) *The Politics of Transition in Kenya: From KANU to NARC*, (Nairobi: Heinrich Boll Foundation, 2003), pp. 15-50, p. 24.

KANU government the economic support they needed and worked with Asian business men to undercut the kikuyu economic power.

By this time, governance structures had been totally destroyed and Moi often ruled by decree with absolute disregard for formal rules and procedures compromising institutions and eroding democratic principles. For instance, President Moi was known to announce new directions in policy with no consultation with his advisors. The civil service would be expected to implement the new policies without question even if the new policies would cause disruptions and incur heavy costs. Resource allocation became almost exclusively the prerogative of the president making access to political power a zero-sum game where the winner took all. The regime rewarded loyal individuals and regions and deliberately marginalised those areas perceived to be opposition strong holds. As Moi would often remind Kenyans, '*siasa mbaya, maisha mbaya*'. Consequently, politically endorsed socio-economic inequalities increased.

The president cracked down on individual freedoms and considered any dissent as being tantamount to treason. The level of human rights abuses, economic corruption and political patronage rose sharply.¹²² The Moi government further clamped down on human rights by introducing the Preservation of Public Security Act that was to permit indefinite detention without trial. Public debate on policy changes was discouraged and eventually forbidden. By 1982, even the semi-free press was self censoring. After 1982, Moi began constitutional amendments that contracted the democratic space. The first was changing Kenya from a *de facto* one party state to a *de jure* one party state.

Additionally, supervision of elections was transferred from an independent body to the provincial administration that was tightly controlled by the president this meant that electoral

¹²² Ibid.

malpractice was rampant. Election results were rigged, the demarcation of electoral borders was done to favour the interests of the ruling party, KANU. Worse, the appointment of the 12 nominated MPs followed criteria other than the representation of minority groups otherwise unrepresented such as women and persons with disabilities.¹²³ These special interest groups faced marginalisation due to numerical disadvantage and political powerlessness. They are a classic case of what Galtung referred to as cultural violence where violence, indirect or otherwise, is legitimized due to certain cultural aspects.¹²⁴ To reiterate, Galtung refers to cultural violence as existing where those at the bottom of some hierarchically structured relational system cannot by virtue of involuntary membership in certain ethnic, class, religious, gender or other group obtain fair access to the social, economic, political and other resources typically enjoyed by the mainstream.¹²⁵

The failure of the post colonial KANU leadership to manage public affairs in the interest of the citizens implies a corresponding failure of the established political instruments for governmental control and accountability especially free and fair elections.¹²⁶ Distribution of development resources in post colonial Kenya became a contentious matter. It is important to acknowledge that available resources were fewer than the demands. That notwithstanding, the response by the subsequent administrations made the situation worse. For instance in Kenyatta's government, many Kikuyus had better access to resources than other communities while during Moi's regime, Kalenjins had a better access to resources.

¹²³ P. Wanyande,, M. Omosa, & L. Chweya, "Governance Issues in Kenya: An Overview," in P. Wanyande et al (eds.) *Governance and Transition Politics in Kenya*, (Nairobi: Nairobi University Press, 2003), p. 3.

¹²⁴ Galtung, *Cultural Violence*, op. cit.

¹²⁵ Galtung, *Violence, Peace and Peace Research*, op. cit.

¹²⁶ Wanyande, et al. *Governance and Transition Politics in Kenya*, op. cit., p. 4.

With all the repression, domestic pressure for political liberalisation grew. The campaign for democratisation and constitutional reform gained momentum. Moi's excuse for resisting the call for pluralism was that it would engender violence.¹²⁷ In actual fact, studies show that the Moi administration sponsored violence in selected areas such as Molo in the Rift Valley and Likoni in Mombasa during the election periods of 1992 and 1997. Nevertheless, the donor community joined the call for demanding for political pluralism and accountability by withholding all foreign aid to Kenya in November 1991. Up to 1 billion dollars in Aid money was withheld. The resultant fiscal crisis within government left the Moi administration with little choice and a month later parliament repealed section 2 (a) of the constitution thus returning Kenya to multipartyism.

The return to multipartyism did not necessarily bring with it the anticipated good governance. Odhiambo-Mbayi made the observation that Kenya had the dubious distinction of being a multiparty autocracy.¹²⁸ This was because the nature of the Kenyan governance structures was such that having a multi party election alone did not guarantee social justice to the Kenyan people. The 1990s in Kenya witnessed the worst form of political atrocities and economic decline despite the introduction of multipartyism. Thus between 1992 and 2002, structural violence continued unabated.

2.2.2.3. Kibaki Government, 2002-2007

In spite of the prevailing political situation or perhaps because of it, Kenyans overwhelmingly voted for Mwai Kibaki during the 2002 election under the banner of the National Rainbow Coalition (NARC). Kibaki's huge victory was premised on several key changes in the

¹²⁷ "Moi Warns of Tribal Conflict" *Daily Telegraph*, 31st December 1991.

¹²⁸ Odhiambo-Mbayi, *The Rise and Fall of the Autocratic State*, op. cit., p. 51.

governance structure. These were: a new democratic constitution, the war against corruption, and sweeping political and economic reforms, changes that were supposed to correct the existing chronic failures of governance.¹²⁹ The government started off on a positive note. One of the earliest achievements was the establishment of the Kenya National Human Rights Commission (KNHRC). This was an autonomous and largely independent body that was intended to check the human rights abuse history in the country. However, the positivity was short lived as soon corruption, patronage politics; state sponsored violence, and persistent police abuses were back.

Among the election promises that NARC made was that it would put an end to endemic corruption.¹³⁰ Like everything else, this seemed to be on-course at the beginning with the appointment of the ethics Permanent Secretary to spear-head the fight against institutional corruption. The Kenya Anti Corruption Commission (KACC) was also formed and soon after an inquiry headed by Justice Ringera was launched into the claims of corruption in the judiciary that resulted in an unprecedented purge of 23 judges and magistrates including the former Chief Justice Chunga. Unfortunately, corruption seems to have mutated and continued unabated. If anything some of the grandest corruption schemes seem to have flourished during the NARC government.

Several ministers in Kibaki's government were also implicated in corruption scandals, most of them were President Kibaki's close allies. These included Kiraitu Murungi, Chris Murungaru, Mwiraria, and George Saitoti. To make matters worse, his fight against corruption appeared to have totally lost steam when Mr. John Githongo the Permanent Secretary for Ethics

¹²⁹ HRW, *Kenya's Unfinished Democracy: A human Rights Agenda for the New Government*, Vol. 14, No. 10 (A), 12 December 2002.

¹³⁰ See the NARC Manifesto, 2002

resigned in January 2005 and went into exile with a dossier of fraudulent government deals.¹³¹

Mr. Githongo claimed that the government lacked commitment in fighting corruption. Notably, Kibaki did not appoint a replacement. In 2006, the Anglo leasing scandal broke with claims that the government may have lost the country as much as \$1 billion dollars in the deceitful deals. To camouflage government impunity, several ministers resigned, though several close Kibaki allies were reinstated in no time. As late as December 2010, the permanent secretary in the ministry of finance admitted publicly that an estimated 25-30% of the national budget, about 270 billion shillings of public money, is stolen annually¹³².

Other major fraudulent deals that took place on Kibaki's watch without any reprisals for the perpetrators include: the Triton Scandal, Nairobi City Council Cemetery land purchase irregularities that led to the loss of about 290 million shillings city council money, Mismanagement of subsidized maize scheme, embezzlement of the Free Primary Education funds¹³³. In a speech to the British Business Association of Kenya, British High Commissioner to Kenya, Edward Clay, captured the mood of the citizens with his choice of words. Clay had this to say of the general disappointment with the Kibaki regime:

'... We never expected corruption to be vanquished overnight... we hoped it would not be rammed in our faces. But it has ... evidently the practitioners now in government have the arrogance, greed and perhaps a sense of panic to lead them to eat like gluttons. They may expect we shall not see, or notice, or will forgive them a bit of gluttony, but they can hardly expect us not to care when their gluttony causes them to vomit all over our shoes...'¹³⁴

¹³¹ For details on Mr. Githongo's dossier, see M. Wrong, *It's Our Turn to Eat: The Story of a Kenyan Whistle Blower*, (London: Fourth Estate, 2009).

¹³² KHRC, *Lest We Forget: The Faces of Impunity in Kenya*, (KHRC: Nairobi, August 2011).

¹³³ Ibid.

¹³⁴ The Independent, 'A Speech by the UK High Commissioner to Kenya, given to the British Business Association in Nairobi, July 16, 2004, Retrieved from '<http://www.independent.co.uk/opinion/commentators/edward-clay-kenyas-government-is-full-of-corrupt-gluttons-553304.html> last accessed on 24/08/2011

Also of import, was the promise to carry out the long awaited agrarian reforms.¹³⁵ Kibaki attempted to do this through the establishment of what was popularly known as the Ndung'u Commission.¹³⁶ The commission did an excellent job in investigating all of the land issues that had plagued the country from pre colonial times. Unfortunately, by their conclusion in 2006, a culture of impunity had already taken root in the Kibaki government and thus the findings were deemed too controversial to be implemented.¹³⁷ Kibaki was also seen as funning the embers of negative ethnicity by allotting many appointments to the civil service to the Mt. Kenya region.

When he got into power, Kibaki also promised that there would be a new constitution within the first 100 days. This as so many other promises did not happen. Without a new constitution in place, there was little hope that any of the reforms that had been promised would materialize. For as alluded to earlier, many of the ills that plague the Kenyan society have been as a result of the anomalous structures, the constitution being the fundamental structure anchoring all the others. Professor Mutua Makau wrote one of the most scathing criticisms on the Kibaki regime's ability to carry out structural reform. Makau criticized Kibaki for staffing the government with some of the worst human rights perpetrators in Moi's government. To quote:

'...the coalition government has found common cause with some of the vilest elements of the Moi regime. In fact, there is now precious little difference... in personnel and programs...between the Rainbow Coalition... and the KANU state it replaced. The tragic failure of the Kenyan experiment in reform speaks volumes about the bankruptcy of the country's elite. No one exemplifies this tragedy better than Murungi, the justice minister. An important human rights advocate and opposition figure during the Moi regime,

¹³⁵ See also, HRW, *Kenya's Unfinished Democracy: A Human Rights Agenda for the New Government*, Vol. 14, No. 10 (A), December 12, 2002.

¹³⁶ See Republic of Kenya, *The Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, (Nairobi: Government Printer, June 2004).

¹³⁷ See also KNCHR and KLA, "Unjust Enrichment: The Making of Land Grabbing Millionaires," *Living large series* Vol. 2 No. 1, 2006.

Murungi is Kibaki's most trusted aide. But the Harvard-educated lawyer is now widely believed to be the architect of the stunning reversal of reforms....¹³⁸

The NARC victory therefore turned out to have been neither a revolution nor a fundamental political change. The imperative to perpetuate the political and economic status quo seems to have been the motivation for the union against KANU.¹³⁹ As it was, many of the 'liberators' had been implicated in the looting of public funds, gross violations of human rights and land grabbing during both the Moi and Kenyatta governments.¹⁴⁰ The implication was that these were leaders who were incapable of engineering real change that would have put an end to the structural violence.

2.3 An Analysis of the Colonial and Post Colonial Periods

Even after independence, the 60 plus years of colonial rule¹⁴¹ continued to have an immense impact in determining the modern state of Kenya. Among the most significant aspects of the political heritage of colonialism were the emergence of an authoritarian structure of governance; statist policies of administrative control and the centralization of development and law and order.¹⁴² Significantly, the colonial governance structures entrenched neither liberty, nor equality nor democracy. What was obvious was authoritarianism, lack of a genuinely representative government, exploitation, underdevelopment and social inequality. Berman reiterates these sentiments in his observation that democratisation of the administrative structures played no part in the colonial policy. To Berman, the colonial administrators held paternalistic authoritarian

¹³⁸ M. Mutua, "The End of Reforms in Kenya," *The Boston Globe*, 14/08/2004

http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/08/14/the_end_of_reforms_in_kenya?pg=2

¹³⁹ See G. R. Njeru and J. M. Njoka, "Political Ideology In Kenya," in P. Wanyande et al (eds.), *Governance and Transition Politics in Kenya*, (Nairobi: University of Nairobi Press, 2007), pp. 21-54, p. 34.

¹⁴⁰ Ibid.

¹⁴¹ See, R. M. Maxon, "The colonial Roots", in W. O. Oyugi, (ed.) *Politics and Administration in East Africa*, (Nairobi: EAEP, 1994), pp. 33-67.

¹⁴² Ibid., p. 33.

values that were fundamentally antithetical to the concepts of democracy.¹⁴³ In the name of efficiency, order and welfare, Africans were acted upon but not consulted with by the colonial rulers.¹⁴⁴

The above was hardly surprising considering that the colonial state had evolved through what John Lonsdale referred to as vulgarization of power.¹⁴⁵ In order to establish its control, the colonial state often had to legalise oppression. According to Maxon, an important aspect of vulgarization of power was the formulation of alliances with groups or individuals in the process of conquest and the establishment of local administration.¹⁴⁶ In the case of Kenya, allies were drawn from those that had assisted in the conquest as well as those that had endeared themselves to the European administrators by other means. These became the communicators who made the wishes of the colonial state known to the population at large. These communicators were also expected to assist in the maintenance of law and order thus giving rise to an authoritarian system of local administration based on the artificial institution of a chief backed by the coercive power of the colonial state.

Also significant was the policy of divide and rule that involved the creation of distinct ethnic communities or tribes as they were often referred to. Ethnicity and tribal identity thus became essential attributes on the colonial experience. This later formed the basic framework for African political activity for decades to come as the colonial states continued to practice the policy of divide and rule through the maintenance of a system of local administration based on

¹⁴³ See, B. J. Berman, *Politics and Administration in Colonial Kenya*, PhD Dissertation, Yale, 1974, p. 111.

¹⁴⁴ Ibid.

¹⁴⁵ See, J. Lonsdale, "The Conquest State, 1895-1904" in W.R. Ochieng, *A Modern History of Kenya*, (Nairobi: 1989)

p. 13-22.

¹⁴⁶ Maxon, *The Colonial Roots*, op. cit., p. 34.

distinct ethnic identities. Ethnicity and tribalism were thus entrenched in the administrative system and conversely the politics of the Kenyan state from the onset of colonial rule.¹⁴⁷

The struggle for independence in Kenya stemmed from a desire to establish a democratic government after nearly half a century of British colonial rule.¹⁴⁸ As noted above, colonial rule had been responsible structural violence manifested in widespread poverty, economic hardship and social strife for Africans. African majority rule was therefore expected to result in a change of conditions for the oppressed. The new regime was supposed to bring two critical conditions: freedom and prosperity. In other words, the new government was expected to deliver social justice to the Africans and engender a peaceful society where people's basic needs were being met.

From the above, it is clear that the Kenyan society has since the colonial times, had extremely violent structures. The degree of violence merely varied with each leader in office. For instance Odhiambo-Mbayi credits the slightly better performance of Kenyatta's regime to the fact that Moi lacked the sophistication of Kenyatta. But more significantly while Kenyatta came from a large community that had a relatively large pool of educated and competent individuals who could fill up the public offices on offer, Moi came from a minority Turgen community with hardly any qualified persons. In an attempt to promote members of his own community Moi therefore, allotted positions to individuals which no qualifications what so ever save for their last names. As a consequence, Kenyan institutions suffered the worst mismanagement under Moi.

