



# DEALING WITH THE PAST:

## Economic Crimes and the Transition

Public Forum organised by Transparency International Kenya (TI-Kenya) and the Law Society of Kenya (LSK), Nairobi, August 1, 2002



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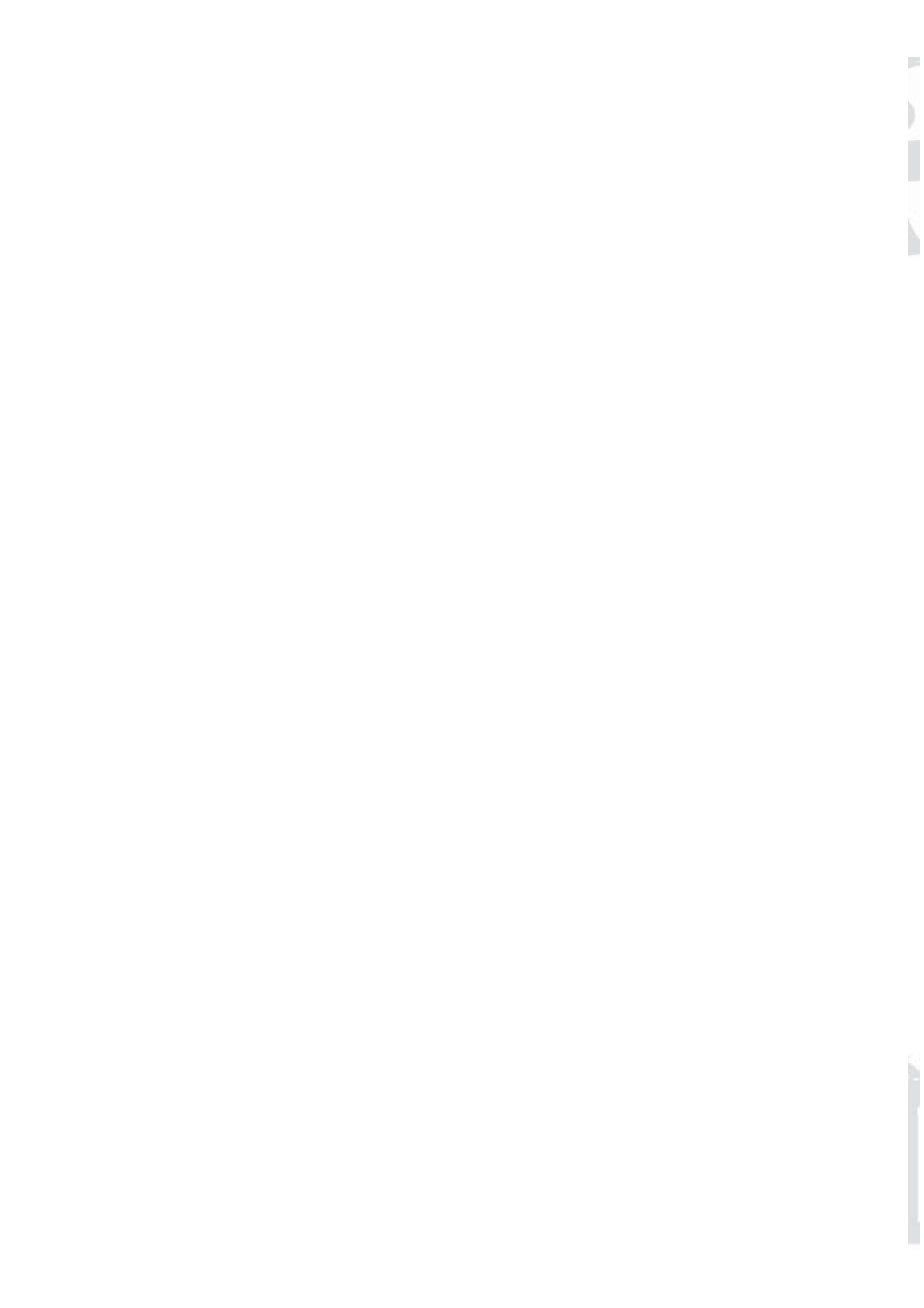


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# Introduction



The Law Society of Kenya (LSK) and Transparency International–Kenya (TI-Kenya) co-hosted a one-day conference on August 1, 2002, titled *Dealing With the Past: Economic Crimes and the Transition*. It brought together over 50 participants from government, civil society and the private sector. The conference was convened to facilitate discussion on transitional justice mechanisms and issues and to provide a forum where Kenyans from various sectors could share their knowledge and experiences on this topical and fundamental issue.

The key objective of the conference was to enhance public participation in the transitional justice debate and to commence the process of national dialogue and consultation that will ultimately lead to the development of a genuine and lasting model for the Kenyan transition.

The conference featured a morning session with two thematic plenary sessions: “Models of Transitional Justice” and “Revisiting the Amnesty Debate.” Presenters at this session included *inter alia*, the Attorney General, Hon. Amos Wako and Nzamba Kitonga, the President of the East African Law Society. The afternoon session comprised of a plenary session titled “Reconciliation and the Way Forward” where a host of local resource people presented papers.

Plenary presentations were made by Raychelle Omamo (Chairperson, LSK), Ahmed Abdallah (Director, TI-Kenya), John Githongo (Executive Director, TI-Kenya), Hon. Amos Wako (Attorney General), Nzamba Kitonga (President, East African Law Society), Prof. Mohammed Hyder (Muslim Civic Education Trust), Rev. Mutava Musyimi (General Secretary, National Council of Churches of Kenya), Ambassador Bethwell Kiplagat (Chair, Nairobi Stock Exchange) and Hon. Musikari Kombo (Member of Parliament). This report carries the conference presentations and deliberations by the participants.

The Law Society of Kenya and TI-Kenya would like to thank all conference participants for taking time to contribute to this important issue. We look forward to their continued support and collaboration as we address other issues of national concern.





# Plenary One


## Welcome and Introduction

Raychelle Awuor Omamo (Chairperson, LSK)

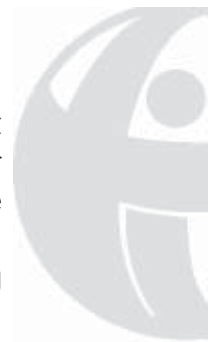
We live in moment of great expectation. Kenya has reached a turning point. Through the constitutional reform process, Kenya is on the brink of a significant transformation, a rebirth if you will, similar in importance to that which occurred in 1963, when Kenya transcended from a colony to an independent republic. Unfortunately, these times in which we live have been a result of long and often painful experiences. At the end of colonial rule in 1963, we departed from an epoch, which witnessed the deliberate exploitation and dehumanisation of one race by another. The constitutional reform process, currently in motion in Kenya, has to a large degree, been propelled by the desire of many Kenyans for a new dispensation — a new order, one that is expected to herald an egression from the excesses of greed, corruption, human rights violations and impunity, which have intermittently scarred the face of post-colonial Kenya.

When in 1963 Kenya reached a political catharsis, two broad sets of injustice required confrontation. The first was the systematic human rights abuses that were the essence of colonialism. The second was the extensive expropriation that had been carried out against the African population, which had resulted in the loss of substantial amounts of their land. The mechanisms for independence overlooked the first problem and provided only for the second. The independence constitution stipulated that all land titles that had been issued by the colonial government would remain valid in independent Kenya. Notwithstanding, the history of exploitation, which underpinned those titles, the nationalists agreed that the independence government would recognise and uphold those titles.

Since independence, Kenya has contended with a series of grave transgressions that have led to profound and legitimate grievance on the part of the citizens. These, it seems, must be addressed in a manner that accords with the sense of justice for the ordinary people. Undeniably, there has been an extensive and astonishing failure in dealing with public resources in a manner consistent with the public interest. Large portions of public land have been misappropriated in the most brazen and cynical manner. Massive corruption scandals have led to direct loss by the public of sums estimated at billions in any currency that you choose. In terms of human rights, atrocities of the nature witnessed in the tribal clashes of 1992 and 1997, not only precipitated injury, loss of life and property, but also occasioned the internal displacement and dislocation of citizens at an unprecedented scale. Regrettably, sensitive issues pertaining to the resettlement and compensation of victims and the prosecution of offenders have not been adequately addressed or resolved.



Surely, matters such as these must be confronted at this time because they constitute an integral part of our past that we are unhappy with and which we would like to lay to rest. Unless we confront them in a manner satisfactory to the public interest, they will return to haunt the future. Debate on how to confront the shame of the past has been sporadic and



uncoordinated. However, it has not been absent. Fears about the past are clearly important in charting out the future. People who feel that their past conduct may be opened up for future scrutiny may well be tempted to sabotage the future. Others who feel that the future does not adequately address the past will simply not respect the settlement for the future. To put it simply, the only means of securing the future is confronting rather than a glossing over of it.

It is necessary to have a quick overview of some of the proposals that have been raised in public discourse on how to deal with the past. In 1994 the influential “Kenya We Want” document prepared by the Law Society of Kenya (LSK), the International Commission of Jurists (ICJ) and the Kenya Human Rights Commission (KHRC) proposed the creation of a land commission to investigate cases of alienation of public land to ensure that gifts and grants made on corrupt and political grounds were recovered. The proposal suggested the creation of the office of public funds prosecutor equivalent to the Attorney General who would be charged with recovering any public funds misappropriated without any time limitation.

In 1997, the National Convention Executive Council (NCEC) proposed a South African-type mechanism for handling issues of transitional justice. NCEC has, over time, refined its proposal, which is now referred to as transitional jurisprudence. In 2000, the LSK, at its annual conference unveiled draft bills to resolve the impasse in the constitutional reform process. In part, the bills provided that the person who occupies the office of the president shall be exempt from criminal or civil proceedings in respect to anything omissions or commissions in the course of exercising the functions of the Office of President. The Society further suggested that parliament may exempt such persons, as may be agreed, from criminal and civil proceedings to effect national reconciliation and facilitate the transition to a new democratic order.