¹⁴⁷ Ibid., p. 35.

¹⁴⁸ P. Wanyande, M. Omosa & L. Chweya, "Governance in Kenya: An Overview," in P. Wanyande et al. (eds.) *Governance and Transition Politics in Kenya*, (Nairobi: University of Nairobi Press, 2007), p. 1.

Structural violence in Kenya largely emanated from the collapse of the governance realm. Odhiambo-Mbayi has also attributed the bad governance to autocracy¹⁴⁹. Autocratic regimes are responsible for the decline in the efficient delivery of public services and the subsequent decline of the economy. Governance institutions stopped responding to essential needs of citizens leading to the persistence of problems such as hunger; extreme poverty; unjust disparities; gender discrimination; marginalisation of minorities; unemployment and corruption.

It is therefore rational to conclude that the underlying structure of relationships in the Kenyan society during all of the successive administrations was unjust and inequitable. This structural violence was manifested in aspects such as ethnic marginalisation through skewed allocation of resources. Violence was systematically legitimised by use of the existing political structures such as the constitutional amendments.

Structural violence that is not addressed eventually leads to physical violence.

Correspondingly, the Kenyan society, choking under structural violence, did erupt into physical violence intermittently. Most notable was the sporadic violence that arose before and after general elections especially in 1992 and 1997. This however, was attributed to state sponsorship¹⁵⁰. The Moi regime was accused of instigating the violence in order to discredit the viability of multiparty democracy in Kenya. The state had clamped down on freedoms so much so that citizens were unable to mobilize sufficiently enough in order to have a revolution. That notwithstanding, Kenyans kept pressing for change at every opportunity-notably, there was the attempted coup of 1982 as well as the Mwakenya clandestine group of the 1980s. However, suppression of these groups was swift and brutal. To reiterate Jeong's point, the lack of overt

¹⁴⁹Odhiambo-Mbayi, *The Rise and Fall of the Autocratic State*, op. cit., p. 51.

¹⁵⁰Republic of Kenya, *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, (Nairobi: Government Printer, July 31, 1999).

violence from the repressed citizens was only an effect of the hegemonic order imposed by the very powerful state nurtured by Kenyatta and Moi's governments.¹⁵¹

The significant difference between Kibaki's administration and the previous governments' were the concessions he made such as loosening the grip on individual freedoms that allowed citizens to develop an awareness of their rights. Previously, a vast majority of Kenyans had been like Adam Curle's proverbial slave.¹⁵² According to Curle, the slave may be unaware of his/her position or the fact that it could ever change and therefore indifferently accepts it. This situation can be changed by educating the slave and creating awareness to him/her of their position. Once awareness has been built, the slave will struggle to become equal to his/her master so that their relationship can be reformed to a just one. The awareness therefore, is what will engender revolution among the slaves.

Similarly, Kenyans had been receiving civic education from a number of civil society organizations thus becoming a politically informed populace. They were therefore more prepared to resist any attempt to returning the country to autocracy. This contributed a great deal to the events of December 2007 when citizens mobilized and went to the streets due to the alleged rigging of the presidential polls. Be that as it may, lasting solutions to the crises require a comprehensive overhaul of the Kenyan institutions and a serious endeavour to redress deep seated problems that have plagued the country since independence. As Mudida puts it, rebellions are either put down, and may re-emerge later, or they may be successful thereby leading to a greater degree of balance between conflicting parties.¹⁵³ By the end of 2007, the Kenyan

¹⁵¹ See, Jeong, *Peace and Conflict studies: An Introduction*, op. Cit., p. 20-22.

¹⁵² A. Curle, *Mystics and Militants, A Study of Awareness, Identity and Social Action*, (London: Tavistock, 1972) p. 2-3.

¹⁵³ R. Mudida, *Structural Sources of Constitutional Conflicts: a Conflict Analysis of Constitution Making in Kenya, 1997-2005*, Unpublished PhD Thesis, September 2008.

rebellion re-emerged, and since it could no longer be merely put down, some form of balance had to be sought.

2.4 Conclusions

From the foregoing discussion, it is clear that structural violence was a common feature throughout the period under study. While the colonial regime by virtue of its being was expected to be repressive, Kenyans had expected that independence would bring a change of leadership that would put an end to repression. Unfortunately, this was not the case as the new leadership adopted the repressive colonial structures that continued to nurture structural violence. This was passed over to the Moi administration and the Kibaki government as well.

CHAPTER THREE

STRUCTURAL CAUSES OF VIOLENCE: A CASE STUDY OF KENYA'S THE POST - ELECTORAL VIOLENCE, 2007-2008

3.0 Introduction

Chapter two was a discussion of the history of structural violence in Kenya. The chapter traced the violence from the colonial era to post colonial Kenya. The al argument in the chapter was that the anomalous structures were responsible for generating violence were largely inherited from the colonial regime and nurtured by the subsequent regimes.

Chapter 3 as the case study seeks to show how the defective governance structures were the underlying cause of the post election violence in 2007-2008. The discussion is organized around five issues: the constitution; the land question, the question of minority communities; the issues of women and other marginalised groups and lastly the issues of corruption and impunity.

3.1 The Kenyan Constitution Making Process

A constitution is a body of fundamental rules in society. It describes the society's core institutional framework and more importantly how power is to be shared in the process of governance.¹⁵⁴ It is the fundamental law of the land.¹⁵⁵ It is what defines the organs of the state and distributes power among them.¹⁵⁶ It checks the exercise of power by power holders;

¹⁵⁴ K. Kibwana, "The Fate of Constitutionalism in Contemporary Africa," in K. Kibwana (ed.), *Readings in Constitutional Law and Politics in Africa: A case Study of Kenya*, (Nairobi: Claripress, 1998). Pp. 3 7-47.

¹⁵⁵ K. Kibwana, "The People and the Constitution: Kenya's Experience," in K. Kibwana, C. Mama and J. Oloka Onyango (eds.) *"In Search of Freedom and Prosperity: Constitutional Reform in East Africa*, (Nairobi: Claripress, 1997), pp. 340-3 50.

¹⁵⁶ *Ibid.*

announces the inalienable rights of individuals and ensures their protection. If a country has a just constitution then the people stand a chance of being happy and content.

As stated in the previous chapter, the colonial constitution was an oppressive and exploitative instrument governing the native without their consent and despite their resistance; and being used by the colonialists to service capital accumulation at the expense of the development of the natives. At independence, African elites took over power but instead of radically changing the constitution to reflect the new freedoms acquired by the citizens, they chose to continue with the old order established for the very purpose that the natives had fought against it.

Worse still, any provisions therein that would have guaranteed individual freedoms and placed a check on executive power were lost through the frequent fiddling with the constitution that was prevalent during the Kenyatta and Moi administrations thus creating a defective constitution that was incapable of engendering social justice and instead nurtured the collapse of the governance realm and the attendant structural violence. The CIPEV in its report found that the constitution had been a major source of structural violence in Kenya. The report noted that: “laws were routinely passed to increase executive authority and those laws seen as being in the way were often changed or even ignored. By 1991, the Constitution had been amended about 32 times...”¹⁵⁷

Mugambi Kiai in his essay advocating for constitutional change did a comprehensive review of the anomalous constitutional provisions that caused structural violence.¹⁵⁸ The most

¹⁵⁷ See, Republic of Kenya, *Report of the Commission of Inquiry into the Post Election Violence in Kenya*, (Nairobi: Government Printer, 2008).

¹⁵⁸ See, M. Kiai, “Why Kenya Needs Another Constitution,” in K. Kibwana, C. Maina and J. Oloka-Onyango (eds.), *In Search of Freedom and Prosperity: Constitutional Reform in East Africa*, (Nairobi: Claripress, 1997). See also,

significant of these was the immense powers vested in the presidency. The presidential powers were such that the principle of checks and balances had been totally eroded. For instance, parliament was near impotent in the face of presidential power. For starters, the president was charged with appointing the Electoral Commission of Kenya (ECK) members. The ECK was the body charged with the entire management of the electoral process including the delineation of borders. The incumbent could and often did influence the amendment of borders and creation of new constituencies that were often used to tilt elections in his favour.

Additionally, incumbents often filled the ECK with their personal choice of commissioners whose loyalty ultimately lay with the appointing authority. Indeed, it was this arbitrary appointment of 17 ECK commissioners by Kibaki, the 1997 IPPG agreement notwithstanding, that became a major sticking point in the events of December 2007. Even before the elections, the opposition was already convinced that the PNU was planning some mischief as Kibaki had appointed new commissioners so close to the election date without consultation. One is inclined to agree with these sentiments given the colossal mess that that the ECK made of the election process¹⁵⁹.

The anomalous provisions in the constitution on the ECK also impeded its proper functioning. According to the IREC commission¹⁶⁰, Kenya's constitutional and legal framework relating to elections contained weaknesses and inconsistencies that undermined its effectiveness. The commission found that during the preparation and conduct of the 2007 elections the ECK lacked the necessary independence, capacity and functionality because of weaknesses in its

W. Mutunga, "The Need for Constitutional Changes," in K. Kibwana, C. Maina, J. Oloka-Onyango (eds.) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa*, (Nairobi: Claripress, 1997). Pp. 410-415.

¹⁵⁸ Ibid.

¹⁵⁹ See, Republic of Kenya, *Report of the Independent Review Commission to Investigate the Electoral Commission of Kenya*, (Nairobi: Government Printer, 2008).

¹⁶⁰ Ibid.

organisational structure, composition, and management systems. The institutional legitimacy of the ECK and public confidence in the professional credibility of its commissioners and staff were hence, gravely and arguably irreversibly impaired. The commission asserted that ECK lacked functional efficiency and was incapable of properly discharging its mandate.¹⁶¹ Predictably, the ECKs organisational structure was inherently a disaster in waiting, a potential source of structural violence.

The incumbent also had the sole discretion of nominating the 12 special interest members. Often, the special interest groups and minorities were ignored while the president's cronies including those that had competed in the election and lost were nominated. The president also had power over the prorogation and dissolution of parliament, implying that parliament held its sessions at the pleasure of the president. The president could and did appoint as many ministers and assistants as he wished. He had power over the economy in terms of granting or disposal of any unalienated land; power to exempt land transactions from the Land Control Act; the power to exempt imposition of certain import tax, prohibit importation and exportation of certain commodities and power to direct state resources to any area of the country.¹⁶²

This unfettered access to resources contributed in the absolute corruption of incumbents as they used state resources in the maintenance of patron-client relationships. Even more destructive was the practice of alienating areas considered to be opposition zones from national development in order to get the people to conform. This contributed to the marginalisation of high potential areas such as Western and Nyanza provinces for their perceived dissent

¹⁶¹ Ibid.

¹⁶² Ibid.

The judiciary lacked independence as the president appointed the Chief Justice, the judges of the court of appeal the high court judges and the Director of Public Prosecutions (DPP). He also appointed the members of the Judicial Service Commission, charged with appointing, transferring, firing all judicial employees. He also appointed the Attorney General. Watering down the autonomy of the key offices of the Controller and Auditor General was the provision that they be appointed by the president. He also appointed members of the public service commission (PSC), vice chancellors, and deputies and parastatal heads.

Aside from the far reaching presidential powers, the 1963 constitution had several repressive laws that created inequity as they enhanced the government's control over individuals' rights thus impeding individual enjoyment of and full participation in the social, political and cultural life of the nation. These provisions included: the Preservation of Public Security Act Cap 57 which allowed for detention without trial; the Chief's Authority Act Cap 128 wide powers of control over local communities; public Order Act Cap 56 restrictions on public assembly; sections of Penal Code 63 that had Laws on sedition, subversion, incitement, prohibition of publications and breach of peace; the societies' act, trade Unions Act, Books and News Papers Act . Other anomalous provisions such as discrimination against women, on land and the constitution's inability to guarantee social and economic rights for minorities and other special groups are discussed elsewhere in this chapter.

According to Maina Kiai, a human rights activist, constitutional change needed to be seen in the long term.¹⁶³ As it stood, the 1963 constitution had been tinkered with in order to facilitate

¹⁶³ M. Kiai, "Why KANU Stands to Gain From Serious Constitutional Changes," in K. Kibwana, C. Maina , J. Oloka-Onyango (eds.) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa*, (Nairobi: Claripress, 1997).

¹⁶³ Ibid.

and support a single party dictatorship-a position that was no longer tenable with the advent of multipartyism in 1992. Maina Kiai summed up the situation in his observation that, while the president was extremely powerful, Parliament was inconsequential as a check on the executive; the judiciary could not be impartial nor independent; the civil service was serving the president rather than the people and the police and the courts were being used to harass and intimidate those perceived to be the opposition or voices of dissent.

Kiai noted further that the inevitable result of the defective constitution in the absence of constitutional reform would be crisis and instability.¹⁶⁴ Just as the colonial era when the use of force and law to control led to violent resistance from the natives, the repressive laws would also lead to violent resistance from the citizens. Kiai insisted that Kenya was firmly on the way to crisis and indeed this was the end in the 2007/2008.

3.2 The Land Question

Although land is critical to the economic, social, and cultural development of Kenya, only 20% of the land area can be classified as medium to high potential agricultural land as the rest is mainly arid or semi-arid. Forests, woodlands, national reserves and game parks account for 10% of the land area.¹⁶⁵ Ironically, 75 %of the population lives on the 20% high potential area while 25% lives on the Arid and Semi Arid Lands (ASAL). The importance of land to a Kenyan citizen therefore, cannot be over-emphasized. Land was the single most important reason for the struggle for independence and land issues remained politically sensitive and culturally complex thereafter.¹⁶⁶ Land issues were habitually a source of structural violence in Kenya and often this

¹⁶⁴ Ibid.

¹⁶⁵ Republic of Kenya, *National Land Policy*. (Nairobi: Government Printer, 2009)

¹⁶⁶ Ibid., p. 4.

degenerated into violent physical conflict. Central to this was the question of ownership, access, and use of land.¹⁶⁷

The land question originated from the colonial era's oppressive legal regime. The legal organisation of the colonial regime had but one aim, to enable the European sector to develop while under developing the Africans.¹⁶⁸ Unfortunately, this anomalous situation persisted after independence since the Kenyatta Regime adopted the colonial land laws. The independence constitution provided for an elaborate protection of private property without reference to the history of its acquisition.¹⁶⁹ Successive post-independence governments continued to uphold the sanctity of privately owned land to the frustration of the large number of Kenyans who had been dispossessed through colonialism leaving them squatters on their ancestral land or landless and poor.

The land question as a source of structural violence manifested itself in several ways.¹⁷⁰ There was the question of the land alienation during the colonial times that led to massive displacements of people. One of the issues here was the squatter problem. The squatter problem first arose as a consequence of having peasants who were displaced by the colonialists but did not get back their land at independence as the Kenyatta government adopted an unjust system of resettlement that resulted in the undeserving elites getting land while the real victims became squatters with no land rights.¹⁷¹ The Kenyatta regime used the loan schemes in such a way that only the moneyed class could get land through purchase while the impoverished victims were

¹⁶⁷ See R. Mudida, *Structural Sources of Constitutional Conflicts: a Conflict Analysis of Constitution Making in Kenya, 1997-2005*, Unpublished PhD Thesis, September 2008, p. 211.

¹⁶⁸ H. W. O. Okoth-Ogendo, *The Political Economy of Colonial Land Law*, Unpublished PhD Thesis, Yale, 1976.

¹⁶⁹ Interview with Kenya Land Alliance, Nakuru, 13th September 2011.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

denied.¹⁷² Rampant corruption in the resettlement program also meant that the political elite close to the administration benefitted from land meant to resettle the landless. Critically, this resettlement process led to “aliens’ settling among the indigenous communities especially in the Rift Valley and marked the beginning of a hostile relationship with the local communities who feel that they should have been given back their land.¹⁷³ It is no wonder that politicians are able to exploit these sentiments and ignite violent clashes in these regions so frequently.

As a consequence of the anomalous settlements above, tensions arose in the affected areas creating room for political incitement that led to severe land clashes that displaced a large number of people particularly in the Rift Valley, Coast, and parts of Western Kenya. This was especially intense before the multiparty elections of 1992 and 1997.¹⁷⁴ The clashes spawned a large population of people who owned land but could not go back to it due to the existence of the threat of violence. The ‘aliens’ lived perpetual fear that the local communities attack would attack them again thus necessitating the ‘aliens’ to stay away from their land.¹⁷⁵

No doubt, the single most conflictive issue in Coast Province’s society and politics was land – or rather, the loss or lack of access to it.¹⁷⁶ The genesis of the problem was the issue of the ten-mile coastal strip that the Sultan of Zanzibar acquired sovereignty over. In 1895, the Sultan leased it to the colonial government which in turn introduced the Land Titles Ordinance that provided for the acquisition of land titles to those that claimed individual ownership within the 10 mile strip. Unfortunately, majority of the locals were not aware of the legislation and

¹⁷² Interview with IDP from Burnt Forest, Naivasha, 12th September 2011.

¹⁷³ Interview with Kenyan from Kwa Rhoda Nakuru, Nakuru, 13th September 2011.

¹⁷⁴ See for example, Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, (New York: HRW, 1993), see also, Human Rights Watch, *Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Governance*, (HRW: New York, 2003).

¹⁷⁵ Interview with IDP from Burnt Forest, Naivasha, 12th September, 2011.

¹⁷⁶ See, M. Mghanga, *Usipoziba Ufa. Utajenga Ukuta: Land, Elections and Conflicts in Kenya’s Coast Province*, (Nairobi: Heinrich Boll, 2010).

therefore did not participate. The implications were that many people of Arab descent acquired vast tracts of land while the locals were left landless.¹⁷⁷

The issue of absentee landlords was also particularly emotive among the local people. Many people from up country acquired land at the Coast, many of them through illegal and irregular allocations further exacerbating the situation.¹⁷⁸ Locals were so repressed that in some places they found it even difficult to carry out their daily economic activities such as fishing because hotels and other plot owners blocked access roads to beaches. The trend to disregard local land rights as well as ecological concerns continues, as shown by new large-scale agricultural schemes, planned by Kenyan and international investors, in the Tana River.¹⁷⁹ The government seemed to have turned a blind eye to the predicament of the Coastal people as the Kibaki government leased an estimated 100 000 acres of land in the Tana Delta to the Qatari government.

Land tenure systems were also a major source of structural violence. These refer to terms under which access to land rights are acquired, retained, used, disposed off or transmitted.¹⁸⁰ Problems relating to tenure included the status of women. This is discussed elsewhere in this section. Another tenure issue had to do with the pastoral communities. There were past inappropriate policies by government and interventions aimed at settling them. Successive administrations generally lacked recognition of the existence and validity of their community based land rights.

¹⁷⁷ See, KLA, *National Land Policy in Kenya: Addressing Historical Injustices*, KLA, Issue Paper No. 4/2004.

¹⁷⁸ See, Republic of Kenya, *The Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, (Nairobi: Government Printer, June 2004).

¹⁷⁹ Mghanga, *Usipoziba Ufa, Utajenga Ukuta: Land, Elections and Conflicts in Kenya's Coast Province*, op. cit.

¹⁸⁰ See, CKRC, *The Main Report of the Constitution of Kenya Review Commission*, (Nairobi: Government Printer 18th September 2002).

Tenure issues were also prevalent in the slums. Slums refer to the informal urban settlements characterised by squalid conditions occasioned by the lack of infrastructure and services. These include, Kibera, Mathare, Korogocho and Mukuru kwa Njenga in Nairobi; Ziwa la Ng'ombe in Mombasa and Nyalenda in Kisumu. In Nairobi alone, about 60% of the population lives in the slums. Unfortunately, slum dwellers were unable to meaningfully improve their lot as they lacked secure tenure. They had to deal with frequent evictions mostly by private developers a majority of who had acquired the land illegally or irregularly.¹⁸¹

Another source of conflict was identified as issues relating to land administration. Land administration encompasses all activities relating to procedures for the delivery of land rights, systems of land rights, security; including demarcation, survey and registration, regulation and control of land use planning, land market regulation and the processing of land disputes.¹⁸² The main weakness of the previous land registration system was the lack of transparent and effective institutions dealing with public land and customary land, the administration of which was always considered corrupt and highly over centralised and remote from the resource users.

3.3 Corruption and Impunity

3.3.1 Corruption

Corruption refers to the inappropriate behaviour or abuse of office by public officials for personal gain.¹⁸³ The Anti Corruption and Economic Crimes Act , 2003 of Kenya expands the definition to include: bribery, fraud, embezzlement, abuse of office, breach of trust, and any offence involving dishonesty, in connection with any tax or rate levied under any Act or

¹⁸¹ Interview with Shelter Forum, Nairobi, 4th October 2011

¹⁸² See, CKRC, *The Main Report of the Constitution of Kenya Review Commission*, (Nairobi: Government Printer 18th September 2002), p. 209.

¹⁸³ P. Annassi, *Corruption in Africa: the Kenyan Experience*, (Victoria: Trafford; Nairobi: Dialnet, 2004).

dishonesty relating to election of any person in public office. Corruption can also be broken down into petty corruption, grand corruption and looting.¹⁸⁴ Petty corruption involves relatively small sums of money for instance a small bribe to a traffic police man; in grand corruption, the figures are significantly larger and may be in the form of kickbacks paid to government officials on public works projects; and lastly looting is a large scale economic delinquency that involves mind boggling figures that often results in collapse of banks and a rise in inflation like was the case with the Goldenberg scam.

In the discourse of structural violence, J. B. Dobel provides an apposite definition of corruption. He defines a politically corrupt society thus:

“...social relations are characterised by complete self interest and fellow citizens are seen as instruments, obstacles or competitors. In a morally corrupt society, civil virtue and social responsibility are abandoned and intense competition for spoils becomes standard practice...”¹⁸⁵

In Kenya the existence of the patron client relationship made it impossible for leaders to be corruption free.¹⁸⁶ In order to perpetuate the relationship, the clients required resources a majority of which could only be acquired through corruption. Politics was seen not as a process of governance but as an economic enterprise.

Corruption was a source of structural violence through its link to the violation of human rights. While corruption led to the personal enrichment of the public officer involved, inevitably, the citizens were impoverished and denied access to basic needs such as food, transport and education—all essential ingredients in an individual’s ability to realize their full potential.

¹⁸⁴ J. Githongo, “Introduction,” in A. Mullei (ed.) *The Link Between Corruption and Poverty: Lessons from Kenya Case Studies*, (Nairobi: ACEG, 2000), p. 4-6.

¹⁸⁵ J. B. Dobel, “The Corruption of a State,” in *American Political Science Review*, Vol. 72, No. 3. 1978.

¹⁸⁶ S. K. Akivaga, “Anti Corruption Politics in Post KANU Kenya,” in L. Chweya, J. K. Tuta and S. K. Akivaga, *Control of Corruption in Kenya: Legal Political Dimensions: 2001-2004*, pp. 243-283.

Corruption was also responsible for conferring benefits to people who did not merit them.¹⁸⁷

Corruption therefore became both unjust and a disincentive to hard work.

As a purveyor of structural violence corruption also impeded growth and development and penalised the poor.¹⁸⁸ Corruption and corrupt leaders consequently deepened poverty and made it difficult for ordinary citizens to get ahead as a result of their own efforts. The costs of corruption therefore disproportionately affected poor Kenyans who not only suffered from lack of services but were also powerless to resist the demands of corrupt officials.¹⁸⁹

3.3.2 Impunity:

Closely linked to corruption and working as a reinforcement mechanism for it was the culture of impunity. International human rights law defines impunity as 'the impossibility, de jure or de facto of bringing the perpetrators of violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.'¹⁹⁰

The trend in Kenya, especially among the political elite was breaking the law confidently knowing that they could get away with anything. Leaders and administrators allied to the political parties to which the executive belonged seemed to be more prone to these violations and crimes. For instance, in the Kibaki government, the purveyors of grand corruption schemes were

¹⁸⁷ See G. Mwabu and A. Mullei, "Status of Poverty in Kenya," in A. Mullei (ed.) *The Link Between Corruption and Poverty: Lessons from Kenya Case Studies*, (Nairobi: ACEG, 2000), pp. 8-19.

¹⁸⁸ See World Bank President 1997 as quoted in G. Mwabu and A. Mullei, *The Link between Corruption and Poverty: Lessons from Kenya Case Studies*, op. cit. p. 29.

¹⁸⁹ See Global Coalition for Africa as quoted in A. Mullei and G. Mwabu, *The Link between Corruption and Poverty: Lessons from Kenya Case Studies*, op cit., pp. 29-42.

¹⁹⁰ See Kenya Human Rights Commission, *Lest we Forget: the Faces of Impunity in Kenya*, (Nairobi: KHRC, August, 2011).

mostly members of his cabinet. Some of these include the Anglo leasing scam, the FPE scandal, the relief maize scandal, the illegal government raid on the standard newspaper premises, the Artur brothers' scandal, and the irregular sell of the Grand Regency Hotel and a myriad of other scandals. Reading the accounts of some of the shenanigans that went on under the very nose of the president is nothing short of sickening.¹⁹¹ John Githongo a former Permanent Secretary in charge of Governance and Ethics, recounts tales of cabinet ministers, including the minister for Justice at the time no less, asking him to go slow in his investigations into their corrupt dealings¹⁹².

Despite the public out cry after the scandal broke, none of the perpetrators of the fraud were prosecuted. Instead, the government spent more money setting up commissions of inquiries as a public relations exercise. A majority of these reports were never made public and their recommendations were often ignored. The KHRC aptly calls these reports the conduits for cover-up and entrenchment of the culture of impunity.¹⁹³ A report by the Africa Centre for Open Governance (AfriCOG) which investigated the efficacy of commissions of Inquiry in Kenya, found that such commissions were often created for many reasons other than the uncovering of truth. These reasons included: response to public pressure, pacification of the public and as political exit strategies.¹⁹⁴

Every so often the token government official would 'step aside' in order to allow for investigations the content of which hardly mattered in the grand scheme of things as the officials were always brought back after a short interval after which the public would have been engaged

¹⁹¹ See M. Wrong, *It's Our Turn to Eat: The story of a Kenyan Whistle-Blower*, (London: Fourth Estate, 2009).

¹⁹² Ibid.

¹⁹³ See, KHRC, *Lest We Forget: The Faces of Impunity in Kenya*, op. cit.

¹⁹⁴ See, AfriCOG, *Commissions of Inquiry in Kenya: Seekers of Truth or Safety Valves?*, (Nairobi: AfriCOG Press, 2004)

by yet another scam often bigger and more audacious than the last . Similarly, previous perpetrators of violence were never brought to justice despite the fact that government as well as NGOs¹⁹⁵ had routinely collected sufficient evidence to warrant the investigation and prosecution of suspects.¹⁹⁶ This lack of holding individuals to account engendered a dangerous culture of impunity.

Government institutions that were charged with the responsibility of maintaining law and order like the police and the judiciary were complicit in this. For instance, in 1999, the Akiwumi Report gave a detailed account of the alleged perpetrators of the 1992 and 1997 ethnic clashes across Kenya. The government of the day refused to make the findings public until 2003 after a public demand with an addendum by government trying to discredit the findings.¹⁹⁷ The tradition of shielding certain offenders was so entrenched within the systems of maintaining law and order that officers were expected to look aside if violations of the law were committed by well connected individuals. For instance during the CIPEV sittings some public officials testified that even though they had known the perpetrators of the violence they were afraid to bring them to act as against them as their superiors would not be pleased thus putting their jobs in jeopardy.¹⁹⁸

In this kind of environment, a culture of impunity was nurtured as citizens knew that they needed not account for their actions.¹⁹⁹ It was under this setting that the ODM feeling aggrieved after the announcement of the presidential poll result in 2007, announced that they would not

¹⁹⁵ See for example, Africa Watch, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, op. cit.; Republic of Kenya, *Report of the Judicial Commission Appointed to Inquire Into Tribal Clashes in Kenya*, (Nairobi: Government Printer, 31 July 1999); Republic of Kenya, *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and other Parts of Kenya*, (Nairobi: Government Printer, September 1992)

¹⁹⁶ See for example, Kenya Human Rights Commission, *Lest We Forget: The Faces of Impunity in Kenya*, op. cit.

¹⁹⁷ See, Republic of Kenya, *The Report of the Commission of Inquiry into the Post Election Violence in Kenya 2007/2008*, (Nairobi: Government Printer, 2008); see also Comments by the Government on "Report of the Judicial Commission to Inquire into the Tribal Clashes in Kenya," (Nairobi: Government Printer, 31 July 1999)

¹⁹⁸ See Republic of Kenya, *Report of the Commission of Inquiry into the Post Election Violence in Kenya, 2007/2008*, op. cit.

¹⁹⁹ Interview with FIDA-K, Nairobi, 28th September 2011.

contest the result in the courts as they considered the system biased towards the incumbent. The alternative choice of mass action was preferred and the attendant violence was the result.

3.4 Minority Communities

The question of minority communities was a major source structural violence in Kenya. This was caused by the failure of successive governments to recognise and protect minority rights. Article 27 of the International Covenant on Civil and Political Rights (ICCPR) lays down the foundation upon which the protection of minority rights is based. The article states that:

‘...In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with other members of the group to enjoy their own culture, to profess and practice their own religion, or to use their own language.’²⁰⁰

Mwagiru defines minorities as those groups of citizens held together by ties of common descent, language, culture or religious faith who feel that they differ in these respect from the rest of the population and who desire to preserve their special characteristics and to develop them further.²⁰¹ Oloo defines minority groups as those having lower social status, possessing less power and prestige, and exercising fewer rights than the dominant group.²⁰²

In Kenya, demands for the protection of minorities emanated from two broad categories: ethnic constituencies and an array of groups that transcended ethnic groupings. For this section, focus shall be on ethnic minorities. This is a group of ethnic groups that considered themselves traditionally disadvantaged in access to opportunities and public resources. Oloo posits that the predicament of these groups was the institutional inequity that had been reproduced in the state

²⁰⁰ See OHCHR, *International Covenant on Civil and Political Rights*, from <http://www2.ohchr.org/english/law/ccpr.htm> last accessed on 11/10/2011.

²⁰¹ See M. Mwagiru, "Minority Rights and their Protection," in S. Wanjala, S. K. Akivaga, and K. Kibwana, *Yearning for Democracy: Kenya at the Dawn of a New Century*, (Nairobi: Claripress, 2002), pp. 69-91.

²⁰² A. Oloo, "Minority Rights and Transition Politics," in P. Wanyande, M. Omosa and L. Chweya in *Governance and Transition Politics in Kenya*, op. cit., pp.179-214.

from colonialism to post independence Kenya.²⁰³ As a consequence, the desire of these groups to maintain their distinct identity cost them the opportunity to develop at par with the rest of the country.