Last year, the government published the controversial Anti-corruption and Economic Crimes Bill, which, without adequate warning, proposed amnesty for a category of offenders who would otherwise be guilty under its provisions. After robust debate and criticism, the Bill failed largely because a constitutional amendment on which it was based could not pass through the National Assembly. These instances demonstrate that there is grave concern and anxiety about the past. The reaction to the Anti-corruption and Economic Crimes Bill clearly demonstrates that the Kenyan public felt deeply about the past and has clear views on how it should be handled.

We have convened this conference to bring together persons involved in charting out Kenya’s future to discuss Kenya’s past. For reasons already explained, it is important to do so. We hope that this conference will be the beginning of the difficult process of building consensus on how the future should handle the past.





# Opening Remarks

Ahmed Abdallah (Director, TI-Kenya)

On behalf of Transparency International-Kenya, I would like to welcome you all to this event that we are co-sponsoring with the Law Society of Kenya. We are here to debate a most evocative topic at a most historic time. Our question today is: How do we deal with past economic crimes in a time of transition?

Transparency International-Kenya's interest in this subject dates back to April 2001, the month in which we convened an Open Public Forum at the Norfolk Hotel to debate the question "Should there be an amnesty for economic crimes?" At the time, the government had published an Anti-Corruption and Economic Crimes Bill, which contained a clause prohibiting the investigation or prosecution of economic crimes and corruption committed prior to December 1997.

The day after the event, we awoke to screaming newspaper headlines with the *Daily Nation* editorial leader exclaiming, "talk of Amnesty to Moi is premature." In the days following, similar sentiment was to be expressed from both sides of the political divide, albeit for different reasons. On the one hand, there were those who argued that amnesty was wrong because it would perpetuate the culture of impunity and not redress serious wrongs and injustice. On the other hand, there was the argument that amnesty proposals prior to any trials or convictions prejudged the guilt of its intended recipients — and that indeed no crimes requiring amnesty had either been committed or admitted to. Clearly, there is much distance to bridge between these two positions. That is why we are here again today.

We invite you to spend the day in serious deliberation on what has clear potential to become the most vexing of preoccupations at this crucial time. That is to say there is, in Kenya, a transition process going on that will see the departure of a fairly well established political group from state power and the potential exposure of some of its members to legal processes hitherto inapplicable to them.

As the time for the hand-over draws nearer, the anxiety felt by those who are departing may cloud judgements with disastrous effects. Immediately after the handover, the danger of victor's justice taking arbitrary turns is real. We have seen this in Rwanda where, following the Arusha Power Sharing Agreement of 1994, hard-line Hutu elites fearing loss of power waged a genocide campaign against the Tutsi who were to be incorporated in government. We also saw this in Zambia, where having vanquished Kenneth Kaunda, the new President Fredrick Chiluba embarked on a vindictive campaign of harassment via the legal process of his predecessor. Agreeably, these are extreme examples, and we are not suggesting that they are likely to be replicated in Kenya. Nevertheless, the incumbents have the capacity to assure peaceful transfer of power and this capacity is their monopoly. What must be accepted is that dealing with the past is essential to a peaceful transition of power.

Transparency International-Kenya has no view one way or the other on how this will be done. Our role is to facilitate debate and discussion on this and other issues. Our actions are informed by international experiences. John Githongo, the TI-Kenya Executive Director, will be presenting some models of transitional justice later this morning.

I would like to conclude with some personal observations on the principles behind restorative and redemptive transitional justice. Kenya has reached the point where we can truly say that we have been reduced to a sorry state, largely because of corruption and economic mismanagement. Our capacity to remove ourselves from this state is compromised because nearly all our institutions have been impaired and undermined. Morals and ethics in public life have all but disappeared. Because of corruption, the world has lost faith in our public servants and institutions. The rot took place over a long period of time.

It has been a process in which we are all partly to blame through our acts of commission or omissions. The social sense of justice is offended at the moment. For the people at the bottom, it is extremely painful and they cry to the heavens for relief and justice. For the people at the top, they have lost their sense of responsibility, a sense of caring, a national brother and sisterhood that is above tribe, clan and religion. We need to remove the sense of grievance about the past by demonstrating that we are dealing with it. Injustices committed in the past cannot be removed from society's consciousness until society takes action to rectify past wrongs. We need to ensure that justice is done without fear or favour, but more than that, we must ensure that justice is also tempered by mercy.

Transitional justice mechanisms that we set up must satisfy two conflicting national needs: first, there must be the appearance that justice applies to all and is done where it is due, and second, there must as far as possible be insulation of people in authority from humiliation and vindictiveness once they have left office. The reality of the transition beckons with all its risks, threats and opportunities. We hope that today we will move this debate forward because as Kenyans of goodwill, it is our duty to do so.





# International Models of Transition Justice


John Githongo (Executive Director, TI-Kenya)

*Based on a presentation by Stephen Garrett at the 41<sup>st</sup> Annual Convention of the Columbia University International Studies Association, Los Angeles, March 14-18, 2000*

At its core, transitional justice might be said to be concerned, above all, with the politics and principles of memory. For a departing regime and for its counterpart incoming regime, minds are concentrated on the essential questions of what to remember of the past, how to define the past, what to “do” about the past, and how may (or will) all these matters affect both the present and the future of society? The outgoing seeks absolution while the incoming seeks legitimacy. The citizens likewise seek resolutions to these questions.

The salience of the debate over transitional justice is, undoubtedly, a result of the unusually potent democratisation process that has been observable in Africa since the collapse of the Berlin Wall in 1989. Within roughly six years, in 33 out of 54 African countries some form of political pluralism was reintroduced after 1989. In 20 out of the 33 countries that adopted political pluralism after 1989, the incumbents went ahead to win subsequent elections. In 11 countries, the incumbents were defeated in subsequent elections or democratic processes. However, in seven out of the 11 countries where the incumbents were removed, there was civil strife and/or major political instability.

It is now increasingly clear that this first decade of the 21<sup>st</sup> Century for Africa will see democratic institutions tested in fundamental ways and significant internal political realignment as certain democratic imperatives, like constitutional term limits for heads of state, kick in. It can be expected that legislatures and judiciaries across the continent will also come increasingly into focus as arenas for political contest. Indeed, it can be argued that constitutional term limits on sitting heads of state, especially those who have survived from the cold war era, represent the second phase of the second liberation. At the current time, the following 21 African countries have term limits imposed on sitting heads of state that can only be changed via some sort of constitutional amendment: Algeria, Benin, Burkina Faso, Cameroon, Djibouti, Gabon, Ghana, Kenya, Malawi, Mozambique, Namibia, Niger, Sao Tome & Principe, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Togo, Tunisia and Zambia.



These transitions across Africa will throw up a variety of transitional justice challenges. Current events in Zambia and anticipated events in Ghana are a case in point. What I would like to offer here are a range of “models” or paradigms of differing approaches to transitional justice, each of which is illustrated by reference to specific historical cases. As a general matter, the models presented here occupy points along a spectrum at one end of which lies “retribution” and at the other “reconciliation.” All the examples relate to gross human rights violations — but there is much to be learnt in dealing with past cases of grand corruption in particular.

## Spain: The Balm of Forgetfulness - the Amnesia Model

In this instance, the new regime makes a conscious decision not only to avoid prosecutions of past offenders, but even shuns widespread public discussion about their having taking place in the first place. To style this as the “amnesia model” is not to suggest that there will not be many individuals who will continue to remember the past in all its traumatic detail and to insist that great crimes were committed. The point here is that these tend to remain in the private domain and do not become the object of widespread attention in the press, the political process or even the judiciary. The best example of this approach to transitional justice is probably that of Spain, in the years following the death of Generalissimo Francisco Franco in 1975. Some twenty years after his death, an official in the then-ruling Spanish Socialist Party touched on the key themes here when she commented, “it seems like a century ago that he died. Nobody discusses that past much. We never even really faced that past.”

And yet there was plenty to account for in the Franco past, particularly in terms of its abysmal human rights record, especially during the earlier period of the Franco regime. As democratic institutions began to establish themselves in Spain in the period after Franco's demise, there was little public pressure for trials of the principal figures involved in human rights abuses of the past, nor was there even much of a call for some type of “truth commission” to examine the full extent of these abuses.

A number of factors are commonly cited to explain this:

1. Economic crisis: Spain by 1975 was facing a severe economic crisis due to the incompetence of the Franco regime.
2. Threats to national security united the country: There was a rising tide of terrorism in the country, notably from the Basque Liberation Movement (ETA).
3. Spain was also undergoing what Samuel Huntington called a “transformation” scenario, in which the elites in power take the lead in producing democratisation, even though this is often accompanied by tacit or open negotiations with important opposition groups. A special characteristic of the transformation process is that since members of the old regime are principal players in the transition to a new democracy, the fervour for punishment of this regime is typically less intense than in situations where its resistance to change has continued to the last moment. As a practical matter, moreover, agents of the former regime typically insist on guarantees of immunity in return for their acquiescence to a new political order.

Under the circumstances, it seemed that the vast majority of Spaniards felt it necessary to focus all the country's energies on dealing with the twin challenges of the economy and terrorism, and to eschew steps to deal with the past as essentially unnecessary diversions from this task. Prime Minister Adolpho Suarez said at the time that “the question is not to ask people where they are coming from, but where they are going to.” All in all, then, the Spanish transition stands out as almost an ideal model of the “determination to forget.”





## Ethiopia: A Settling of (Some) Accounts - the Selective Punishment Model

A second form of transitional justice that lies at the opposite end in terms of the reconciliation-retribution spectrum may be styled as the “selective punishment” paradigm. In this case, the principal political figures from the previous regime, as well as prominent members of the security forces identified with torture and similar conduct, are subject to formal legal action and sanction. This does not just involve loss of civil or political rights (such as holding governmental office) but actual trial and incarceration and—in the most extreme cases—even execution. Following the overthrow of the Mengistu regime in 1991, the new government indicted over 3,000 members of that regime for criminal acts and instituted what was sometimes described as the “Nuremberg trials of Africa,” although subsequent judicial proceedings have slowed to a snail’s pace.