According to the UNDP, human development is about allowing people to lead the kind of life they choose—and providing them with the tools and opportunities to make those choices.²⁰⁴ Unless people who are poor and marginalised—who more often than not are members of religious or ethnic minorities—can influence political action at local and national levels, they are unlikely to get equitable access to jobs, schools, hospitals, justice, security and other basic services.²⁰⁵ States must stop denying the recognition and accommodation of a lifestyle that a group would choose to have and stop insisting that individuals must live like everyone else. They must also stop engendering exclusion where minorities are discriminated against thus suffering disadvantage in social, political and economic opportunity because of their ethnic identity. There has to be an institutional framework that recognizes and protects the said rights.

Ethnic relations including the question of minority rights and their protection can be a good indicator and early warning for potential conflict.²⁰⁶ The protection or lack thereof of minority rights in the constitution is a good sign of the presence of structural violence. This is because the structure of relation in the society is disadvantageous to the minorities. The structures thus start causing structural violence to them. This is often a precursor to violent or physical violence. Structural conflict is about how resources are distributed and more so how the minorities feel about their position in the society in relation to the majority groups.

²⁰³ Ibid.

²⁰⁴ See UNDP, *Human Development Report 2004: Cultural Liberty in Today's Diverse World*, (UNDP: New York, 2004).

²⁰⁵ Ibid.

²⁰⁶ See M. Mwagiru, "Minority Rights and their Protection," in S. Wanjala, S. K. Akivaga, and K. Kibwana, *Yearning for Democracy: Kenya at the Dawn of a New Century*, op. cit, pp. 69-91. P. 90.

Kenya has a history of marginalisation of its minority communities. This was to a large extent engendered by a constitution that did not specifically provide for the protection of these groups. Research by the CIPEV captured aptly captured the sentiments of Kenyans thus:

“...there is a feeling among certain ethnic groups of historical marginalisation, arising from perceived inequities concerning the allocation of land and other national resources as well as access to public goods and services. This feeling has been tapped by politicians to articulate grievances about historical injustices which resonate with certain sections of the public. This has created an underlying climate of tension and hate, and the potential for violence, waiting to be ignited and to explode.”²⁰⁷

Some of Kenya’s minority communities include: Sengwer, Nubian, Ogiek, El Molo, Sakweri, Endorois, Nubians and the North Eastern Communities.

Nubians for instance, faced citizenship problems inherent in their lack of lack of formal identification that disenfranchised them and restricted their freedom of movement.²⁰⁸ They also lacked representation in decision making organs. They lacked land rights over land that they had occupied for decades. This led to underdevelopment as they could not engage in any meaningful economic activities. Additionally, many well heeled Kenyans especially politicians and the provincial administration grabbed their land and registered it as their own making the Nubians squatters and tenants on land that should have been theirs.²⁰⁹ The Nubians were also unable to construct decent shelter on the land they resided on due to their lack of secure tenure leading them to live in squalor²¹⁰. This severely infringed on their rights and dehumanised them.

²⁰⁷ See, Republic of Kenya, *Report of the Commission of Inquiry into the Post Election Violence*, op. cit.

²⁰⁸ Interview with Shelter Forum, Nairobi, 4th October 2011.

²⁰⁹ Ibid.

²¹⁰ Ibid.

3.4.1 The Hunt Gatherers of Kenya

Hunting and gathering involves obtaining daily sustenance through the collection or pursuit of wild foods.²¹¹ The hunter gatherers are easily assimilated once they come into contact with power agriculturalist and pastoralist communities. These communities stand apart from the rest as they form an intricate relationship between nature and themselves, a relationship of that transcends the physical into spiritual interdependence.²¹²

In Kenya, hunter-gatherer communities include: Ogiek, Sengwer, Yaaku, Boni, and Waata.²¹³ Others are the Endorois, Ilchamus and the EL Molo a small fishing community dependent on Lake Turkana. These communities were discriminated against as their practice of hunting and gathering was considered backward. Governments adopted policies that denied them land rights a key essential to their livelihoods. For instance, the government had policies that restricted hunting through the formation of game reserves and game parks with little regard to the communities that reside in these areas.

3.4.2 The Communities of North Eastern Kenya

North Eastern Kenya has seen some of the worst marginalisation of minority communities in Kenya. Some scholars have aptly named this region the 'the forgotten badlands'.²¹⁴ These area covers over 80 per cent of the country's land mass, and accounts for over 70% national livestock production, with an estimated value US \$ 1 billion (Kenya, 2004:vi). In total, the area contributes about 16% Kenya's Gross Domestic Product (GDP).

²¹¹ B. Winterland, and D. J. Kennet, *Behavioural Ecology and the Transition to Agriculture*, (Los Angeles, University of California Press, 2006).

²¹² Ibid.

²¹³ See, KLA, *Forest Dependence in Kenya: A case of Hunter Gathering Communities in Kenya*, (KLA: Nakuru, 2009).

²¹⁴ See O. G. Mwangi, "Conflict in the 'Badlands': the Turbi Massacre in Marsabit District," *Review of African Political Economy*, Vol. 33, No. 107, *State, Class & Civil Society in Africa* (March, 2006), pp. 81-91.

Yet despite the immense potential that this area has, the Kenya government set out with policies that alienated the area and marginalised the inhabitants. The area lacked infrastructure and the communities were often fighting over scarce resources, especially water, a lifeline for their pastoralist lifestyle. Stock theft has particularly detrimental with observers estimating that the country was losing over US\$130 million annually through banditry some of whom were attacking from across borders in Ethiopia, Uganda and Somalia. Amid all this the Kenya government seemed unwilling to provide adequate security for the citizens of Kenya in this region. This failure of state agencies to provide security led to the communities forming militias to protect themselves. The implications were that there was proliferation of arms in the area further jeopardizing the overall security of North Eastern.

Further, the residents lacked access to schools for their children, medical facilities, roads, water and sanitation. The ubiquitous image of North Eastern Kenya was always that of malnourishment and death from the perennial famine that afflicts the area. Government structures of government were thus particularly violent to this region.

It is also telling that this was the setting for perhaps what was the worst human rights violation by government agencies. The incident was referred to as the Wagalla Massacre...

3.5 Women, youth and other special groups

Women, youth and persons with disabilities (PWDs) form another level of marginalised people in Kenya.

3.5.1 The Woman Question

Historically, women have been subordinated in most societies. Social theorists refer to the problems that women face collectively as the Woman Question. These include: lack of equal rights, oppression, and differential participation in social labour.²¹⁵ Kenyan women have been no different. Women have continued to be marginalised mostly because the structures that exist have refused to recognise their rights as human beings equal to men in society. While the centrality of women to the development process is now accepted, and their crucial role in food production recognised, women in Kenya still form the bulk of the poorest group in the country and have yet to be considered equal partners in development.²¹⁶

At independence, two legal systems were adopted, the modern and traditional, both controlled and managed by men. According to Ooko-Ombaka: ‘...depending on the mood, whim or politics of the situation, African culture may be invoked to oppress women, or modern society may be cited in efforts curb to some cultural practices that safeguard the rights of women...’²¹⁷ The legal system in Kenya was mostly therefore a tool that legitimised the oppression of women in society. Tove Stang Dahl captured it thus: “...law as an institution to a large degree contributes to the maintenance of the traditional male hegemony in society...”²¹⁸

The implication is that the tool that was meant to address gender inequality in society through the protection of rights for all was actually perpetuating inequality. FIDA-K identified

²¹⁵ M. A. Mbeo and O. Ooko-Ombaka, “Introduction,” in M. A. Mbeo, O. Ooko-Ombaka *Women and Law in Kenya*, (Nairobi: Public Law Institute, 1989), pp. i-xviii.

²¹⁶ J. Adhiambo-Oduol, Gender Advocacy Research: Opening statement at the “Women in Autonomy in Kenya: Policy and Legal Framework Seminar”, Feb 17-18 1995, in K. Kibwana, (ed.) *Women and Autonomy in Kenya: Policy and Legal Framework*, (Nairobi: Claripress, 1995).

²¹⁷ O. Ooko-Ombaka, “The Kenya Legal System and the Woman Question,” in A. Mbeo, O. Ooko-Ombaka (eds.) *Women and Law in Kenya*, (Nairobi: Public Law Institute, 1989), pp. 31-39.

²¹⁸ Tove Stang Dahl...

several gender discriminatory provisions enshrined in the 1963 constitution.²¹⁹ One glaring issue was discrimination on the basis of sex. Although chapter 5 of the constitution had guaranteed citizen rights and prohibited discrimination based on sex, section 82 was silent on the same giving a loophole for the said discrimination. Secondly, the constitution did not guarantee women's voting and representation. This is despite the fact that women constitute the dominant voter segment.

Women were also discriminated in the provisions on citizenship.²²⁰ While a man who married a foreign woman under section 91 could pass on his citizenship to her, the same was not applicable to a Kenyan woman in the same position. Additionally, while a child born of a Kenyan man outside Kenya automatically became a Kenyan citizen the same was not applicable to a child born of a Kenyan mother.²²¹ There was also the question of application of different systems of family law the implication of which was that men who married under customary law had an upper hand to women.

FIDA-K also noted with concern that women were not expected to own property under customary law especially land. Men therefore, used the customary law provisions to deny women their rights even though under the constitution women were entitled to property rights. It was disturbing that although the Kenya government had been a signatory to the Covenant on Elimination of all forms of Discrimination against Women (CEDAW), the vice was still rampant as there lacked political will necessary to enforce it. For CEDAW to have been effectively implemented, it had to be supported by the articulation of women's rights in national

²¹⁹ Interview with FIDA-K, Nairobi, 28th Sep 2011. See similar sentiments in K. Kibwana, *Law and the Status of women in Kenya*, op. cit., pp 1-16

²²⁰ See, K. Kibwana, "Law and the Status of women in Kenya" (Nairobi: Claripress, 1996)

²²¹ Ibid.

constitutions and other laws in other regional and international human rights instruments. The 1963 constitution had failed to do that.²²²

The women's problems have also been compounded by their lack of awareness of the law. Unfortunately, even when awareness has been attained, violent structures have stood in the way of women exercising the said rights. For instance, women who chose litigation as a way of resolving harsh discriminatory practices under customary law had to content with court rooms full of judges and magistrates who were men steeped in tradition. They therefore often made ruling against women based not on the strict interpretation of the law but their own foibles as men.

Women in Kenya were also marginalised on the education front. The role of education in empowering communities cannot be overemphasized. Availability of education largely determines the individual woman's situation and contribution thus educational policies are key to women's participation in the country's development²²³ and more importantly to the realisation of their potential. Even though education policies greatly improved in post independence Kenya, other structural issues that were not addressed interfered with women's ability to stay in school and study on a level playing field with men. Access was thus limited not by educational policy or law but by limited opportunities, customs, social attitudes and financial constraint. For instance, despite the introduction FPE girls access to education remains limited due traditional attitudes as well as high drop out rates occasioned by pregnancy, early and forced marriages-which stood at 80 000 annually.

²²² Interview with FIDA K, Nairobi, 28th September 2011.

²²³ F. A. Karani, "Educational Policies and Women's Education," in A. Mbeo, O. Ooko-Ombaka (eds.), *Women and Law in Kenya*, op. cit., pp. 23-28.

The system also tended to discriminate women through their invisibility in the official economic valuation and statistics. This nurtured the erroneous belief that women were less productive than men. Exacerbating these problems was the lack of representation for women who were always a minority in Parliament. Since 1963, the 10th parliament has had the majority women representation and yet this is a paltry 22 out of 210 or 10% of the entire house.²²⁴ This was due to a number of factors, which included women's relative lack of economic power and entrenched gender stereotypes and the nature of party politics. The last one is important because of the nomination process, the stage at which party gatekeepers chose candidates.

In a country with entrenched stereotypes such as Kenya, the ordinary perception of capable leadership is ordinarily male-centred. Combined with the perceptions of the voting public, who are the final decision-makers, it makes for a situation in which women are at a disadvantage to men in an election.²²⁵ The resultant under-representation of women implied that it was nearly impossible to pass legislation that could positively impact the status of women in a male dominated environment. Ooko-Ombaka aptly captured the situation in his observation that MPs exhibited a remarkable chauvinism and general lack of awareness whenever matters of women's concern came before the house. He stated further that the expected male chauvinism was made more potent when coupled with the more subtle but no less devastating cultural chauvinism where progressive initiatives were shot down by invoking the African culture.²²⁶

Land tenure was another constraint facing Kenyan women in agricultural production an industry a majority of them engaged in as demonstrated by the figures above. Women faced extremely limited control of land resources. For instance although women constitute 75% of the

²²⁴ See FIDA-K, *Gender Audit Study of the 10th Parliament*, (FIDA-K: Nairobi, Draft Report, 2011).

²²⁵ See, FES & CGD, *Fairer, Friendly, Electoral Systems for Women and Minorities in Kenya: Benefits of a Mixed Member Representation System*, (Nairobi: FES, April 2002).

²²⁶ O. Ooko-Ombaka, *The Kenya Legal System and the Woman Question*, op. cit., p. 35.

agricultural workforce, they only held about 6% of all land titles. Access to the land was often by virtue of being wives, mothers or other relation to the community in which they live. This limited their ability to engage in agricultural investment which requires a substantial amount of capital from credit institutions.

Motherhood in Kenya was always a highly risky business with mortality rates at 560 per 100 000 live births. Only 46% of births are assisted by trained personnel. 1 out of 20 girls therefore is likely to die from a complication arising from motherhood in her lifetime.²²⁷ The tragedy is that all of the causes of these deaths- haemorrhage, infection, obstructed labour and unsafe abortion are preventable. Because of the anomalous structure manifested in the poor health policy, motherhood in Kenya was been criminalized to the extent that it cost lives. The fact that maternal health statistics have not improved in decades is testimony to the carelessness with which the system regards women's welfare.

3.5.2 Youth

In the current, social, economic and political environment, the youth find themselves drifting through life almost aimlessly. Their fears, ambitions, hopes and aspirations hardly attract a corporate attention from the wider society.²²⁸ Wanjala painted a grim picture of youth in the informal sector. He called them a tough and hardened lot. The rough and tumble of their daily lives left them with only one priority-survival. Anything and anyone that stood in the way of that was ruthlessly shunted aside.

²²⁷ K. O. Rogo, "Women and Health," in K. Kibwana, (ed.) *Women and Autonomy in Kenya: Policy and Legal Framework*, (Nairobi: Claripress, 1995), p. 70.

²²⁸ S. Wanjala, "Elections and the Young in Kenya" in S. Wanjala, S. K. Akivaga, and K. Kibwana *Yearning for Democracy: Kenya at the Dawn of a New Century*, op. cit., pp. 322-328.

Yet the youth remained the most manipulated and misused in politics where they are referred to cynically as the leaders of tomorrow. The youth form a majority of the population in Kenya. Significantly, in 2007 they formed 60% of the voting bloc.²²⁹ What made the youth a particularly dangerous group though was that a majority of them were unemployed-an estimated two million youth. Additionally, the youth's propensity to violence was exacerbated by the phenomenon of street children. Between 1992 and 1996, the number of street children increased 300% in just four years. Many of these initially rootless children became adults, the product of displacement by ethnic violence.²³⁰

Like other marginalised groups, youth started to experience structural violence in colonial Kenya and this continued through successive governments. After independence, the administration engaged in a style of leadership that was anti-youth. Young, ambitious leaders were either assassinated or shunted from the mainstream,²³¹ while being actively reminded that they would be leaders of tomorrow- a tomorrow that never came. Young people were therefore, actively alienated from participation in decision making processes in the country. The number of young people in public office for instance was low in contrast to their numeric advantage

The trend Kenya was that most violence was perpetuated by young people at the behest of senior politicians. Studies have shown that during elections for instance, the youth were the main actors taking the lead with responsibility for over 55% of the actual violence.²³² In contrast only about 7% of the violence was sponsored by the youth.²³³

²⁹ See Youth Agenda, *Who is Guilty? Youth Perspectives on the 2007 Pre-Polls Electoral Violence in Kenya*, (Nairobi: Youth Agenda, 2008).

³⁰ See the Republic of Kenya, *Report of the Commission of Inquiry into the Post Election Violence*, op. cit.

³¹ See Youth Agenda, *Youth in Leadership*, (Nairobi, FES, 2006)

³² Youth Agenda, *Who is Guilty?*, op. cit.

³³ Ibid.

The CIPEV investigation found that another problem facing the youth was the ever growing population of poor, unemployed youth both educated and uneducated, who agreed to join militias and organised gangs. These gangs were alleged to intersect with parts of the Government and the security forces going as far as becoming “shadow governments” in some places. In the slums around Kenya and even in other parts of the country these gangs were used by politicians to attack their opponents; to secure their own security, and to gain power.

Furthermore, these proliferating militias were also said to sometimes dovetail with the State and its security apparatus thereby not only reducing the State’s capacity to control violence but also increasingly threatening the integrity of the State and the nation. This underlying endemic situation created a climate where violence was increasingly likely to be used and where it was used was increasingly unlikely to be checked.²³⁴

Angela Godoy in her study of gang activity in Latin America suggested the re-examination of the tensions between political liberalisation and economic exclusion in impoverished and radically unequal societies where crime is often a commentary on the character and quality of the life and society.²³⁵ This argument is in sync with Galtung’s theory that inhibiting people’s potential for self realisation by violent structures engenders an outbreak of physical violence.

Ruteere in his study of the Mungiki-a youthful militia in Kenya, observed that the disillusionment of the youth with the formal political and economic institutions of social organisation in Kenya was the context that framed Mungiki violence. Mungiki is descended from

²³⁴ See Republic of Kenya, *Report of the Commission of Inquiry into the Post Election Violence*, op. cit., p. 24.

²³⁵ See A. S. Godoy, *Popular Injustice: Violence, Community, and Law in Latin America* (Stanford: Stanford University Press, 2006) as quoted in Ruteere, *Dilemmas of Crime, Human Rights and the Politics of Mungiki Violence in Kenya*, op. cit.

a pedigree of groups that often combined a religio-cultural identity with a political agenda in Kenyan history. The attraction was the promise of a foundation that offered hope for a better material existence than what the mainstream was offering.²³⁶

Mungiki members claimed to represent the unfulfilled aspirations of the Mau Mau of an alternative political dispensation. Like the Mau Mau, the land question was central to their politics. The movement was built on the dissatisfaction with the material deprivations of its constituency. This explains why the movement was successful in recruiting members from among the squatters and slum dwellers. Predictably these were the areas where the most marginalised youth with little hope for the future were to be found. Violent structures therefore served to push these youth into an alternative existence of violence.

3. 5. 3 Persons with Disabilities

Persons with disabilities were some of the most neglected in Kenyan Society both by the families and the government structures. According to the World Health Organisation (WHO)'s international classification of impairments, disabilities and handicaps of 1980, disability is a term which, in relation to an individual, describes a functional limitation which he or she may have arising from physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature²³⁷. According to the Vienna Declaration and Programme of Action; "the place of disabled persons is everywhere. Persons with disabilities should be guaranteed equal opportunity through the elimination of all socially determined barriers which exclude or restrict full participation in

²³⁶ See, Ruteere, *Dilemmas of Crime, Human Rights and the Politics of Mungiki Violence in Kenya*, op. cit.

²³⁷ See World Health Organisation, *International Classification of Impairments, Disabilities and Handicaps*, (Geneva: WHO, 1980).

society.”²³⁸ The Vienna Declaration further stresses that: “special attention needs to be paid to ensure non discrimination and equal enjoyment of all human rights and fundamental freedoms by disabled persons”.

In Kenya, the Persons with Disabilities Act, 2003, defines disability as: “a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.”²³⁹ The Act notwithstanding, the enduring image of a PWD in Kenya is that of his/her dependence.²⁴⁰ Disability is associated with charity. It is seen as blight and a scar on the normal surface of society. Most charities extended to disability were nothing more than cynical quests for a feel good effect. This charity had the effect of absolving society of any responsibility towards PWDs socially, politically and economically.

The above scenario was fostered by the lack of constitutional protection for PWDs. The Bill of rights in the 1963 constitution made no explicit reference on the rights of PWDs. Compounding the problem was the lack of political representation for persons with disability. Employers often discriminated against them. The enactment of the Disability Act 2003 did not help change the situation as the implementation of the provisions there in was not enforced. PWDs did not enjoy fundamental rights such as access to public spaces, public transport and education facilities. Besides, archaic cultural practices like killing, hiding and abandonment of infants with disabilities were thriving, a clear indication that the Act had not been implemented.

²³⁸ See, Para. 64 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights of 1993. As quoted from, KHRC, *Objects of Pity or Individuals with Rights: The Right to Education for Children with Disability*, (Nairobi: KHRC Occasional Report, 2007).

²³⁹ See Republic of Kenya, *Persons with Disabilities Act*, (Government Printer, 2003).

²⁴⁰ M. wa Mungai, “Bodily Contrariness” in K. Njogu, (ed.) *Governance and Development: Towards Quality Leadership in Kenya*, (Nairobi: Twaweza Communications, 2007).

3.6 Conclusions

From the above study it is apparent that indeed there was structural violence in the Kenyan society. This structural violence had affected different sectors of the society such as women, minorities, and youth. The post election violence of 2007/2008 can be directly attributed to the structural violence. The chapter also finds that the structural sources of conflict that were prevalent in the Kenyan society were critically linked to the defective 1963 constitution. This is because provisions there in or lack there of, on land, discrimination of women, resource distribution, and the all important powers of the president were legitimising the structural violence emanating from other structures such as the judiciary and the ECK.

CHAPTER FOUR

STRUCTURAL CAUSES OF VIOLENCE IN KENYA: A CRITICAL ANALYSIS

4.0 Introduction

The previous chapter as the case study dealt with the structural causes of PEV. Both primary and secondary data was used in the discussion of the various causes including: the 1963 constitution; the land question; the problem of minorities; the case of women, youth and other special groups; and the culture of corruption and impunity.

Chapter four is a critical analysis of the issues that emerged in chapter three. These include the conflict management strategies that were adopted with particular attention to the long term measures being implemented in order to resolve the structural problems that were identified in the case study in chapter three. Information is given on the structural reforms and the progress of the said reforms, and how efficient they have been in addressing the underlying causes of PEV.

4.1 International Mediation of the Post Election Violence

The International Community was shocked at the speed with which Kenya descended into violence after the announcement of the presidential poll results in December 2007. What was even more astounding was the swiftness with which the violence escalated resulting in the deaths of over 1500 people, displacement of hundreds of thousands and the destruction of property worth billions of shillings.²⁴¹ It totally ripped apart the façade that Kenya had built for herself as a haven of peace in the midst of the chaos that are prevalent in other states in the Horn

²⁴¹ See for example, ICG, "Kenya in Crisis," Nairobi/Brussels, Africa Report No. 37, 21 February 2008 ; HRW, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance*, Vol. 20, No. 1(A), March 2008 and Republic of Kenya, *The Report of the Commission of Inquiry into the Post Election Violence*, op. cit.

of Africa and the greater Great Lakes Region such as Somalia, Sudan, and the Democratic Republic of Congo (DRC)

Expectedly, reactions from the international community were swift. This can be attributed to the immense strategic interest that Kenya holds for a majority of the world powers. From being host to the only United Nations Office in the developing world to the existence of a multitude of diplomatic offices and regional offices for a myriad of international organizations, and other business interests; to the hosting of military bases for the US and Britain; and being a key ally of the West in the region in the fight against terrorism, Kenya could not be let to burn. Too much was at stake. Resolution efforts were therefore started almost immediately.

For conflict theorists, earlier resolution of violent conflict is easier than trying resolve a protracted conflict. Raimo Vayrynen argues that violence in its early stages is easier to handle since the issues are still specific and hence more amenable to transformation and the number of parties to the conflict is limited, thus reducing its complexity.²⁴² The same principle was true of the post election violence where by the quick response by international community ensured that conflict resolution and management was started in good time when the sole focus of the parties in conflict was the alleged stolen election and the underlying causes of it.

Among those who showed concern for the situation were the former and sitting African heads of state that reacted with alacrity and flew in to offer good offices. These included former Presidents Chissano of Mozambique, Masire of Botswana, Kaunda of Zambia and Mkapa of Tanzania (all members of the Africa Leaders Forum) and President Kufuor of Ghana the then Chair of the AU. Their effort resulted in the deployment of the African Union Panel of Eminent

²⁴² See, Vayrynen, 'Towards Effective and Cost Effective Conflict Prevention: a Comparison of Different Instruments' *International Journal of Peace Studies*, Vol. 2, No. 1, 1997. retrieved from http://www.gmu.edu/academics/ipjs/vol2_1/vayrynen.htm last accessed on 10/9/2008

Personalities, led by Kofi Annan as the chief mediator, with former Mozambican first lady Graca Machel and former Tanzanian President Benjamin Mkapa.²⁴³ A successful forty-one day mediation process followed that brought the country back from the brink of disaster.²⁴⁴

At the fourth session of the talks chaired by Kofi Annan, the parties to the Kenya National Dialogue and Reconciliation came up with an Agenda that sought to not only stop the violence but resolve the conflict with a raft of long term measures.²⁴⁵ Agenda one discussed the need for immediate action to stop violence and restoration of fundamental rights and liberties. Agenda two focused on the immediate measures to address the humanitarian crisis: promote reconciliation, healing and restoration. This led to the need to establish commissions to enquire investigate the electoral process-the CIPEV, the conduct of the ECK-the IREC as well the establishment of a TJRC.

Agenda number three was the hardest to resolve as it involved overcoming the crisis through negotiation and agreeing on a comprehensive power sharing deal.²⁴⁶ The final agenda item four on long term issues and solutions laid out a comprehensive inventory of reform measures that were to be undertaken within one year if the structural causes of the violence were to be resolved and thus prevent future recurrence of violence. On 28 February 2008, the actors in the conflict, the Government/Party of National Unity (PNU) led by Kibaki and the Orange Democratic Party (ODM) led by Raila Odinga, under the Kenya National Dialogue and

²⁴³ See M. Griffiths, *The Prisoner of Peace: An interview with Kofi A. Annan*, (Geneva: Centre Humanitarian Dialogue and the Kofi Annan Foundation, 9 May 2008).

²⁴⁴ For details of the mediation process see: M. Mwagiru, *Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, op. cit.; E. Lindenmayer and J. Lianna, *Choice for Peace? The Story of 41 days of Mediation in Kenya*, an Unpublished Research Paper of the United Nations Studies Program, New York, 2009; Griffiths, *The Prisoner of Peace: An interview with Kofi A. Annan*, op. cit.

²⁴⁵ Kenyan National Dialogue and Reconciliation, *Annotated Agenda and Timetable*, (Nairobi: 1st February 2008).

²⁴⁶ Griffiths, *The Prisoner of Peace: An interview with Kofi A. Annan*, op. cit.

Reconciliation (KNDR) signed an agreement²⁴⁷ that resulted in the formation of a coalition government and precipitated the ending of the crisis and heralded the beginning of the much needed reform process. In this chapter we will carry out a discussion of the reform measures agreed upon.

4.2 Conflict Resolution and management Strategies for the Post Election Violence

The NDRC settled on a multipronged approach in resolving the PEV. Some involved settlement while the most elaborate measures involved actual conflict resolution. The most critical issue was the NDRCs recognition of the fact that the PEV was not just about the alleged stolen election but that the election was only a trigger of a much more deeply entrenched structural malady that needed to be addressed if a sustainable peace was to be achieved. Resolution therefore had to be about targeting the root causes of the conflict by having a comprehensive approach that targets the underlying political, social, economic and environmental causes of conflict.²⁴⁸

The above resonates with Ramsbotham, Woodhouse and Miall who posit that conflict resolution is essentially about overhauling the conflict generating structures.²⁴⁹ Adam Curle also offers a similar argument that the way out of structural violence is to change the structure that is responsible for conflict and that change of structure is achieved through overthrowing the structure responsible.²⁵⁰

²⁴⁷ www.dialoguekenya.org/docs/signed_Agreement_Feb281.pdf last accessed on October 12 2011, see also The National Accord and Reconciliation Bill 2008 at

http://www.dialoguekenya.org/docs/Signed_National_Accord_Act_Feb28.pdf last accessed on 12th October 2011

²⁴⁸ R. Vayrynen. *Towards Effective and Cost Effective Conflict Prevention: a Comparison of different Instruments*, op. cit.

²⁴⁹ See, O. Ramsbotham, T. Woodhouse, and H. Miall, *Contemporary Conflict Resolution: the Prevention, Management and Resolution of deadly Conflicts*, op. cit. pp. 118-131.

²⁵⁰ Curle, *Making Peace*, op. cit., p. 1-2.

4.2.1 Commission of Inquiry into the Post-Election Violence

The Commission of Inquiry into Post-Election Violence (CIPEV) was set up as a prerequisite of Agenda item number 2. It was set up on 23rd May 2008,²⁵¹ with Justice Phillip Waki as the chairman.²⁵² The mandate of the CIPEV was to investigate the facts and circumstances surrounding PEV, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters.

At the conclusion of its work, the CIPEV made several recommendations based on the findings. These recommendations made the basis for some of the issues that have been implemented so far. It is worth noting at this juncture that most of the recommendations made by CIPEV-perhaps due to the restrictions of its mandate- were about settlement and retributive justice and very thin on structural reform. Given the euphoria and excitement with which human beings embrace retribution, the danger is that the more critical measures, those of radical structural reforms may be put on the back burner as society focuses on the seemingly more urgent question of settling scores. It is dangerous as ultimately conflict resolution is really not about removing people from certain positions but overhauling the structures that engender that conflict. In the words of the eminent scholar John Burton, "...prevention and correction of social behavior must be targeted towards the environment as opposed to the deviant who actually needs rehabilitation"²⁵³

²⁵¹ See, Republic of Kenya, "Kenya Gazette Notice, No.4473 vol. cx-no.4." (Nairobi: Government Printer, 2003)

²⁵² See, Republic of Kenya, *Report of the Commission of Inquiry into the Post Election Violence*, op. cit.

²⁵³ See, Burton, *Conflict Resolution as a Political System*, op. cit., p. 72 .

One of the most far reaching recommendations that the CIPEV made was the establishment of a special tribunal, to be known as the Special Tribunal for Kenya. The tribunal was to be set up as a court setting in Kenya and seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 general elections in Kenya.²⁵⁴ The CIPEV gave strict deadlines for this, failure to adhere to which would mean the handing over of the list of suspects to the Special Prosecutor of the International Criminal Court (ICC).