## Guatemala: Remembering is Enough - The Historical Clarification Model

There are two other major paradigms of transitional justice that can be identified, and each of these occupies distinct intermediate points along the line of the retribution-reconciliation spectrum. The first of these to be considered is what might be called the “historical clarification model.” In this instance, there is some attempt to confront and document the abuses of the past (unlike Spain), but at the same time the identification of specific individuals responsible for such abuses is eschewed and, it follows logically, no formal legal proceedings are instituted against those responsible for human rights violations (unlike Ethiopia). Perhaps the best contemporary example of this model is that of Guatemala.

After the overthrow of the leftist government of Jacobo Arbenz in 1954, Guatemala evolved into a society in which social stratification was extremely pronounced. As of the early 1990’s, according to a report from the Organisation of American States, 77% of Guatemalan families lived below the poverty level; health programmes covered only 14% of the population and a third of the Guatemalan people suffered from malnutrition. It also became a country where a culture of violence became pervasive as the political and economic elite sought to maintain the privileges of its position. From 1960, leftist rebels waged a war to topple the rightist military-controlled government and to bring at least some measure of social justice to the country. The government’s response was brutal and in the course of a 25-year civil war, up to 200,000 civilians were killed. Under the auspices of the United Nations, negotiations between the Guatemalan government and the Guatemalan National Revolutionary Unity (URNG) guerrillas eventually resulted in a 1996 peace accord, and as part of this agreement, both sides agreed to the formation of the so-called “Historical Clarification Commission,” which was charged with examining the abuses that had taken place during the civil war without “individualising responsibilities.”

This seemed to be an ornate or at least roundabout way of saying that no names of the guilty would be offered in the final report. The Clarification Commission, initially established in June 1994, issued its final report on February 25, 1999, styled as the “Guatemala: Memory of Silence.” The document ran some 3,400 pages, with about 2,000 pages devoted to individual cases, and the remaining text offering a general analysis of the conflict.


The report was unsparing in its overall assessment. Christian Tomuschat, its co-coordinator and a German jurist, said that while the guerrilla groups had been guilty of their own atrocities, government forces had been responsible for the vast majority of the killed or missing (including 626 outright massacres). "Believing that the ends justified everything, the military and the state security forces blindly pursued the anti-Communist struggle, without respect for any legal principles or the most elemental ethical and religious values, and in this way completely lost any semblance of human morals." The main objective of successive Guatemalan governments, according to the report, was to crush dissent from the deprived elements of Guatemalan society, and in particular the term "genocide" was used to describe these measures, and the Commission called for the institution of legal proceedings against those responsible for such outrages.

To date, the government has ignored this recommendation, and there seems little reason to assume that it will change its position any time soon, particularly given the continuing heavy influence of the military and the security forces in Guatemalan society and their disinclination to accept any responsibility for past abuses. In contrast to other countries where formal amnesties have been established, the Guatemalan government has followed what might be called a policy of 'tacit impunity' but it is interested in promoting human rights and reforms outlined in the peace accords. At the same time, the government's failure to move forward on any of the recommendations of the Historical Clarification Commission is far more indicative of its real stance. Past President Alvaro Arzu let the cat out of the bag in this regard when he simply asked the Guatemalan people to grant forgiveness for the state's "actions or omissions, for what we did or what we didn't do."

### South Africa: Truth Telling With a Bite - the Mixed Memory and Punishment Model

South Africa is perhaps the best example of a fourth paradigm that we can term "the mixed memory and punishment model." In this instance, there is a combination of truth telling as well as (potential) prosecution of selected individuals involved in past abuses. Blanket or general amnesties to members of political, military or security organisations are specifically eschewed. The standard for pursuing such prosecutions as are undertaken often revolve around the abusers' willingness to admit their crimes and in the process plead for an individual grant of amnesty. Failure to do so lays the person open to criminal procedures. The central ethical dilemma in this scenario is, of course, whether even those who are guilty of particularly brutal crimes should be allowed to go free simply because they offer a potentially hypocritical and false contrition for past wrongs.

In April 1994, the Promotion of National Unity and Reconciliation Act was passed establishing the Truth and Reconciliation Commission (TRC). Headed by Nobel laureate Bishop Desmond Tutu, the Commission was eventually given leave to examine all putative cases of human rights violations committed during the period from March 1, 1960 through May 10, 1994 (the date of Nelson Mandela's inauguration as South African President). The TRC was composed of three separate committees, one dealing with human rights violations, another with amnesty, and a final one concerned with reparations and rehabilitation. The committee on amnesty came to be the focal point of public attention with respect to the TRC, since it was authorised to consider amnesty for those who committed abuses "associated with political objectives." Essentially this meant that the individual involved had to be a member of an acknowledged public institution (such as the security forces) or a recognised liberation




group (such as the African National Congress). The acts in question had to have been committed in furtherance of the person's "official" duties and not for essentially private or arbitrary reasons.

The amnesty provisions in the TRC's charter represented, essentially, a compromise between the demands of the old regime for a blanket amnesty for all those charged with human rights abuses and the equally strong insistence of many in the anti-Apartheid movement that just punishment had to be meted out. The decision to proceed on a course that represented a middle ground between "Nuremberg and Amnesia" was dictated by the fact that the transition to the new South Africa was the result of a negotiated settlement between the old regime and the liberation forces. Without the possibility of at least selected amnesties for past crimes, it is virtually certain that the government of President F. W. de Klerk would simply have refused to proceed with the dismantling of Apartheid and to allow the African National Congress to come into power. In the event, fears that the TRC would be unduly generous in forgiving the crimes of the past proved to be exaggerated.

Aside from the issue of amnesty, the other main purpose of the TRC's deliberations was to establish an agreed-on historical record of the nature of the human rights abuses committed during the Apartheid period in South Africa, and in so doing promote a process of healing between whites and blacks. The assumption here was that given an acceptance of responsibility and an admission of guilt on the part of those involved in various crimes, the process of forgiveness and ultimately reconciliation would be significantly advanced. One striking aspect of the TRC's final report in this regard was the way in which it addressed not just the iniquities of the pro-Apartheid forces but of the liberation movement as well.

The report detailed actions of the African National Congress as well as the Zulu-based Inkatha organisation that involved attacks on civilian targets, killing of suspected informers, often by the dreaded "necklace" method (a car tire placed around the victim's neck filled with gasoline and set alight), and other abuses. This attempt at evenhandedness outraged many in the ANC, including current South African President Thabo Mbeki, who denounced the TRC's findings as "inaccurate" and contrary to international law. It was further suggested that whatever abuses the liberation forces had committed were "unauthorised" or the result of poor communication with forces in the field. Interestingly enough, however, Nelson Mandela supported the TRC's position: "The ANC was fighting a just war, but in the course of the fighting the just war, it committed gross violations of human rights." Nevertheless, as it were, President de Klerk himself was able to persuade a court to black out a part of the final TRC report that implicated him in human rights abuses.

### **Uruguay and Argentina: Blanket Amnesty After Truth Telling**



In this model, there is a fairly widespread discussion of past human rights violations was followed by a decision to grant full amnesty both to the agents of the previous regime and to its opponents. The conscious attempt to address the crimes of the past included an extensive study by a private Uruguayan human rights group. In the end, however, calls for retribution were set aside and impunity embraced. What was particularly interesting in this instance was that the Uruguayan amnesty was not just a regime decision, but was actually approved in a national referendum by a free vote of the Uruguayan people.

In Argentina, the fall of the military junta in 1983 provides yet another paradigm of transitional justice, combining as it did a government-sponsored truth commission, an early series of prosecutions of top junta leaders, but eventually under the so-called “full-stop” law, a grant of immunity to all those who had not yet been subject to legal action.

## Conclusion

The ongoing issue of transitional justice is a compelling one because it touches on some of the most basic aspects of our moral universe, and the possibilities and difficulties of achieving ethical outcomes in a world fraught with violence and injustice. The issue also has deep relevance to our constitutional review process. The challenge of transitional justice also cuts deep because it requires the societies involved to engage in a process of self-examination and moral assessment that may prove distinctly uncomfortable. Thus in Kenya it is clear that the new Constitution should include the explicit articulation in its preamble of the deleterious effects of our corrupt past and of the commitment to combat corruption. Beyond all this, the new Constitution must also address some fundamental political economy issues that enabled corruption to flourish. It is suggested that the new Constitution should, among other things:

1. include an open acknowledgement of the continuing power of ethnic identity in Kenya and the extent to which it drives economic, political and social decision making.
2. make a determined effort to define and address Kenya’s regional and ethnic inequalities, particularly the economic ones, and to create clearly articulated mechanisms to deal with these, such as affirmative action policies.
3. facilitate the creation of a mechanism for dealing with the past where issues like corruption are concerned.





## Plenary Two

# Revisiting the Amnesty Debate

Hon Amos Wako (Attorney General)


I received the invitation by Transparency International (Kenya Chapter) to address this meeting with utmost appreciation. The issue of whether amnesty should be granted and, if so, on what terms can be extremely emotive, yet it is one of the most important in the transition debate. The issue today is being revisited because when the Anti-Corruption and Economic Crimes Bill 2001 was published, some limited amnesty was contained in clause 63 of the Bill. We all know that the clause generated such public outcry that contributed significantly to the defeat of the Constitutional Amendment Bill, which was to restore the Kenya Anti-Corruption Authority (KACA) as an independent constitutional institution, even though the Bill did not contain the amnesty clause. Therefore, it is important that this issue of amnesty be confronted and dealt with if we are not only to be successful in turning a new chapter in our anti-corruption strategies, but also successfully inaugurate a new constitutional dispensation. However emotive and controversial the issue is, it must be discussed rationally for the good of the republic.

In discussing this issue, let us bear in mind the following:

Amnesty is an act that relieves a person or a group of persons of punishment for a public offence and has to be distinguished from a pardon. Amnesty bars prosecution for the specified crimes whereas pardon is granted after conviction. The prerogative of mercy under Section 26 of the Constitution only gives the president the powers of pardon or remission of sentence or punishment after the person has been convicted. If we are, therefore, to have some form of amnesty, then we must have legislation for it. I hope that this seminar and the following consultations and dialogue will enable a consensus to emerge on the issue of amnesty, which can be provided for in an appropriate legislation.