Other recommendations were the fast tracking of the International Crimes Bill 2008 in order to facilitate investigation and prosecution of crimes against humanity; the implementation of the Witness Protection Act 2008 which would be necessary for the protection of witnesses willing to give information on the perpetrators of PEV; the enactment of the Freedom of Information Bill that would enable state and non-state actors to have full access to information which could lead to the arrest, detention and prosecution of persons responsible for gross violations during PEV.

Additionally, the commission urged for the suspension of all persons holding public office and public servants charged with criminal offences related to the post-election violence from duty until they had been exonerated from all blame. Lastly, but with far reaching implications was the recommendation that if any person were found liable for any offences related to the post election violence, such persons were to be barred from holding any public office or contesting any electoral position. Implementation of this recommendation would go a long way in slaying the monster of impunity that plagues Kenya.

²⁵⁴ Ibid.

4.2.1 Independent Review Commission (IREC)

The commission was set up as a non judicial body whose mandate was to investigate all aspects of the 2007 Presidential Election and make findings and recommendations to improve the electoral process.²⁵⁵ IREC's terms of reference were formally published in a Gazette notice on the 14th of March 2008.²⁵⁶ The mandate of IREC was to examine the 2007 elections from a number of angles. These were: the constitutional and legal frameworks to identify any weaknesses or inconsistencies; the structure and composition of the ECK in order to assess its independence, capacity and functioning; the electoral environment and the role of the political parties, civil society, the media and observers; the organisation and conduct of the 2007 elections, extending from civic and voter education and registration through polling, logistics, security, vote-counting and tabulation to results-processing and dispute resolution; vote-tallying and -counting to assess the integrity of the results of the entire election with special attention to the presidential contest.

The IREC was also tasked with assessing the functional efficiency of the ECK and its capacity to discharge its mandate; recommending electoral and other reforms to improve future electoral processes and lastly within six months to submit to President Kibaki and the Panel its findings and recommendations which were then to be published within 14 days.

As expected, failure to effectively manage the 2007 elections by the ECK was found to have been the trigger of the post-election violence, which had devastating consequences for Kenya. Investigations by the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 found, inter alia, that the country's constitutional and legal

²⁵⁵ See Republic of Kenya, *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007*, op. cit.

²⁵⁶ Republic of Kenya, *Gazette Notice No. 198 of 14 March 2008 (annex 1.A)*, (Nairobi: Government Printer, 2008).

framework relating to elections contained weaknesses and inconsistencies that limited the effectiveness of the electoral system. The Commission underlined the need to thoroughly overhaul the electoral management process and the institutions on which it was anchored. The inquiry also found that the defunct ECK lacked the necessary independence, capacity and functionality resulting from its organisational structure, composition and management systems. The investigation further indicted the political parties and the media, while noting serious anomalies in the delimitation of constituencies.²⁵⁷

At the conclusion of its investigation, IREC recommended radical reforms in the electoral body. This is because the ECK had been found culpable in the trigger of the PEV. This still points to the existence of structural violence since the operations of the defunct ECK had been anchored in the 1963 constitution. IREC called for urgent executive, legislative and political measures to enable a newly reconstituted electoral body to perform its essential functions. Some of those functions would be initiating, popularising and sustaining a national commitment to electoral integrity in Kenya. This would entail the adoption of a new voter registration system and relevant legal reforms.

In terms of structural reform, IREC therefore, put forward measures that address the underlying causes of the violence. Focus is not on the individuals per se but on the structures under which the said individuals were acting. The implication is that IREC recommends conflict resolution, as opposed to mere settlement. There is a general recognition that conflict was caused by flawed structures and not individuals.

4.2.3 Truth Justice and Reconciliation Commission

²⁵⁷ Republic of Kenya, *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007*, op. cit., p. 3.

In countries emerging from periods of great political turmoil, particularly turmoil associated with gross violations of human rights, the question of how to deal with the past has been a crucial part of the transformation process.²⁵⁸ The issue is: how does a society return to any sort of normality when, for instance, two neighbours living side by side are, respectively, victim and perpetrator of heinous crimes.²⁵⁹ In such situations as it is in Kenya after PEV, there are victims and perpetrators of abuses on both sides and simultaneously there is no outlet for the anger and pain behind the abuse. This circumstance creates the need to establish a process that will allow healing from both sides.

A truth, justice and reconciliation commission creates a record of human rights abuses that is as complete as possible, including the nature and extent of the crimes and a full record of the names and fates of the victims. The principal aim of truth commissions is national reconciliation. In order to facilitate the reconciliatory process, they make hidden crimes public. The philosophy behind such attempts is that truth, not punishment, contributes to reconciliation. Criminals must be penitent and victims should be encouraged to forgive them in order to construct a new society together. Shinoda posits that a TJRC is akin to a spiritual intercourse between criminals and victims to renew a disrupted society as one. There is no role for outsiders except supporting their spiritual efforts toward reconciliation behind the scenes.²⁶⁰

Some commissions cover very short periods of time while others cover much longer but still well-defined periods. A truth and reconciliation commission can be set up in a variety of

²⁵⁸ J. Sarkin, "The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda," in *Human Rights Quarterly*, Vol. 21, No. 3 (Aug., 1999), pp. 767-823.

²⁵⁹ *Ibid.*

²⁶⁰ H. Shinoda, "Peace-building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals," *Institute for Peace Science*, Hiroshima University, Spring 2002, Vol. 7 No. 1.

ways. The important thing is to tailor the commission's mandate and powers to both the country's current situation as well as its history so as to provide the best chance for success.²⁶¹

Even before PEV, Kenyans had expressed the need for a TJRC. The hue and cry for this reached a crescendo at the end of the Moi regime in 2002. The NARC government acquiesced to the demands by setting up a task force chaired by Professor Makau Mutua. Its mandate was to find out if a truth commission was necessary for Kenya, and, if so, to make recommendations on the type of truth commission that was to be established.²⁶²

The task force recommended the formation of a TJRC to investigate several injustices including: political assassinations; massacres and possible genocides; political violence and the murder of democracy advocates; torture, exile, disappearance and detention and persecution of opponents, rape, politically instigated ethnic clashes and; violence of economic, social and cultural nature.²⁶³ Although the recommendations were that a TJRC be established no later than June 2004, the clamour for the commission died with the release of the findings.

With PEV however, the need for a truth commission re-emerged. The National Dialogue and Reconciliation Committee proposed the immediate formation of a TJRC to promote justice, national unity, reconciliation and peace among Kenyans. Subsequently, the TJRC was formed with the enactment of the TJRC Bill, 2008.

The Commission was formed but was plagued by several challenges. One of the major problems it faced was the questions that arose over the integrity of the chairman Ambassador

²⁶¹ Ibid.

²⁶² Republic of Kenya, *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, (Nairobi: Government Printer, 2003).

²⁶³ M. Appollos and O. Ongowo, *Transitional Justice and Truth Commissions: The Way Forward for Peace*, (Nairobi: CCR, 2009), p. 37-63.

Bethuel Kiplagat. His critics alleged that Ambassador Kiplagat had been a part of the Moi establishment, the same establishment that presided over numerous violations of human rights that the TJRC was tasked to investigate. This to them, already posed the problem of conflict of interest for the chairman whom they thought should have excused himself from the commission. One of the commissioners Professor Ron Slye resigned, citing his discontent over the questionable integrity of the chairman especially with regards to his involvement in the Wagalla massacre.²⁶⁴

The criticisms and early resignations notwithstanding, the commission started its work and at the time of writing this is still traversing the country and holding hearings for victims of injustices. TJRC is striving to be as accessible to all as possible especially in its adoption of a gender sensitive approach.²⁶⁵ With this in mind, the recruitment of staff was done with gender balance in mind; statement takers have been trained on gender sensitive statement taking; they routinely have hearings for women only and they have thematic hearings for women's issues. This is a departure from past practices where commissions did not take into consideration the unique experiences that women go through and the need to be sensitive to this uniqueness in order to realise justice.

The bill has some weaknesses. Key among these is the question of amnesty. Critics are of the view that the bill gives too much attention to the question of amnesty while only briefly mentioning reparation for the victims.²⁶⁶ That notwithstanding, low level perpetrators of the violence though hope that the TJRC will be the forum through which they explain their

²⁶⁴ Resignation letter of Prof Ron Slye from the TJRC from http://www.apsea.or.ke/reforms/index.php/component/docman/doc_download/25-resignation-letter-of-prof-ron-slye-from-tirc last accessed on 12th October 2011

²⁶⁵ Interview with FIDA-K, Nairobi, 28th September 2011

²⁶⁶ Apollos and Ongowo, *Transitional Justice and Truth Commissions: The Way Forward for Peace*, op. cit., p. 49-50.

motivation for participating in the violence and thus make a case for amnesty²⁶⁷. They feel that they were victims of a harsh system that gave them little option.²⁶⁸ One of the perpetrators admitted that he had participated in the violence because he felt betrayed by the loss. To him, having his preferred candidate at statehouse meant that his rural home was finally going to get the development that he had been promised during the campaign. Loosing meant that he would have to wait another five years in the hope that his candidate would win then²⁶⁹.

There is also the question of the TJRC operating at the same time as the special tribunal. This will mean two organisations trying to address the same issues but with totally different approaches for while the TJRC will be seeking truth and reconciliation; the tribunal will be seeking retributive justice. Concern has also been raised about the fact that the time allocated to conduct investigations into atrocities ranging over decades-since 1963, is too short.²⁷⁰ The TJRC is scheduled to issue its report on 3rd November 2011 provided no extension is granted and the fear is that this shortness of time may compromise the quality of work done.

Despite this short comings however, the TJRC is necessary as it will ultimately help to uncover truths of crime in order to achieve reconciliation and enduring peace.²⁷¹ Victims of the PEV feel that the TJRC is a good forum through which they can be able to publicly express themselves and let the government know how traumatized they felt about the attacks.²⁷² They hope that through the TJRC, the people who hurt them can be able to come and at least offer

²⁶⁷ Interview with a low level perpetrator from Korogocho, Nairobi, 16th September 2011.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Interview with FIDA-K, Nairobi, 28^h September 2011.

²⁷¹ Shinoda. *Peace Building by the rule of Law: An Examination of Intervention in the Form of International Tribunals*, op. cit.

²⁷² Interview with an IDP from Mathare Kosovo, Nairobi, 7th September 2011.

them an apology. More importantly though, the victims hope that the TJRC process will go beyond just truth and offer them the necessary compensation for what they lost in the violence.²⁷³

4.2.4 Local Tribunal and International Criminal Court Processes

Scholars posit that punishment of perpetrators of violence is about respecting fundamental rights of others therefore fostering greater stability in the society.²⁷⁴ This is often done by use of special tribunals especially since the local justice systems are often nonexistent-in the event of protracted conflicts- or are considered incapable of being impartial in meting out justice to the alleged offenders. Proponents of tribunals argue further that they are necessary as they foster justice and kill impunity.²⁷⁵ The international indictment as is the case with the ICC is seen as bringing about deterrence. More fundamentally, tribunals are necessary in their role as enforcers of justice for there cannot be enduring peace in a society where there is no justice. This is an important view that articulates the nexus between justice and peace.

Reiterating the point Shinoda observes that international tribunals are needed, when national courts cannot discharge their proper functions. The justification for judicial intervention is that there are usually no appropriate judicial systems or no sufficiently legitimate organs in post-conflict disrupted societies.²⁷⁶ In the case of Kenya for instance, the local courts were perceived by some of the actors in the conflict as being biased and therefore incapable of rendering fair verdicts. Furthermore, the political leadership was unwilling to set up a local tribunal to try the masterminds of the post election violence as had been recommended by the CIPEV.

²⁷³ Ibid.

²⁷⁴ Shinoda. *Peace Building by the rule of Law: An Examination of Intervention in the Form of International Tribunals*, op. cit.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

Ultimately, a local tribunal would have been the best way of dealing with the suspects as it would have heralded the beginning of a new era where perpetrators of violence would no longer get away with offences. It would have sent a message that the political leadership was willing and ready to punish offenders regardless of political affiliations and thus end the culture of impunity. Commenting on the issue, Nobel Laureate, Wangari Maathai stated that:

‘...It would have been valuable for Kenya to experience the administration of justice within the country, so that its citizens can see that they live in a country where law and order are respected and all citizens are subjected to the same law. Carrying out the process within our borders will also send a message that the country will not tolerate impunity - especially from its leaders... There is need to develop confidence in ourselves and our institutions to deal with all crimes within our borders... Such confidence would also nurture a sense of unity and belonging. Once the country deals with the perpetrators of crimes, the country will have a more conducive environment for truth, healing, reconciliation and restitution.’²⁷⁷

Citizens increasingly preferred the option of taking the masterminds of the PEV to the ICC because they felt that past experience had shown that the law and order system in Kenya never punished elite offenders.²⁷⁸ This is true given that the perpetrators of some of the most serious crimes ranging from instigating ethnic clashes in the 1990s to economic crimes like the Goldenberg fraud, the Anglo leasing scam and a plethora of others had never been punished. Kenyans argue that the country has a history of impunity that stretches back to the colonial days. The master minds therefore, need to pass through a court system that they do not have the power to manipulate²⁷⁹

Another argument was that the Kenyan legal system as it was, was incapable of carrying out the prosecutorial duties since the organs that would have been charged with the responsibility

²⁷⁷ W. Maathai, ‘Kenya: The Hague or Local Tribunal’ from http://www.newsfromafrica.org/newsfromafrica/articles/art_11627.html last accessed October 12 2011

²⁷⁸ Interview with FIDA –K, Nairobi, 8th September 2011.

²⁷⁹ Interview with youth from Mathare, Nairobi, 7th September 2011.

of investigating and trying the suspects like the police were already compromised as they had been mentioned adversely by the many commissions that were set up to investigate the PEV including the CIPEV.²⁸⁰

Ultimately though, it was up to the coalition government to push for the establishment of the local tribunal in order to try the suspects locally but it failed to do so in time. On March 31, the Kenyan government challenged the admissibility of the two Kenyan cases, citing its plans to begin or continue investigations of those responsible for the post electoral violence in the context of a range of reforms mandated by the new constitution promulgated in Kenya in August 2010.²⁸¹ But, the pre-trial chamber, in a May decision, rejected the government's admissibility challenge as the judges found no evidence that the government was actually investigating any of the six people named in the two cases.

In March 2011, the pre-trial chamber issued summonses to appear for the six people, and all six appeared voluntarily before the court in April 2011. The six are Francis Kirimi Muthaura-currently serving as Kenya's head of the civil service; Uhuru Muigai Kenyatta of PNU-Deputy Prime minister as well as Kenya's Finance minister; Mohammad Hussein Ali – was the Commissioner of police during the violence but is currently the Post Master General; William Samoei Ruto-was one of ODM's pentagon members during the violence, became minister of Agriculture but was recently fired from the cabinet following a fall-out with ODM leader Raila Odinga, still, he has retained his parliamentary seat; Henry Kiprono Kosgey, Minister of Industrialisation and formerly the chairman of ODM, and Joshua arap Sang a radio presenter with a Kalenjin vernacular station Kass FM.

²⁸⁰ Interview with FIDA-K , Nairobi, 28th September 2011.

²⁸¹ Under article 19 of the Rome Statute, ICC judges may decide that a case is inadmissible because genuine national investigations or prosecutions are taking place. The ICC is a court of last resort, and the Rome Statute clearly recognizes that the ICC may only act where national authorities are unable or unwilling to do so.