There has been confusion in the mind of the public in so far as section 77(4) of the Constitution, which states that no person shall be held to be guilty of a criminal offence based on acts or omissions that did not amount to an offence at the time they were committed. No new offence can be enforced retroactively. Consequently, the issue of amnesty on new offences does not arise. Amnesty only arises in respect to acts or omissions that were offences at the time they were committed.

In handling of this issue, precedent has shown a distinction between amnesty which covers matters where gross violation of human rights is alleged to have occurred and matters where corruption and economic crimes are alleged to have been committed.



A typical example of amnesty where corruption and economic crimes are alleged is the Hong Kong legislation. The Independent Commission Against Corruption (ICAC) was established in Hong Kong in 1974. Its original mandate was to investigate all corruption allegations irrespective of when the alleged corruption took place. The primary target for its

activities was the Hong Kong police force and other disciplined services where corruption had reached very high levels. For three years, the ICAC was not able to operate. In fact, its target, the Hong Kong police force, rioted and raided ICAC's headquarters, attacking its officers and destroying the documents. The British government, faced with civil disorder, changed its policy. An amendment to the Independent Commission against Corruption Act — by way of a new Section 18a — was enacted which prohibited investigation and prosecution of the offences before January 1, 1977. It also gave the governor of Hong Kong the power to investigate past acts if the alleged crime was so heinous that it demanded investigation. It was only after this limited amnesty clause had been enacted that the ICAC was able to move with the result that Hong Kong is one of the world's success stories on the issue of combating corruption. The lesson here is that if a group of persons have a perception that they are being targeted unfairly and indiscriminately, they can be an obstacle to a newly established anti-corruption authority which can successfully focus on present and future acts. One should not get the impression that the prosecutions are unfair, discriminatory or politically motivated.


It is in the light of the foregoing that one should review and decide on the effective date of the amnesty. The report of the Parliamentary Anti-corruption Select Committee, chaired by Hon. Musikari Kombo, recommended that the effective date should be pre-December 31, 1972 cases because "the date marks the commencement of major practices of corruption and economic crimes which arose after the implementation of the Ndegwa Commission." Some felt that this date favoured those who were in government prior to 1973. It was argued that if there were to be any investigations, then to be fair, we may as well begin with 1963 when we attained our independence.

In drafting clause 63 of the Anti-Corruption and Economic Crimes Bill, we settled on the date of December 1997 because that was the time when KACA was established, when the bill was enacted, and consequently every public officer and indeed everybody was on notice that the government was serious in the implementation of its zero tolerance policy towards corruption. The issue of the date, if any, when amnesty should take effect is a matter to be carefully considered.

Other additional reasons for amnesty have been mentioned in the report of the Risk Advisory Group Ltd. on Kenya's anti-corruption initiatives. They estimated that it would take the anti-corruption police unit between 10 and 20 years to work through the cases identified by the Kombo Committee report as being worthy of investigation and prosecution before they even begin on the current matters calling for investigation. They conclude that from a purely logistical perspective, it is not tenable to require any new investigation or prosecution unit to take on such a monumental task. A new effective and independent unit should not be burdened with these past cases but should focus on the current cases.

Although the public debate was at times orchestrated by the wrong perception that clause 63 of the Anti-Corruption and Economic Crimes Bill gave absolute or blanket amnesty, it was not so. Clause 63 gave limited amnesty. For example, all investigations and prosecutions undertaken by the former Kenya Anti-Corruption Authority (KACA), the Commissioner of Police or the Attorney-General in respect of corruption or related offences did not enjoy amnesty. It will be recalled that the Parliamentary Select Committee on corruption had gone through the previous reports of the Public Accounts Committee and had recommended that KACA investigate the allegations. Consequently, some of these cases, some of which






can be described as heinous, were not covered by the amnesty clause. The clause even went further than that provided for in the Hong Kong legislation, in terms of the extent of exemption, in that amnesty did not cover public property that was acquired corruptly, unlawfully and irregularly.

The Parliamentary Select Committee was not averse to amnesty. The only issue was on what terms. In recent surveys, the public are not averse to amnesty. Again, the only issue was on what terms. There is no reason why, since the amnesty clause in the Hong Kong legislation was the turning point in the success of its declared war against corruption, a similar clause in our own Bill cannot be the turning point in the success of zero tolerance policy towards corruption in our society. The clause provided a good balance by exempting from amnesty certain serious crimes that are in the public domain.

Some Commonwealth nations are moving away from the exclusive reliance on criminal prosecutions to recover “unjust enrichment” from suspected criminals. Consideration should be given, particularly on issues of suspected corruption and economic crimes, granting wider exemption from criminal prosecutions. This could go hand in hand with the enforcement of the state’s right of civil proceedings to recover the proceeds of corruption where there is proof. Clause 63 of the Bill provided for recovery of the value of the public property irregularly acquired as assessed by the court. Part V of the current Corruption Control Bill 2002 also provides for compensation and recovery of improper benefits.

On the issue of amnesty in the context of gross violation of human rights, truth and reconciliation commissions have been established in some countries. However, these truth and reconciliation commissions have been established in the context of the transition from military dictatorship to civilian rule or from civil war to peace such as Chile, Argentina and El Salvador. However, a fundamental issue arises as to whether Kenya — which has had universal and equal suffrage and has held periodic elections by secret ballot electing the government under a constitution that enshrines fundamental human rights and its basic principle of nondiscrimination, — should also have a truth and reconciliation commission. In my view, Kenya is not in the category of Chile, Argentina and El Salvador.

Kenya is also not in the category of South Africa whose constitution violated the basic principle of nondiscrimination in the enjoyment of human rights, including the right to vote and be elected at an election to choose your government. The truth and reconciliation commission was concerned with issues of gross violation of human rights and a legacy of hatred, guilt and revenge. The mandate of the commission was to focus on what might be termed “bodily integrity rights” such as the right to life and the right to be free from torture and the right to freedom and security of the person, including freedom from abduction and arbitrary and prolonged detention. In this respect, the goal of confession, reconciliation and forgiveness can be achieved because both the perpetrator and the victim are identifiable persons. In fact, as far as the victims are concerned, it also provided a psychological therapy as they told their stories of suffering and struggle.



In conclusion, from what I have stated, it is clear that a limited amnesty clause can be provided for in the Corruption Control Bill that awaits the committee stage and third reading in parliament. Indeed, one prelate is reported to have said that the Bill was flawed because it

does not have such a clause. The issues of amnesty, in relation to the violation of human rights is more problematic, but a solution must be arrived at which will assist in the commencement of a new constitutional dispensation that enhances the rule of law and the protection of human rights.

I hope that this seminar will make useful recommendations on these important issues: on whether, if we have a limited amnesty, what the content of the amnesty on various issues will be. We are faced with mainly corruption and economic crimes on one hand and the violations of human rights on the other hand. We need to agree on whether the provisions of such an amnesty should be dealt with as part of the transitional arrangements under the constitution or under a separate act altogether or in different acts.





# The Question of Impunity and Historical Injustices

Nzamba Kitonga (President, East Africa Law Society)

With the looming change of guard in leadership of the country, the urgent case for the formulation of a comprehensive framework of transitional justice cannot be gainsaid. This is a complex question, which would ordinarily require time, serious reflection and debate. Unfortunately, throughout its tenure in office, the outgoing parliament has failed or refused to address this important question. Nevertheless, with sufficient goodwill on the part of Kenyans and their leaders, the question can still be reasonably addressed, albeit hurriedly.

There is no outgoing regime in Africa that is not accused, rightly or wrongly, of having committed crimes and wrongs against the people and institutions of state for which it should be held accountable. Tales of genocide, crimes against humanity, theft of public funds and the plunder of national resources abound throughout the continent. The question is normally one of degree. In neighbouring Uganda, Idi Amin visited mass murder, rape and theft upon his people and their cries for justice remain the shame of the continent.

The Rwandan genocide of 1994 is still fresh in our minds today. The crimes of murder and cannibalism practiced by the late Emperor Bokassa in Central Africa will, forever, cloud African history. This also applies to Kamuzu Banda of Malawi and Mengistu Haile Mariam of Ethiopia. Mobutu Sese Seko of the then Zaire fled his country to die in exile at the conclusion of three decades of bloodletting, plunder and mayhem. In Kenya, complaints of impunity and historical injustices are not as extreme and pronounced, but they exist. These generally include:

1. the takeover and allocation to private individuals of what are termed ancestral lands
2. the so-called "grabbing" of public lands in urban centres, the coastal zone, forests and state farms
3. the alleged theft and misuse of public funds from the central government and other institutions of state
4. the land clashes of 1992 and 1997 and their consequences
5. mysterious deaths and murders, which remain unresolved to date.

These questions remain in the public realm and are largely unresolved. An attempt has been made to look into questions of land acquisition through the Njonjo Land Commission. Its report is awaited, but the Commission has no legal power to reverse illegal allocations, and its findings will be purely recommendatory in nature. The Akiwumi Commission on Land Clashes report will face a similar fate because it is still up to the government to initiate action. With regard to the plundering of public assets, various cases, including the endless Goldenberg saga, are pending in the courts. Others highlighted in the Parliamentary Accounts Committee (PAC) and Parliamentary Investments Committee (PIC) reports and the infamous "list of shame" are on the shelves.

The purpose of a transitional justice mechanism is to resolve such pending disputes and provide a cut-off device that enables members of the outgoing administration to continue their lives in relative peace. It also enables the incoming administration to commence on a new slate without getting bogged down in disputes and reappraisals. In this, it is recognised that the outgoing administration still has some remedial political power and in countries like ours, where ethnic politics take centre stage, a move, however legally justified towards members of the previous administration, such as criminal prosecution and civil litigation, may be viewed as a witch-hunt thereby inciting rebellion among supporters and certain tribes. The theory of a witch-hunt, victimisation and selective justice attains credibility, particularly in the context that the administration of the late President Jomo Kenyatta has equally been accused of past wrongs and injustices. Witness, for example, the outpouring of grief when the Njonjo Commission visited the coast where leader after leader accused the late president's administration of massive land grabbing.


Accordingly, a systematic inquiry into past wrongs and injustices would have to start from the late president's administration. But this would still take us further to the colonial era during which many collaborators and home guards unfairly earned large handouts in terms of land and other benefits for their treacherous activities. In this scenario, we would only open a Pandora's box threatening national stability and instigating civil disaffection. Former Zambian President, Fredrick Chiluba, summed it up only too well when he posed the question, "Why only me, Why not Kaunda?" Handled incompetently and recklessly, an inquiry into past impunities can easily lead to civil strife, thereby destabilising the country. Yet complaints by aggrieved persons need to be addressed and some form of recompense and justice given. An effective transitional justice mechanism therefore seeks to preserve our stability and nationhood while addressing grievances, thereby achieving the required balance.

In seeking to create a framework for transitional justice, we are not re-inventing the wheel. Historical examples from other jurisdictions exist and we need to examine these to inform our own process. The infamous Nuremberg trials in the aftermath of the Second World War were, in fact, a failed attempt at transitional justice in that they sought to banish Nazi chieftains and to appease victims of the Nazi holocaust. However, they proved to be an elaborate method for the victor to punish the vanquished. This was because the trials were crafted such that no person implicated in the Holocaust could escape irrespective of his innocence.

In Chile, former president, Augusto Pinochet, made elaborate legal arrangements for self-preservation by manipulating the then parliament, which he controlled. However, there was no national consensus and the arrangements collapsed as soon as he was out of office. He is now a pitiable creature who is constantly in and out of the courts. Zambia is another recent example, which shows that imposed immunity, without the people's consent, is bound to fail. Nigeria has opted to negotiate with the Abacha family by extending immunity in exchange for the return of stolen national assets. The family was also allowed to keep some of the assets. The deal has been largely criticised in the sense that the state is seen to abet and negotiate crime, but it also seems to have satisfied many.

In our own country, Jomo Kenyatta gave frightened colonialists blanket immunity with his famous refrain "We shall forgive but we shall not forget." We actually also forgot. The Truth and Reconciliation Commission of South Africa enabled the offenders and the victims to





come to terms with each other and to bring out the terrible impunities of apartheid. But demands for punishment and concrete compensation still continue.

Our current constitutional set up has no immunity provisions for a departing head of state and members of his administration. Provisions which come close to some form of immunity are in Section 14 of the Constitution that merely protect the incumbent president from criminal or civil court process while in office. In fact, the section makes it clear that he can be prosecuted after he leaves office by suspending the law of limitation during his term of office. The only other provisions that slightly relate to immunity are the powers of pardon conferred upon the president under Section 27 of the Constitution. But this section is not useful in as much as the powers come into play only upon conviction by a court of law.

The absence of transitional justice and immunity provisions under our constitution place an outgoing president and members of his administration in great jeopardy. In effect, this means even if the incoming government may not wish to prosecute a former president and members of his administration, any member of the public is free to do so either by way of private criminal proceedings or civil process. Such proceedings may be frivolous, vindictive, political or malicious but they would have to be heard in full. Assume, for example, that a hundred citizens lodge a hundred separate court proceedings against a former president. He would literally have to live in court defending himself. This form of exposure, humiliation and harassment is undesirable. At the same time it is necessary to deal with genuine claims of abuse of office. These considerations underpin the urgent need to develop a framework of transitional justice.

The experiences from other countries, which have been discussed above, merely provide examples from which we can borrow. It is not in the nature of transitional justice to wholly borrow a mechanism from another jurisdiction and impose on a local situation. This is because the nature, extent and types of impunities and perceived injustices differ from country to country. A people's ethics and sense of fairness and justice may also differ.

In developing a home grown solution, we would need to take some tentative steps. These include:

1. The setting up of a commission to firstly get all available information of all instances of alleged impunity, abuse of office and alleged injustices.
2. The Commission would then endeavour to arbitrate between the alleged perpetrators and the victims to see what compromises can be made.
3. We would need to agree on whether all forms of wrongs and crimes can be forgiven or to create categories of what can and cannot be forgiven.
4. We would need to agree on whether immunity should be extended both to the president and also to members of his administration.
5. There is need to agree on the principle of compensation, if any, and who pays it - is it the state or the perpetrators?
6. Our ability to trace and recover alleged illegally acquired national assets must also be considered.
7. There is need to agree on a cutoff date for any amnesty - is it from 1963, 1978 or from today?

The Attorney General has just published a bill requesting parliament to enact law to provide for a suitable retirement package for the president. It is evident from public reaction to the bill that it is in principle agreed that the president be allowed a dignified and comfortable retirement. Today's negotiations towards the creation of a transitional justice framework are further evidence of the prevailing national mood of reconciliation and goodwill. The president must capitalise on and reciprocate this goodwill by assuring the nation that justice and fair play will prevail during this time of transition and in seeing to it that:

1. Public property is protected.
2. Peace and security is maintained before, during and after the elections.
3. There is impartiality and fairness during elections both at party and national levels.

The subject of transitional justice, which confronts you as decision makers, is complex and sensitive. There is need to preserve national stability and also to do justice. In enforcing an effective transitional justice system, there must be no victors and the vanquished; there must be no revenge and the settling of scores; there must be no winners and losers. The guiding spirit should be reconciliation with justice. And ultimately the message should be NEVER AGAIN.





## Plenary Three

# Transitional Justice: Between Mercy and Precedence

Prof Mohamed Hyder (Chair, Muslim Civic Education Trust)

The first 50 years of post-colonial African governments have been characterised by a culture of gross abuse of power, blatant looting of public funds and assets, congenial ethnicity, uncontrolled nepotism, open cronyism, unfettered corruption, flagrant disregard of human rights, despicably bad governance, unrestrained highhandedness, chronic power drunkenness and shameless public ethics.

The metamorphosis from a seemingly well-ordered society at the time of independence to the sorry state we are in today has been remarkably similar in different African states. From independence, we hit the ground running quickly to a republican state — not the Indian type with a constitutional presidency but the American type with an executive presidency. As we shall see later, the United States form of executive presidency is buttressed by a powerful democratic system. The assumption of an executive presidency in African countries quickly led to a series of constitutional changes resulting in more and more power being concentrated into the president's hands. Through a mixture of the stick and the carrot, we moved from being a *de facto* multiparty state to being first a *de facto* and finally being a *de jure* one-party state.

The pinnacle of this metamorphosis was the transformation of the one-party state to the one-man estate. In this autocrat's Garden of Eden, the African executive president appoints and sacks at the drop of a pen: the vice president, the prime minister (if there is one), cabinet ministers, permanent secretaries, provincial and district commissioners, commissioners of police, of the paramilitary General Service Unit (GSU), Criminal Investigation Department (CID), commissioners of prisons, heads of intelligence services, ambassadors, the entire judiciary from the Chief Justice to all the magistrates, officers of public universities, all chief executives and board members of the 169 parastatal bodies and virtually everybody who is anybody in the country. The command of authority is in one pair of hands. At that point, he is in Sixth Heaven, with only God resting in the Seventh. In time, of course, who knows?

And if I may quote myself – with apologies to Lord Acton – “all power intoxicates and absolute power intoxicates absolutely.” This is the incremental culture of the abuse of power that we have been witnessing over the last fifty years. This is the culture we helped to create through commission and omission! This is the culture that has been growing more and more confident of its own invincibility and has, thus looking for more conquests and perpetrating more injustices against the very people whose welfare they are supposed to protect. We will return to this later.

For the moment, however, we have to decide what has to be done about those who perpetrated injustices. There are some painful nettles to be grasped. There are some bitter pills to be swallowed. The issue is not just one of what to do with the outgoing autocrat, but also how we create a new political ecology in which the mistakes of the past half-century are never repeated. We shall look at these questions in turn. But first, we have to ask the question of whether or not our colonial embryonic life adequately prepared us for a vigorous democratic tradition, an open society and a public ethic which was observed by all – in the letter and the spirit.


At independence, most African countries emerged from colonial rule not as a result of deliberate, extended period of democratic tutelage, but as a consequence of reluctant surrender by the colonial powers whose previous sympathies were with a racial minority government. European colonial powers have never had the conviction that Africans are capable of modern democratic governance. But that is a different issue. We only mention it here to underline two relevant points. The first is that the transition from colonial to post-colonial government has a lot to do with many of the problems of independent Africa. The second point is that despite the prevailing attitudes of the European colonial powers, African leadership should have worked to disprove European pessimism about good governance under an African leadership. But democracy was not a real issue at independence.

At independence, therefore, beneath the euphoria of being 'free at last' was a touch of disbelief that the invincible might of the British military machinery led by a Conservative government could be made to relent to African demands for majority rule in Kenya — even with a strong local White opposition. It is against this backdrop that the African political leadership acquired an aura of almost divine approval. Kenya, in particular, looked so far away from independence that most *wananchi* would be forgiven for the subliminal impression that nothing short of a miracle would make the European minority let go of its political privileges. Notwithstanding Harold Macmillan's "Winds of Change" speech to the diehard Apartheid South Africa of the early 1960s, the dice was still weighted in favour of the European settlers in South, Central and East Africa.

When independence came to Tanganyika (December 9, 1961), Uganda (October 1962), Zanzibar (December 10, 1963), Kenya (December 12, 1963), Malawi (July 6, 1964) and Zambia (October 24, 1964) in quick succession – under British conservative governments at that – there was almost an air of disbelief. Even the *Encyclopaedia Britannica* says of Kenya: "In 1960, the principle of one man-one vote was conceded." Mzee Jomo Kenyatta was still in detention in 1961. He was not released until August 1961, a London constitutional conference was held in early 1962, self government came on June 1, 1963 and independence on December 12, 1963. The winds of change were blowing a little bit too fiercely for democratic practices to be entrenched into the political psyche of the African leadership.