Already, the confirmation of charges hearings which begun on September 21 2011, has been undertaken and the six suspects are awaiting the decision of the court on whether they should actually stand trial. Whether the suspects, get to go through trial and some or all actually get convicted or not, already the process has send a message to the entire country that impunity will no longer be tolerated. Victims of the PEV already feel that the process is offering them a measure of justice for violations that they suffered.²⁸² This speaks to the changing trends that will see society transformed in order to create sustainable peace.

What is disturbing though is the extent to which the government is willing to support the suspects and help prove their innocence. For instance, the president himself, wrote a statement to the ICC that was to argue the innocence of Muthaura. This may send the wrong message to Kenyans who believe that no one is above the law. Additionally, the suspects should have been made to resign their public positions given the fact that they are facing the charges of crimes against Kenyans. On the contrary, the minister for Justice is on record as having asked the Special Prosecutor to of the ICC to stop the process.²⁸³

Still, credible national trials will be necessary to complement the ICC's prosecutions and to widen accountability for the post-election violence. This is necessary both for the victims and the perpetrators. Retribution constitutes a firm principle in most legal systems as well as in certain strands of theological thought. It is a basic principle of justice that a wrong should be righted. The concept of retribution maintains that the offender deserves punishment.²⁸⁴ In spite of important reforms under way, Kenya's judicial system faces a number of challenges in meeting that goal. For instance police investigations into the violations have been hampered by the lack

²⁸² Interview with an IDP from Burnt Forest, Naivasha, 6th September 2011.

²⁸³ L. Barasa, "Mutula to Ocampo: Quit Kenya probe," *Sunday Nation*, 19 September, 2010.

²⁸⁴ van der Merwe, H. W. and Johson, T. J., "Restitution in South Africa and the Accommodation of an Afrikaner Ethnic Minority," *International Journal of Peace Studies*, (Spring 2003), Vol. 8 No. 1.

of capacity by the force.²⁸⁵ They lack both the numbers and the technical know how of handling cases of that magnitude. Compounding this is the fact that it has already been over 3 year since PEV; therefore, it is very challenging to collect evidence that can withstand a rigorous court process.²⁸⁶

Notably, in June 2010 the President assented to the Witness Protection (Amendment) Act which paved the way for the establishment of an independent and autonomous Witness Protection Agency (WPA). Consequently, a Witness Protection Advisory Board (WPAB), chaired by the Attorney General was appointed amid concerns by a section of the civil society that it was not neutral, for the reason that state organs had been accused of committing atrocities during PEV. Besides, the new independent WPA not fully operational, lacks adequate funding, and will require more experience before it is up to the task of protecting witnesses in high-profile cases.

As the prosecution of the perpetrators gets underway though, it is important to remember that the ultimate goal of the process is engendering a peaceful society. Kenyans must therefore be willing not to focus too much attention on retribution at the expense of peace and reconciliation. For in spite of everything, the perpetrators of the violence though misguided in their choice of method, or perhaps because they felt they had no choice, were also victims of a violent structure that they eventually fought albeit at the expense of other Kenyans. In the words of Boraine Alex, Janey Levy and Ronel Scheffer, Kenyans must find a way, difficult as it is, to

²⁸⁵ Interview with FIDA Kenya, 28th September 2011

²⁸⁶ Ibid.

get to the middle ground between vengeance and impunity.²⁸⁷ For therein lies the key to justice and reconciliation.

4.3 Agenda Item four Interventions

4.3.1 The New Constitution 2010

For structural violence to end and a sustainable peace to be achieved, the structures that are responsible for causing violence in the society must be overhauled. As seen in the previous chapters, the 1963 constitution was considered as the biggest source of structural violence in Kenya. Reports from several Commissions of Inquiry, NGOs and other observers all pointed out that an underlying cause of the PEV was the anomalous provisions in the constitution. These provisions have already been analysed in the foregoing chapters. It was therefore, of paramount importance that structural reform as envisaged in the Agenda 4 of the NDRC, begins first and foremost with a repeal of the 1963 constitution.

Despite minor setbacks, a new constitution was passed at the referendum held on 4th August 2010 and promulgated on 27th August 2010. The urgency with which Kenyans wanted a new constitution could be felt in the fact that a process that had hitherto taken decades without completion was finalised within two years from the time the Committee of Experts was appointed. The voter turnout itself was unprecedented; at 72%, the referendum turnout was the highest in Kenya's multi-party electoral history. And at a 67% approval rating, the legitimacy of the new constitution is uncontested.²⁸⁸

²⁸⁷ B. Alex, J. Levy and R. Scheffer, "Dealing with the Past: Truth and Reconciliation in South Africa." (Cape Town: Institute for Democracy in South Africa, 1994)

²⁸⁸ See South Consulting, *The Kenya National Dialogue and Reconciliation Monitoring Project Review Report June 2011* (Nairobi, South Monitoring, 2011)

A look at the issues raised previously in this study confirms that the Kenyan Constitution 2010 has indeed addressed a vast majority of the shortcomings that were generating structural violence. The New Constitution therefore, has the potential if implemented properly and respected, to address political instability in Kenya and thus engender a positive peace. It has established a context for addressing political instability by especially promoting devolution, trimming the powers of the executive and safeguarding the principle of checks and balances; promoting equitable sharing of national resources and protecting and respecting minorities, children, persons with disabilities and the aged.

The issue of women is particularly well taken care of in the new constitution. For instance, women can now pass on citizenship to their spouses and foreign born children; they have equal rights as married partners under the law; they have equal land and property rights; the constitution now explicitly provides for the inclusion of women in all public sectors through the one third rule in public offices and positions; it also provides for shared parental responsibilities regardless of marital status; and notably, the constitution is now supreme over any provisions of customary law therefore, women can no longer be oppressed under the guise of customs.

Indeed Kenyan women have a lot to celebrate. Only recently, Kenya was ranked top in the world in gender reforms.²⁸⁹ The accolade was bequeathed due to the passing of laws that allowed women to do business, have access to financial institutions, improved matrimonial and family property law and the nullification of customary law-all made possible with the enactment of the new constitution.

²⁸⁹ P. Leftie, 'Kenya Ranked Top in Gender Reforms,' *Daily Nation*, Nairobi October 12 2011.

Recent events however, including the decision by cabinet to amend the provision which requires that women have a third of the seats in parliament and all other public bodies due to the claim that it was unworkable, remind Kenyans that the political class may not have the will to uphold the integrity and sanctity of the constitution. It is therefore the responsibility of all Kenyans to remain vigilant in order to ensure that the new constitution which cost so much to attain remains inviolate. That the gains that have been achieved through this constitution are not eroded²⁹⁰.

In his criticism of the cabinet's decision to change the general elections date from August to December, CIC chairman, Charles Nyachae, observed that he read mischief in the politicians push to post-pone the elections.²⁹¹ To him it was all about the politicians not wanting to loose out on the 4 months worth of salaries and perks if the elections are held earlier. Of course, these sentiments have put him on a collision course with the Minister of Justice Mutula Kilonzo who claimed that the election had to be pushed forward because the government would not be ready in August. Paul Muite,²⁹² and indeed other Kenyans with public interest at heart are of the view that government and all other public officials should work in order to fit within constitutional requirements instead of trying to get the constitution to fit into parochial interests.²⁹³

Yet, there are certain fundamental issues that could lead to conflict that the constitution has not addressed. For instance, the electoral system is not altered. It has retained the principle of first past-the-post and largely ignored MMPR. It has also privileged delineation of constituencies

²⁹⁰ Interview with FIDA-K, Nairobi, 28th September 2011.

²⁹¹ KTN news at 9pm 14th September 2011

²⁹² KTN news at 9pm 14th September 2011

²⁹³ Views also articulated by Shelter Forum, FIDA K and KLA.

on the basis of population as the dominant criteria of devolution. Certainly, devolution is what speaks most concretely to the general public in terms of what represents real change in their lives.

However, implementation of the provision on devolution will face several challenges. Because of its significance, it is expected that there will be multiple interpretations of several articles that are not definitive in meaning. Among these is Article 203 on what 'equitably distribute' the 15 per cent revenue is; secondly the design and the operation of the provincial administration and local authorities alongside the counties might raise confusion and conflict; and finally there is the capacity gap in the counties in terms of technical abilities as well as quality of the political elite. The NDRC monitoring report recommends that the CIC as well as the CIOC expeditiously identify and address these issues in earnest before they undermine effective operationalisation of this vital aspect of the constitution.

4.3.2 Land Reforms

There have been significant land reforms starting with the provisions in the new constitution.²⁹⁴ It especially gives a powerful context for the implementation of the NLP. Previously the old constitution had been a big impediment in the implementation of the proposals of the NLP but with the promulgation of the new constitution, pro reform stake holders in the land sector and indeed all Kenyans given the centrality of land in every Kenyan's life can now look forward to the implementation of a pro-people land policy.

Those with vested interests had argued for instance that there was no way of legally addressing the question of illegally/ irregularly acquired land as had been recommended in the

⁹⁴ Republic of Kenya, *Constitution of Kenya, 2010: Part 5, Land and Environment*, (Government Printer: 2010).

Ndung'u report because land owners were protected under the provisions in section 75 of the 1963 constitution that gave sanctity to property rights.²⁹⁵ This had serious implications for dealing with one of the biggest source of structural violence in Kenya. As noted previously, a key aspect of the land question was the illegal and irregular allocation of public land especially by successive presidents and other public officials in order to maintain patronage to the detriment of many ordinary citizens who were landless and squatting on land that should have been theirs in the first place.

Article 40 of the new constitution is critical as it allows for the limitation of land rights to anyone who has illegally acquired land. This will not only help to right historical land injustices but will also help end impunity and corrupt practices in the land sector.²⁹⁶ With the implementation of this law government will be able to save the destruction of forest lands and the resultant drying up of water catchment areas. This will be of immense benefit to the entire society.

Despite these gains in the land reform sector, KLA notes with concern that there are certain individuals especially those that had benefitted illicitly on land by exploiting the anomalous structures, who are still quietly campaigning in order to have the gains reversed.²⁹⁷ Notably, William Ruto, a former minister of Agriculture no less, was one of the harshest critics of land reform. It is therefore, critical that stake holders, led by the Land Sector Non State Actors educate the public on the reforms, and rally that public to remain vigilant and ready to defend any attempts at the erosion of the gains.²⁹⁸

²⁹⁵ Interview with KLA, Nakuru, 13 September 2011.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

4.3.4 Judicial reforms

The Judiciary has made the most significant progress in terms of transformative reforms thus far. Reforms in the Judiciary are seen as the biggest change the country has seen after the promulgation of the new Constitution. The Judiciary has set high standards for institutional reforms and rejuvenated public confidence in the sector. The transparent process through which judicial officers were appointed and the high integrity standards demanded of applicants to the Judiciary are responsible for this shift in perceptions about the institution.

A new Chief Justice, a deputy Chief Justice and Registrar of High Court were competitively hired. The Supreme Court was also established after the swearing in of Judges appointed to sit in it. Judges of the High Court have also been recruited. In September 2011, the Judiciary received an unprecedented sum of 11 billion shillings to support the reform process²⁹⁹. Current reports are that the Judicial Service Commission (JSC) is set to recruit massively in order to get the man power to handle the enormous backlog of cases that it has.³⁰⁰ This is in testimony to the Judiciary's determination to speed up the delivery of justice and earn back the trust and respect of Kenyans.

A matter of concern though was the fact that the appointments to the supreme court ignored the principle of gender balance as enshrined in the New Constitution calling for having at least a third of the members being of either gender. Concerned members of civil society led by FIDA-K sued the appointing authority to get them to stop the appointments until gender parity had been met but unfortunately the court ruled against them.

²⁹⁹ J. Kadida, 'Judiciary Spells out Array of Reforms,' *The Star*, 11 September, 2011.

³⁰⁰ Daily Nation, 'Judiciary to Carry out Massive Recruitment,' Friday October 14 2011.

4.3.5 Police Reforms

The Police force was perhaps the most vilified public institution following the PEV and with good reason. The CIPEV found the force culpable in having contributed tremendously to the chaos of that were the PEV³⁰¹. In its findings on the response to the PEV by the SSAs the CIPEV focused particularly on the delivery of services by the force. Despite the scattered acts of heroism by a few officers, the force was mainly characterised by an abject failure in discharging even the most basic of its mandated roles. For instance the police were found to have used excessive force in dealing with rioters and this resulted in the fatal shooting of at least 405 people.³⁰² Many were defenceless people who had been shot from behind. Kenyans can recall the pictures in national media of the young man in Kisumu who was hunted down and shot by a policeman who then proceeded to kick him while he lay dying. The haunting spectacle was captured on camera. And needless to say, the then police commissioner, Hussein Ali, is among the suspects summoned to answer charges at the ICC.

In terms of police reform, the government appointed the National Task Force on Police Transformation. It was an 18 person civilian task force headed by Retired Judge Philip Ransley. After collecting views from across the country, the task force made an astounding 200 recommendations-perhaps as evidence of the rot that was rife in the force-as the necessary antidote for police reformation. In January 2010, the government appointed Police Reforms Implementation Committee embarked on the daunting task of implementing the numerous reforms. It had until January 2011 to complete its task.³⁰³

¹ See Republic of Kenya, *Report of the Commission of Inquiry into the Post Election Violence*, op.cit

² Ibid.

³ F. Mukindia, "Team on Police Reforms Launched" *Daily Nation*, 12th January 2010.

There has been the passing and enactment of two police bills – the National Police Service Act and the National Police Service Commission Act. The National Police Service Act is a critical law because it addresses many important elements of policing identified in both report by the Philip Ransley-led Taskforce on Police Reforms and the new Constitution. These include internal discipline, capacity, community policing, and the creation of the Kenya Police Service. It will also guide the recruitment of the Inspector General of Police and the vetting of all police officers to determine whether they are going to continue serving. In addition, a policy on community policing has been finalised and is expected to be devolved to the counties. There has also been the development of a new training curriculum for police that emphasises human rights.

4. 3. 6 Minorities

Chapter 4, part 3 , sections 52-57 of the 2010 constitution expressly recognizes the rights of minority communities and other marginalised groups in Kenya³⁰⁴. This is a big step towards addressing the question of minorities. With their rights being anchored in the constitution, minority groups will be able to hold the government or any other individuals accountable if their rights are infringed upon. Section 54, recognises the rights of persons with disabilities, section 55 recognises the rights of the youth and the need to facilitate their access to a decent standards of living while section 56 outlines specific rights for minorities and marginalised groups to ensure their representation in governance, access to employment opportunities, development of their cultural values and reasonable access to service.³⁰⁵

In implementation of these reforms, the government in 2008 created the Ministry of Development of Northern Kenya and other Arid Lands in March 2008 with a view to addressing

³⁰⁴ Republic of Kenya, *The Constitution of Kenya 2010*, (Nairobi: Government Printer, August 2010).

³⁰⁵ Ibid.

the development challenges facing these hitherto neglected areas. Unfortunately, the new ministry is already tainted by scandal as there were recent media reports that there had been millions of shillings meant for the World Bank funded Arid Lands Natural Resource Management Project had been lost through fraud.³⁰⁶

4.3.7 Impunity

As alluded to previously, the coalition government has been reluctant to address the question of ending impunity. Politicians seem to be putting political expediency before the need to cleanse the country of this cancer that has caused the country so much. Already the coalition government has been rocked by several corruption scandals and yet the alleged culprits have not been punished or at the very least removed from office. There has been for instance the FPE scandal that has lost the education sector over a billion shillings, the maize scandal, and recently the allegations in the media³⁰⁷ that the current rising inflation caused by the collapse of the shilling against other major currencies was caused by the failure of the CBK to regulate banks. The government has yet to sanction anyone over the saga.