It is interesting that the sudden permission to form political parties had the same effect in the early 1960s that it had in the early 1990s. Political parties suddenly proliferated like un-bottled genie. But the different 'genie' did not represent differing ideologies but differing personalities, all of whom wanted to lay claim to the ensuing leadership struggle. 'Democracy' was, and is, in the minds of these politicians, the freedom to form political parties that reflect our personal wishes. Democracy of the type that demands observance and respect for the party constitution, the open debate of policies and prospective administrative pursuits in the execution of those policies was absent. Many emerging African countries never took these





democratic practices within the parties with any seriousness. Political parties generally existed to bolster the legitimacy of the top dog. The underlings' main function was – and still is – to submit supinely to the wishes of the leader. The party that captures power at independence is the party that will hold the reins of power for a long time (hopefully, for ever).


One of the emerging concerns of post-colonial politics has been the reality of transition from one national leader to the next. Those countries like Kenya who have had their first post-colonial leader die in office would have had a softer option to take. Those who would have had an equally soft but less palatable option have been those that have had military coups which have swept aside the niceties of handing over smoothly from one political leader to the next. A few African political leaders — alas! too few — have voluntarily opted out of office. While these have helped towards the commitment to hand over the reins of power to others, the general tendency has been to hand over power to members of their own political parties. This is in many ways a less distasteful political hurdle to live with than that of handing over power to the opposition. Historically, transition politics have been ruled by the two emotions of GREED and FEAR.

Virtually all African countries fell to the temptation of republicanism. All African countries that rapidly dropped the dominion status adopted the executive presidency at the very beginning of their republican status. These indeed led to the same final common path of concentrating absolute power in one pair of hands. As we all know, power intoxicates and absolute power intoxicates absolutely.

It is tempting in a gathering such as this to take a broad historical perspective of the whole question of transition and the ethical problems left in its wake. You will be relieved to know that I have no intention of going down that path. In any case, virtually all early civilizations completely by-passed the question of how the moral baggage associated with one regime is passed on to the next regime by burying them with the vacating chieftain – both literally and metaphorically. The death of the incumbent marked the end of one regime and the beginning of the next. The King is Dead, Long Live the King!

In Islam, the position is strictly not very different from that of the Catholic Church. I have no idea when the Archbishop of Canterbury started retiring but my suspicion is that this is relatively recent. This was, and has always been, the universal solution to a problem that never existed. One King went, another came in. One Pope went and another came in. That was that.

The problem of transition really arises when one national leader is expected to leave office and hand over power to the next national leader. Simple – or is it? The problem with transition justice is not a problem of transition per se. Nor is it a problem of one honest national leader passing the reins of power to the next national leader. The problems of transition justice arise with one national leader abusing his or her office to inflict injustices on others. This injustice may take many forms – some benign and some malignant. In most cases, the seemingly benign leads – as day the night – into unquestionable malignancy.



Some may – with a measure of justification – question the very idea of a benign injustice. What would we call benign injustice in any case? We have used this category to include those forms of injustice whereby the leader himself does not himself benefit materially. The

donation of a piece of state land to a party propagandist might look like an innocent reward for loyalty. That presidents often choose to be oblivious of the fact that state land should not in the first place have been part of presidential largesse does not convince anyone of their innocence. Thus, even though the incumbent national leader is not manifestly benefiting materially from the transfer of state assets to privileged individuals, it is quite clear that the motive of such action cannot be that of the advancement of national welfare.


Acts of what we might call malignant injustice include those of the direct embezzlement of state funds and assets by a national leader. It is said, for instance, that the late Mobutu Sese Seko could have written a cheque to wipe out the entire national debt of Zaire and still have a couple of billion dollars left in the stolen treasures that he stashed away in European banks! But while the case of Mobutu Sese Seko might have been somewhat extreme, we all know that it is by no means unique!

Without spending too much time itemizing diverse forms of politically inspired injustices, I would like to look at transition justice from an Islamic point of view and see what Quranic prescriptions should guide our approach to this growing problem. We know that we cannot ignore the problem for a variety of reasons. In the first place, ignoring the problem would only exacerbate it. The other reason is that ignoring the problem would make us guilty by association. But even more important, Africa has to come to grips with the moral health of our emerging nations if we are to inculcate the self-esteem and dignity that has been eroded by centuries of colonialism and slavery. Are we the congenital thieves and immoral sub-humans that we have been portrayed for a large part of the last 500 years? It is interesting that this denigration of black people – according to Basil Davidson – only came about in seeking a moral justification for the slave trade. Basil Davidson gives many examples of the high esteem in which Africans were treated in Europe before the advent of the cross-Atlantic slave trade.

Back to the Islamic scales with which to judge transition justice. The word 'ghafur' which means forgiveness appears 234 times in the Holy Quran. The word 'rahim' which means mercy appears 338 times in the Holy Quran. Indeed, these two words often appear together as 'ghafurun rahim' in a sort of mutual reinforcement. The word 'tawba' which means the seeking of total absolution through genuine repentance appears 87 times in the Holy Quran. And Allah says, 'Wa anattawabun rahim' and I am the One Who accepts repentance, the Most Merciful.'

Having said all that, is mercy guaranteed just for the asking? No way! The first exception is that Allah refuses to give absolution to anyone who has committed an injustice against another unless and until the injured party agrees to forgive the one who had committed the injustice against him. Seeking the forgiveness of the injured party is fine. What if the injured party is a whole nation? The answer is clear: the whole nation or the vast majority of the nation must decide if it is willing to forgive a national leader who has perpetrated human rights and other abuses against the very citizens that are entrusted to him to guard. Has he ordered the arrest and torture of anyone or any group of people? Has he deliberately effected a denial of the educational, social and/or economic advancement of a group of his countrymen? Whatever he has done, he has to atone for by seeking the forgiveness of the offended party/parties.





There are several corollaries to this set of principles directly impinging on transition justice. In the first place, to gain forgiveness of the injured citizens is an essential part of the attainment of national absolution. The second corollary is that to be genuinely repentant, one has to refund all the gains one made in inflicting the injustice. Repatriation of funds or assets illicitly obtained by virtue of abuse of office is also an essential part of this repentance.

Again, refund of illicit gains – notwithstanding all the complications – is a relatively straightforward matter when one considers other forms of injustice a national leader can inflict on his nation. How does a departing national leader make amends for abuse of office by placing members of one's own tribe in key positions at the expense of other – often better-qualified – nationals? How does one even begin to measure the injustice involved in order to make amends for it?

In the end, one has to balance between the need to emulate the divine virtue of mercy and the fact that a nation has to move forward even if partially redeemed but still bruised. A nation has to choose between permanent bitterness and partial redemption. In a very significant way, we should also remember that a people get the government and leadership they deserve. By keeping quiet and pretending that all is well when everybody knew perfectly well that it was not, the people themselves have a measure of collective guilt and, thus, share responsibility for the injustices that were inflicted upon them. From time to time, a nation needs the innocence of the child who pointed out that the King had no clothes! In a sense, therefore, the nation as a whole needs a measure of redemption. A touch of mercy in the circumstances is like a cold shower – chilling to begin with but ultimately refreshing.

As a Muslim, therefore, I would urge mercy bearing in mind the principles:

1. a measure of retribution is a necessary part of the national reconciliation
2. that injustices committed by an outgoing regime have to be publicly acknowledged and genuine contrition expressed through a public apology
3. stripping of all possible illicit gains made during the tenure of office
4. a touch of mercy to cap it all.

# Dealing with the Past: The Challenge of Transition

Rev Mutava Musyimi (General Secretary National Council of Churches of Kenya)


Kenya's political transition process has started. On the political front this has meant a considerable amount of activity as political actors position themselves in preparation for the next elections. All the political realignments we are witnessing are part of a positive process, they mean that in our own Kenyan way, we are preparing for the transition. But while much of the attention is focussed on topical political developments, some of the most important transition-related work in the country is taking place at the Constitution of Kenya Review Commission (CKRC) as it sets about completing its report after a long period of collecting views from Kenyans regarding what kind of constitution they would want to govern them next year.

As I had the opportunity to emphasise during an address I gave in 1999, it will not be possible to get this country's overall reform process going again without some form of a negotiated pre-reform political settlement. One hopes that the constitutional review process, which has been both comprehensive and intense, will emerge with a product that will provide some semblance of this settlement in Kenya. As I did in 1999, I shall explain why I think that this kind of thing is absolutely necessary.

To do so we need to go back to the beginning. We have already mentioned the inertia and reluctance that characterises reform in Kenya. What we have not done so far is to try and understand where this reluctance is coming from. My view, and this is a personal view, is that the hesitance we see and the stalemate we are now caught up in stems from fear, doubt and selfishness. There are those in government who fear that any thorough economic and political reforms that they implement will be personally costly. They will lose power and privilege for a start. And if they lose power they may lose their lives, their wealth and even go to jail. They fear that in a fit of populism a new government may investigate their tax records and investigate their wealth. Others could be prosecuted for ethnic clashes, corruption, land-grabbing, torture and human rights violations.

To my mind, therefore, the future does not lie in the path of threats or retreat. It lies, instead, in the path of dialogue and negotiations and accommodation. In particular, we must face up to the fact that to get Kenya back on track, we may have to forgive some of those who have wronged us in the past. There is no justice so severe that it cannot be tempered by mercy. If we are unable to do it for more noble reasons, then let us do it for purely selfish reasons! Let us do it for ourselves. Let us at least and for once differentiate between focus and fixation. Let us be a people that will be strong enough to count our losses, draw the line and forge ahead.





What can people interested in genuine change do to reassure those opposed to it? Should we be discussing amnesties at all? Will amnesties not create hazardous precedents? Is there not a danger that future leaders could learn the wrong lessons from the amnesty? Might leaders commit crimes in expectation of amnesty? I do not approve of the powerful hiding their crimes with official protection. Religion and law teaches that people must bear personal responsibility for their wrongdoing. Once you chose wrong or disobey the law for that matter, you cannot choose the consequences that follow. Likewise, my personal wish would be that those in power must not be able to hurt us and still be able to negotiate their own safety.

In truth, Kenya has past experience with a transitional political settlement of which some sort of amnesty was a central element. Immediately after his election to the office of Prime Minister, Kenya's founding father, Mzee Jomo Kenyatta, travelled to Nakuru and reassured white settlers of his intention to forgive and forget. He urged that they all work hand in hand to build the new Kenya. This country's history would probably have been very different had Kenyatta taken a less pragmatic and magnanimous line.

Nations in transition across the world have adopted various mechanisms when it comes to dealing with the past. There is not a major body of literature on the subject but, today, it is acknowledged that issues of amnesty and dealing with past human rights abuses and economic crimes are among the most important in ensuring that transitions are successful. Because they entail an element of give and take, they are almost always controversial. Essentially, an amnesty means those who are injured accepting less in the form of justice than they had originally perceived, and those who have done the injuring giving more than they might have anticipated in the way of concessions.

The South African experience with regard to dealing with past abuses via a truth and reconciliation commission model is increasingly discussed. Over the past one and a half decades, as part of a political transition process, truth commissions officially endorsed to examine and inquire into the past have been established in Chile, Argentina & El Salvador, for example. In Chile and Argentina, the issue arose in the context of new governments making a transition from dictatorship to civilian rule. In El Salvador and also in Guatemala, "truth commissions" emerged as the existing governments negotiated a transition from civil war to peace. Despite their differences in mandate, scope and approach, truth commissions are generally viewed as a starting point for national reconciliation and reparative measures.

As Kenyans stand at the start of the 21st Century, the economic and political troubles of the last 10 years in particular – from grand corruption that has harmed the economy greatly to ethnic clashes that have undermined social cohesion – need to be ventilated. We need to overcome these painful events as a nation; we need to heal and reconcile as a people; to deal with the past and look to the future united and confident as a people. But reconciliation is a process and the experience of other countries has shown that national reconciliation has certain essential steps.



*1. The Process of Reconciliation Begins with Acknowledging the Opponent's Permanency*

The meaning of this is that any solution must be inclusive even of those who have been most instrumental in the past evils. They cannot be wished away so they must be included. At the end of the day we are all Kenyans who have to live together in this country. No one is going anywhere and no one is being chased away. This is a fundamental principle.

## *2. The Process of Reconciliation Requires a Mature Understanding of Evil*

In any struggle, the enemy or those forces collectively perceived as such become demonised and there is a tendency to find the locus of evil in personalities. In Kenya, when people talk of serious economic crimes or human rights abuses, the names of a few powerful individuals pop up again and again. Yet, often the real enemies are bad laws and dysfunctional institutions for example.

Reconciliation is very difficult until we detach the evil of the system from the names of its servants. St Paul has an important insight when he says: "Our fight is not against human foes, but against cosmic powers, against the authorities and potentates of this dark world, against the superhuman forces of evil in the heavens" (Ephesians 6:12).

## *3. The Process of Reconciliation Requires that One Recognises the Wolf Within*

I cannot reconcile with the enemy unless I acknowledge that I am capable of what the enemy has done. One of the laws of human nature is that we become what we hate.


## *4. The Process of Reconciliation Requires an Understanding of How People Change*

Quite simply, we must choose between two propositions: either people change because they seek to earn forgiveness and acceptance, or because people discover themselves forgiven and accepted, they become free to change.

I am not one given to making predictions, but I am willing to hazard a guess that over the coming three important years of transition for Kenya we shall, as a nation, increasingly be forced to ask what we shall have to do with regard to economic crimes and human rights abuses perpetrated over the last three decades. Three issues need to be kept in mind. First, if we attempt dealing with all past 'corruption' using our legal system it would grind to a halt and the resulting examination into Kenya's past would probably decapitate the entire economic and political elite because the tentacles of what is today described as corruption reach into every sector of our society. One needs to be mindful, however, that where economic crimes are concerned the evidence is also easy to destroy. Human rights abuses are easier to confront in this respect because evidence of torture, for example, can remain as scars on victims for life.

One also needs to be mindful of attempts to deal with past economic and other abuses via their 'judicialisation' for example, by forming endless commissions of inquiry to try and achieve effective 'closure' with regard to matters that might become prickly for incumbents in the future. This process might also explain the newfound enthusiasm on the part of certain senior figures to seek court action with regard to accusations levelled against them with regard to specific publicly debated abuses. Attempts by incumbent regimes to deal with these matters legislatively in a unilateral manner also come unstuck. In Argentina, for example, amnesty laws and decrees issued in 1986, 1987, and 1989 severely compromised the overall process of dealing with the past in an effective way.





Still, as long as fear of future prosecution or other troubles related to past abuses consumes significant players in Kenya's political class, their willingness to effect and/or allow a smooth political transition is limited. Indeed, Kenya cannot face the future with confidence unless it boldly and effectively deals with its past – darker periods in its past especially. This means a willingness to forgive for the past abuses of leadership. The principle of forgiveness is important because it is crucial for national reconciliation, which is in turn essential to restore Kenya's confidence in itself. Fortunately, as we have seen, Kenya has a history of internalising forgiveness for past abuses.

It is a testament to the importance of dealing with the past that there is increasing debate around this issue in the media and other fora. In particular, events in Zambia concerning their parliament's removal of the amnesty initially granted to former President Chiluba has raised eyebrows. Ideally, we should not have to go the Zambia route because it is so fraught with uncertainty. Still, it is unlikely that the intensity of this debate will wane in the coming months. Indeed, this matter will become an important issue particularly after our next general election. The maturity with which Kenyans engage in it; the sincerity with which they share their deepest concerns about the future; the magnanimity and pragmatism with which they regard the perceived faults of their fellow brothers and sisters – all these will have a major bearing on the overall transition process in Kenya and the future of our beloved country.

# Reconciliation and the Way Forward


Ambassador Bethwell Kiplagat (Chairman, Nairobi Stock Exchange)

I will stick to the title that I was given “Reconciliation and the Way Forward”, and my assumption is that this morning we looked at the problem itself; what has gone wrong, whether it is corruption as Rev. Mutava Musyimi told us, or whether people have been lax. So I am trying to simply focus on reconciliation and the way forward, and as a premise to this subject I will share with you my own involvement in conflict resolution in this region in particular and in Africa in general.

In the old days, whenever we had a problem and people had fought for years, there were injustices as people hurt each other. However, people used to come together to negotiate, and they still do as the Sudanese are doing here in Kenya. And if it is only the leaders alone that are meeting and negotiating, bargaining or perhaps even share power and then go away without dealing with the root causes of the problem, which are not only political but maybe even psychological, the problems could actually remain. So the subject of reconciliation is one that we take extremely seriously. That is after the negotiations have taken place and people have signed an agreement, there is a lot of work to be done over a long haul in dealing with the hurts and pains that are deeply embedded in the minds of and in hearts of the people.

Now, when we talk of reconciliation, what comes to our mind, of course, is that there is something that is broken. There is a broken relationship: things have been set apart which were together and the intention of the reconciliation is to bring the parties to bring the parts together and go above restoration specifically of relationships. So reconciliation is an attempt to bring the parties that are apart from each other and bring them together to restore those relationships. One of the signs of restoration is that communication is re-established. When people have fallen apart, communication is one of the things that suffers most. When they do not communicate with one another, they stand apart. Therefore, when you bring about restoration you re-establish communication between individuals, parties, and communities as well. And the moment you begin the process of communication, the result is the process of healing.

So these are some of the steps. When we are looking for reconciliation, we bring to recognition that parties are apart, something is broken and we, therefore, need to bring it together and through the process, create or re-establish communication between people. And that is what we need to look at in Kenya. Are there relationships that are broken and, therefore, do we need to restore them? Now in order to restore relationship, the topic of forgiveness comes in. If it has been broken, what is it that has broken the relationship, what are the causes that have created separation of the parties concerned? That is the point we need to recognise.




There must be recognition of those issues that cause that problem and I think that in Kenya it may not be easy in some cases, but I will come to that later. Now, when we come to the question of restoration: who does the restoration? This can be done by (a) A group like ourselves (a third party), where we are concerned about conflict — whether it is a family conflict, whether it is a national conflict and intervene and bring the parties together and say “Hey! What has happened? Come together. Why are you fighting? Why is it that you are not communicating with one another?” So the initiative can come externally. (b) It can come from the parties themselves — the one that has caused pain to the other might take the initiative recognising what he or she has done, the mistakes, the hurt and the pain to the other and goes forward and says, “I know this pain, what you are going through and I am the cause of that pain, please can we deal with it?” And he or she says, “I am sorry”, and the other party, of course, has to accept or not.

It happens that restoration does not take place if the request for forgiveness is not accepted. But then there is the other side as well, where the person who I hurt decides to take the initiative and goes forward and says “Yes you have pained me, you have hurt me. I have suffered so much but I am taking a decision on my own. Without any condition I am forgiving you.” That is really restoration and forgiveness at much higher level because it is the one who has suffered who takes the initiative and moves forward in order to re-establish relationship with the brother or the sister who has hurt them.

Now, the results of all these is that there is freedom. I think all of us know that when somebody has hurt us and we carry it over years it is not only that person, but you are also suffering because of carrying the pain over the years. Maybe I do not want any one else to write the agenda of my life and, therefore, I try to forgive even those who have pained me because I am seeking freedom and healing for myself. It is tough, but I think that it is the only way because even internally, our own communication with ourselves, if there is always burden in us, there is no internal communication. Sometimes, this is the only way forward for an individual and for community to say, “enough is enough and we cannot carry that burden, and we moving ahead because we believe the future is much greater.”

Now, I am not talking theoretically, but I think there are many examples in history and the one that comes very much to mind is Mahatma Gandhi himself who went out and said, “We shall forgive, they have pained us, but we shall forgive.” I think it is the same thing when the first president, Jomo Kenyatta, went to Nakuru and said, “If I have done something wrong to you, please forgive me but am also forgiving you.” And out of that there was restoration. And I think the European community, which was here lived in peace knowing that they had been forgiven.