Another glaring manifestation of impunity currently is the seeming inability of government to deal with the perpetrators of the PEV. It stemmed from governments inability to constitute the local tribunal that would have been charged with trying the perpetrators. Political divisions in the coalition and the ethnicisation of the debate, where by politicians are rallying ethnic communities and convincing them that punishing offenders from certain communities is tantamount o victimization have stalled the process.

³⁰⁶ S. Siringi, 'World Bank Takes on Kenya Over Lost Cash' *Daily Nation*, October 11, 2011.

³⁰⁷ See the Standard, Monday 17 October 2011.

This does not bode well for the country given that the next elections are less than a year away, victims of the violence would like to see the government take action if they are to believe that indeed there is change taking place.³⁰⁸ The inability to act is polarising communities and making reconciliation harder to achieve.

4.4 Conclusions

From the foregoing, the study shows that structural violence is being resolved in Kenya especially since a new constitution is in place. This largely takes care of the other concerns that Kenyans had because the new constitution anchors all the other necessary reforms. However, it is also clear that structural reform alone is not enough. It has to be accompanied by other processes such as punishment of perpetrators and the TJRC in order to accord justice to the victims and create an enduring peace. Additionally, the study has showed that not all members of society embrace the reform process. This is especially true of the political class who benefit from maintaining the status quo. Citizens therefore must be vigilant in ensuring that the political class does not deviate from the reform process.

³⁰⁸ Interview with IDP from Mathare, Nairobi, 7 September 2011.

CHAPTER FIVE

CONCLUSIONS

5.1 Summary

Galtung opines that structural violence is inbuilt in structures and manifests itself as unequal power that results in unequal chances.³⁰⁹ Structural violence also manifests itself as poverty, hunger, repression and unemployment. As a result, human beings experiencing structural violence have reduced quality of life due to the marginalisation and unequal distribution of resources that goes in tandem with unequal decision making powers.³¹⁰ Structural violence also works to deny individuals economic opportunities; social and political equality as well as their autonomy and freedom. Besides, structural violence reveals itself as gross violation of human rights in a diversity of ways including discrimination based on gender or ethnic affiliation that curtails optimum development by individuals.³¹¹

From chapter two the study shows that even though the post-electoral violence in Kenya was experienced in 2007/2008 during the Kibaki government, structural violence in Kenya had started during the colonial era. Kenyans and most prominently the Mau Mau organised a violent and bloody uprising against the colonial government in order to get rid of the oppressive regime. Unfortunately, independence did not bring with it the expected structural change that would have engendered a positive peace. The result instead was what Mamdani referred to as the 'deracialisation' of the state as opposed to 'democratisation' for the only thing that really

³⁰⁹ Galtung, *Violence, Peace and Peace Research*, op. cit., pp. 167-191.

³¹⁰ Jeong, *Peace and Conflict studies: an Introduction*, op cit., p. 20-22.

³¹¹ Ibid.

changed was the colour of the people in power and not the structures.³¹² The African elite had decided to retain the repressive structures that had been designed to oppress and under-develop the Africans while the colonialists prospered. Repression therefore grew in the colonial era and flourished in post-colonial Kenya under the Kenyatta, Moi and even Kibaki governments. The repressive administrations are what nurtured structural violence as is seen in chapter three the case study.

The post election violence of 2007/2008 can be directly attributed to the structural violence. The case study found that the structural sources of conflict that were prevalent in the Kenyan society were critically linked to the defective 1963 constitution. This is because provisions there in or lack there of, on land, discrimination of women, resource distribution, and the all important powers of the president are what was legitimizing the structural violence emanating from other structures such as the judiciary and the ECK.

Resolution of structural violence requires the overhaul of the anomalous structures responsible for the violence. In the Kenyan experience, constitutional change was the premier prerequisite. This has been followed by other reform processes including police reforms, judicial reforms, parliamentary reforms and land reforms. Along side the structural reform, political settlements had to be considered in order to create the necessary environment for the reform processes. This included a power sharing agreement to create a functioning coalition; the CIPEV and IREC commissions that investigated the PEV; the TJRC process that is aimed at giving victims the platform to share their truths and the perpetrators a chance to publicly show their

³¹² See, M. Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, (Princeton, Princeton University Press 1996)

contriteness; and lastly the ICC and local tribunal processes that will serve to punish both the high level and low level perpetrators of the violence.

5.2 Key Findings

Violence is the cause of the difference between the actual and the potential somatic and mental realisations by individuals in society.³¹³ In the conceptualisation of structural violence, peace is characterised as either being positive or negative. Negative peace is that which exists in the absence of physical violence while positive peace is the absence of structural violence and the existence of social justice.³¹⁴ Gilman defines structural violence as the physical and psychological harm that results from exploitative unjust social, political and economic systems.³¹⁵ Mwangi argues that the existence of structural conflict means that it is necessary to look beyond the immediate physical violence and take into account the structure that underlies social relationships since this might be the source of conflict.³¹⁶

Structures in this study are therefore viewed as the underlying cause of the PEV in Kenya. From the study, the constitution emerges as the single most important paradigm in defining relationships in society.³¹⁷ Quoting Kelsen, Mudida posits that the constitution is the *grund* norm among the community of legitimate laws³¹⁸. It is the ultimate basis of all validity. Given the fundamentality of a constitution in defining the key relationships in society including those of defining the relationships between the different arms of government, a defective constitution has far reaching implications for the structure of relationships in society. A defective

³¹³ See Galtung, *Violence, Peace and Peace Research*, op. cit., pp. 167-191.

³¹⁴ See Galtung, *Cultural Violence*, op. cit., pp 291-305.

³¹⁵ See Gilman, *Structural Violence: Can we find Peace in a World with Inequitable Distribution of Wealth among Nations?* op. cit., p. 3.

³¹⁶ *Ibid.*, p. 24.

³¹⁷ See Mudida, *Structural Sources of Constitutional Conflicts: a Conflict Analysis of Constitution Making in Kenya, 1997-2005*, op. cit., p. 273.

³¹⁸ *Ibid.*

constitution therefore, becomes a fundamental source of structural violence. It becomes the cause of the difference between the actual and the potential somatic and mental realisations by individuals in society.³¹⁹ It becomes the impediment for human beings ability to realize their full potential.

From the study, the supremacy of the constitution as source of structural violence is seen in the fact that the constitution as the fundamental law of the land has influence over all the other spheres of life. Therefore, all of the other structural aspects of the society that generate violence such as those reviewed in this study like the land question; the issue of minority communities; the marginalisation of women, youth and other special groups; and corruption and impunity are ultimately linked to the anomalous provisions in the constitution.

The study also contends that although Kenya has always been viewed as an oasis of peace in the midst of a highly unstable and conflict prone region,³²⁰ the truth is that Kenyan society prior to the 2007-2008 post-electoral violence, had been existing in Adam Curle's state of unpeacefulness.³²¹ In Curle's conceptualisation of the dichotomy between war and peace, he contends that while societies are sometimes either in a situation of war or peace, sometimes they are in neither. This is a situation of unpeacefulness for the reason that the potential for the development for some members of society is impeded by the existing structures. This is aptly describes the Kenyan society from independence up to the PEV when a majority of its citizens including women, minority communities, youth, children, and citizens from particular regions were marginalised by a system steeped in structural violence.

³¹⁹ See, Galtung, *Violence, Peace and Peace Research*, op. cit., pp. 167-191.

³²⁰ Kenya is neighbour to the Horn of Africa a highly volatile region consisting of the Somalia, Ethiopia, Djibouti and Eritrea. It is also located near the Great lakes region comprising of Rwanda, Burundi, DRC, Uganda and Kenya. All the other four countries have gone through protracted violent conflict.

³²¹ Curle, *Making Peace*, op. cit., p. 1-26.

Like a pressure cooker, the inability to address this structural violence eventually led to the outbreak of physical violence triggered by the alleged rigging of the presidential elections in 2007. The study also established that ultimately only conflict resolution approaches as opposed to settlement will comprehensively resolve the underlying causes of the conflict. These approaches negate the view that conflict is merely caused by a few manipulative leaders.³²² Reiterating this view, Jeong posits that lack of institutional responses to essential needs or the denial of the development requirements generates conflict.³²³ In light of the foregoing, focus should therefore, be a little less on the alleged perpetrators of the violence and a lot more on structural reform.

Conflict resolution therefore, is essentially about overhauling the conflict generating structures.³²⁴ The study found that in response to the PEV, structural reform in Kenya is on going. Fundamentally, the anomalous constitution that the study identified as being the bedrock of structural violence was replaced by the 2010 constitution which largely addressed the shortcomings of the previous constitution. In addition other peaces of legislation, policies and reform processes such as the National Land Policy, police reforms, judicial reforms, parliamentary reforms, electoral reforms and devolution are being implemented in order to reinforce the constitutional provisions in meeting the needs of Kenyans and therefore mitigate the structural violence.

The study has also found that in the attempt to carry out the structural reform requisite for conflict resolution, issues of justice and punishment of perpetrators of violence have to be dealt with concurrently if impunity is to be eradicated and if the victims are to be accorded justice.

³²² See R. E. Rubenstein and J. Crocker, "Challenging Huntington," *Foreign Policy*, spring 1994.

³²³ Jeong, *Understanding Conflict and Conflict Analysis*, op. cit., p. 52.

³²⁴ See, O. Ramsbotham, T. Woodhouse and H. Miall, *Contemporary Conflict Resolution: the Prevention, Management and Resolution of deadly Conflicts*, op. cit., p. 118-131.

These is being realised through the establishment of the TJRC and the demand by Kenyans for a special tribunal. Additionally there is the ongoing ICC process of trying the alleged masterminds of the violence. The challenge though is in being able find a way, to get to the middle ground between vengeance and impunity.¹²⁵

5.2 Recommendations

The study found that the 1963 was largely responsible for the structural violence that existed in Kenya. Getting a new constitution therefore, was the most significant step towards reform from the executive, to the judiciary, the parliament, police department, resource sharing, the electoral body and all the other area identified in the study. Reforming all of these areas was dependent on having a functioning constitution, the fundamental law of the land. Kenyans therefore must embrace the new constitution and guard it vigilantly against any attempts by politicians, to fiddle with it, especially when the fiddling is merely aimed at serving insular political interests. The study noted that the government is already trying to tinker with certain provisions, most notably the date of the next General Election and the question of equitable distribution of representation among the genders. This will ensure that the sanctity of the constitution is respected and the 2010 constitution does not go the way of the 1963 constitution but instead remains a document that guarantees the rights of all Kenyans and creates an environment where Kenyans can realize their full potential thus engendering a positive peace.

On dealing with perpetrators of the PEV, the GoK should speed up the process of prosecuting lower and middle level perpetrators by setting up the local tribunal in order to deal with impunity at that level too. Those who raped, killed or injured others must face some

⁵ B. Alex, J. Levy and R. Scheffer, *Dealing with the Past: Truth and Reconciliation in South Africa*. (Cape Town: Institute for Democracy in South Africa, 1994).

criminal responsibility. This prosecution will entrench a culture of individual responsibility and eradicate the culture of passing the buck so entrenched among Kenyan youth especially. Additionally the government should show more support for the ICC process in order to send a message of non tolerance to any future engagement in political violence by political leaders. This support should be very clear beginning with the possible removal of the “Ocampo 6” from public office. Because this is likely to create the feeling that certain communities are being targeted, civil society should support government efforts by educating Kenyans at the grassroots on the need to deal with perpetrators of violence. GoK should also increase funding for the witness protection program to ensure that all Kenyans who offer evidence especially against high level perpetrators are shielded from any possible retribution. This will encourage witnesses to step forward in confidence and help build the case against the perpetrators. As suggested in the KNDR monitoring report for October 2011³²⁶, the media should also do their part and focus attention on this level of perpetrators in order to ensure that justice is served.

Even as the ICC process and the local prosecution of perpetrators gets underway, government should not forget the critical component of demobilisation and disarmament of the communities that were involved in the violence.³²⁷ This has yet to take place. There is also need for the demobilisation and disarmament of vigilante groups such as Mungiki, Chinkororo, Taliban and others so as to engender the state’s monopoly over violence

Tackling poverty and inequality and combating regional development imbalances may take a long time. Nonetheless government must strengthen measures put in place to combat this. There should be an affirmative action of sorts for those vulnerable youth in the slum areas and

³²⁶ South Monitoring, ‘Kenya National Dialogue and Reconciliation Monitoring Report’ (Nairobi: KNDR, October 2010).

³²⁷ Interview with FIDA Kenya, Nairobi, 28th September 2011.

other areas that are particularly affected by poverty. This have been the areas where violence has been at its apex due to the availability of impoverished youth willing to join vigilantes and act as foot soldiers for politicians. The study found that if these youth are given equal opportunity to better themselves and thus have a stake in the life of the society then they would be more reluctant to engage in violence.³²⁸

The Government needs to complete the resettlement IDS and give them a reasonable amount of compensation. Already, it has been four years and yet IDPs are still not resettled. Some have been forced by circumstances to go back to their former homes where they live in fear.³²⁹ Others have had to seek alternative resettlement taking up with relatives in different locations. This has made them dependent on the said relatives causing strain on relations and robbing them of their dignity and pride.³³⁰

The government also needs to be firm on land reform. Government agencies should not be seen to appear impotent in the face of powerful land lobbies that represent only a handful of Kenyans but that want to retain the status quo expense of a majority of Kenyans. For instance, Government must do all that is necessary including dealing with reckless politicians that incite the squatters in the forests in order to nullify the illegal and irregular land holdings in the Mau and other forests in order to curb the rampant environmental destruction and save the critical water catchment areas.

The KLA proposes that the government enact certain key pieces of Legislation that will be instrumental in the implementation of the NLP and the New Constitution. Firstly, the NLC recommends the establishment of the National Land Commission Act that will establish the

³²⁸ Interview with youth from Mathare 4B, Nairobi, 7th September 2011

³²⁹ Interview with IDP from Mathare Kosovo, Nairobi, 7th September 2011

³³⁰ Ibid.

office of the recorder of public lands, prepare and maintain a register of public lands and related statistics, and establish a Lands Titles Tribunal to determine the bonafide ownership of land that was previously public or trust land.³³¹ Secondly, there is need for an Historical Land Injustices Act that will specifically address the vexatious issue of land injustices. The KLA argues that this is necessary because even though the NLC has been given this mandate, the issue is quite complex and so far reaching that it requires a separate entity that can give it the attention it deserves. Leaving it to the NLC therefore, would take the NLC away from its core functions. Thirdly, there is need for a Land Act that will designate land into: Private, Public or Community.³³² The Act will also deal with the issues of land tenure; and the restitution of illegally acquired land to the proper communities; and govern land leases. Finally, KLA posits that there is need for a Land Registration Act that will provide for the registration of all land.³³³

Women's lobby organisations must embrace the gains in the constitution. They should, in collaboration with government and other civil society organisations, disseminate the constitutional provisions to community women in order to create awareness on their legal right and thus enable them to exercise the said rights. This will also serve to protect the rolling back of the gains already made.

³³¹ See KLA, *Implementing the Constitution of Kenya and the National Land Policy: Necessary Legislative Interventions* (Nakuru: KLA, October 2010), p. 33-37.

³³² *Ibid.*, p. 35.

³³³ *Ibid.*, p. 36.

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