There is a story of a Somali man during the presidency of Said Barre. He (a Muslim) was as senior official, more like an ambassador. Something went wrong and a relative was put in jail, tortured, suffered for six years in detention, very bitter over those years and angry. But one day, at 3 o'clock in the morning as he was lying in bed unable to sleep something happened to him. It was a spiritual renewal in himself and he said, “Why should I suffer” this pain? But there and then he said, “I want to unburden myself from this anger and bitterness. Yes, I have suffered physically but I will let go,” and he did. And he has been telling his story around the world saying he received freedom, restoration and healing. He remained in jail for few more years. When Said Barre was overthrown, the free man travelled all the way to Lagos to

find the exiled president together with all the people who had tortured him, and went to their house and when these people saw him they were all shocked and he said, "No I have not come for revenge, I have come to tell you that I have forgiven you." They cried. And he was thinking about himself saying, "I want to be free myself".

So as we look at the way forward, let me conclude by giving you a metaphor, which I often use for myself. Somebody was driving a car at night in a very dark and dangerous place. Another car came from behind with its full beam on. And of course when the car behind you has its full beam on, the reflection blinds you. He could not drive because he just could not see the way forward so he stopped. Fortunately the other car deemed its light, and when that happened he was able to see his way forward and the two cars continued. For me, this story is very telling. The past that we carry, whether good or bad, should not always make us look at the negative side. If we allow the negative to build too strongly; if we become obsessed with that past; if we keep on nagging at it all the time, it will blind us and we will not be able to see the future. However, the past is very important.

We need to learn lessons, we do not ask the guy at the back to switch off the lights completely but to dim the lights. Let us dim the lights of the past and focus on the future. For me, therefore, I am looking towards the future and saying, the future is for those who dream about it, not those who dream about the past. I put so much emphasis about the way forward because for us to develop we have to find a way of dimming the lights of the past, finding solutions to that past, healing ourselves and therefore beam towards the future. We need to see the future as a real resource and design it in our dreams and in our vision. But if we just look back to the past, we are not going have the vision towards the future.

Let me conclude by saying that when I travel nowadays, I get opportunities in conferences of this kind to speak about our continent very often. When we discuss about our development, people get very upset as Africans because of how others have oppressed us, how others have undermined us. We keep lamenting again and again and I have reached a point that I am tired of weeping. I am prepared for action, which is to take responsibility for our problems. We forgive the past and we focus our attention towards the future. But it is important that we learn lessons from the past and everything will be all right.

Let me warn you. We have to be careful because we have seen in other countries in this continent where there is euphoria as a new president comes in. Within a year, he is doing exactly what the previous one did, and we wonder what has happened. Let us, therefore, look at the structures that shape our leaders, let us look at ourselves: what did we do that made it possible for leaders to behave this way? One of the things we learn is that silence is perhaps what has enabled the leaders to do what they have done. Let us not keep silent when we come through the new transition.





## Kenya at the Crossroads

Hon Musikari Kombo (Chair of the African Parliamentarian Network Against Corruption (APNAC) Kenya Chapter, MP)

Africa is in transition, and in a sense the current events in Kenya reflect continental developments in a microcosm. We are going through a major transition. If we look around Africa and see what is happening in countries like Ghana and Zambia, it is clear that at some point in the future, the questions will be asked of our leaders here in Kenya regarding past economic crimes and human rights abuses. These matters inform public perceptions of our current leadership and the manner in which they are handled will greatly affect the perceived legitimacy of the incoming administration next year.

In general, Kenyans are not bad at dealing with the past but it is important that we are here to discuss this important issue to give a local angle to what is increasingly becoming an internationalised issue. This internationalisation is happening through a variety of tools — the fledgling International Criminal Court, for example, and the peer review mechanisms of initiatives such as New Partnership for Africa's Development (NEPAD) and the African Union. Increasingly, we the political leaders are being held to account for our actions on an international stage and to standards that are articulated outside our parliaments and home countries generally. I believe that we in Kenya need to discuss these important issues of dealing with past economic crimes and human rights abuses now, because they shall come up next year. We should discuss them because, preferably, they should not be internationalised in terms of intervention; we have the maturity to deal with our problems at home and not have to resort to any outside pressures to take particular actions.

Time and again, political leaders have pledged to confront corruption firmly and effectively, only to be overwhelmed by the immense size of the problems facing them. This is especially the case after the kind of transition we are going through. Whichever government takes over next year will be confronted by such a challenge. The transitional phase from one economic system to another, or from a corrupt regime to one that has declared a policy of building up integrity systems is full of promise, but it is also beleaguered by many dangers. In nascent democracies the world over, and particularly in some countries in Eastern Europe, we have seen corruption and lawlessness become rampant, cultivated by the uncertainty surrounding poorly developed administrative and political structures.

There are those who would invoke stories of America's 1920 robber barons to argue that the 'cowboy capitalism' invariably experienced by emerging democracies is simply a transitional stage that must be endured on the way to a more stable political and economic environment. The danger, however, is that corruption can become so widespread that it can undermine and destroy the transitional stage itself. It can even lead to the rejection of democracy itself by the disaffected population and calls for draconian, authoritarian solutions. Some of the coups around Africa in the past were the result of this kind of thinking. On the other hand, corruption can become so systemic that it consumes the very institutions meant to guarantee governance — the judiciary, civil service and the legislature.

In spite of the often dramatic changes in institutional structure that occur in transitional societies, important obstacles remain. Two key issues are involved in thinking about how to tackle the challenges posed by transition: that of amnesty and recovery of assets. This is the burden of the past. Anti-corruption programmes around the world have almost invariably foundered on the rock of the past. One of the most vexing dilemmas in many African countries is how to respond to society's deep-rooted desire for justice and even for retribution. How can a break be made and an administration of integrity introduced? How can an administration gain the credibility and the moral authority to enforce rules and regulations when many of those in that administration are implicated (to some extent or another) in breaches in the past and the near present? Do we risk institutionalising a culture of impunity by granting amnesty for past political and economic crimes? How do we address the issue of former political leaders who are now out of office? How do we recover those assets meant for the development of our people, which are illicitly kept abroad with the complicity of banks in rich countries?


We in Kenya are no strangers to this quandary. We are, rather, still at the stage of viewing the future with anxiety and trying to find ways of assuring a transition from our present, unenviable condition of endemic corruption to a future where the ingenuity, talents and industry of our people can be redirected from the daily struggle for survival to the task of creating prosperity and wellbeing for the nation. Now, mind you, about the most unpopular thing an administration can do is to grant an amnesty to those who have abused positions of public trust. Yet the question of how to make a break from the past is a crucial one. In countries where corruption is endemic, the rich and powerful of previous regimes may be in a position to block - or at least blunt - efforts to reform. Corrupted systems may be capable of reform on paper, but corrupt individuals can thwart the best intentions of reformers. There are several reasons why an amnesty approach of sorts could be justified, however unpalatable it may be.

First, in a new moral climate under changed rules and with different expectations, it is perhaps not right that acts undertaken in the old and very different moral environment should be judged by these 'new' standards. Second, public awareness and expectations that something effective might at last be done about corruption is likely to result in a spate of allegations that can overwhelm the institutions designed to handle them. Third, the political will to defeat corruption may well be at risk of being undermined by those in positions of influence who could be adversely affected by competent anti-corruption action.

Should there be an amnesty? If Kenyans decided to adopt this course, then it is essential that the people understand and appreciate the reasons behind this and that the amnesty provisions be set out carefully in written law. Thus, public awareness of the need for some sort of amnesty must be raised, and public discussion should precede the introduction of any law. If this does not happen, people are likely to suspect the worst and to take to the barricades - quite literally.

For any general amnesty to work, there may need to be exceptions, both to allow monstrous behaviour that subsequently comes to light to be investigated and punished and to make the whole concept of an amnesty more palatable to the general public. If there are to be





exceptions, then the mechanism used to decide which cases do and which ones do not deserve amnesty must be one the people have confidence in. The mechanism should be judicial in nature — and not be in the hands of politicians.

Another recourse is that of the 'truth and reconciliation process.' If the intention is to provide a forum for the naming and shaming of public officials and to provide an opportunity for them to clear their pasts but with an element of retribution that the public finds acceptable, then this course might be a suitable alternative to a general amnesty. The final option is that of simply doing nothing. This leaves a cloud of uncertainty and does not establish clear and transparent guidelines to which new or revived agencies would be working. It leaves the public at a loss to know what is going on and whether political will really exists. It is a tempting option, for it certainly minimises obstruction by the powerfully corrupt leaders from the immediate past, but it is also arguably the most risky strategy of them all. Ultimately, the final decision on how to treat the sins of the past will have to be taken by the people of each country after open debate.

# Towards Consensus on Economic Crimes and the Transition

Joe Okwach (Member, Law Society of Kenya)


Madam Chair, ladies and gentlemen. First of all, I feel very humbled to have been asked to make closing remarks at the end of this important forum. Humbled because the resource people who have come before me are of really high intellectual capacity and extensive experience. Throughout the day, they have been able to enrich us with their insightful papers and wide-ranging discussions. Considering the great depth of what has been discussed, it is an uphill task but I will do my best to summarise what I perceive to have come out of today's forum.

Now, let me first start by talking on behalf of the LSK and TI-Kenya, the organisers of this forum. The idea germinated because there is clearly a lot of anger out there. People on the streets have a lot of questions, and because many fear asking them aloud, they whisper into the likes of Prof. Wangari Maathai's ears, saying, "I support what you are doing." Others are simply discussing it with their peers and families. Therefore, these two organisations felt that it was a good idea to bring together a group such as this one to articulate what we suspect is happening on the ground as an initial step in preparing for the transition.

Now obviously, the theme of the forum is "Economic Crimes and the Transition." You will agree with me that "economic crimes" is a passive phrase for the word corruption. Again, if we look at the definition of corruption, there are two general forms. Grand corruption and petty corruption – the latter, for example, happening when a policeman gets Ksh. 20 from a *matatu* driver to ignore traffic rule violation. Grand corruption is the realm of economic crimes, when the actions of a few or even one person causes the public to lose a sizeable amount of revenue or other government resources like lands, buildings, forests, movable property, etc. However, defining corruption in these terms is not enough, because we must also be aware of the cyclical and deep-rooted nature of the practice. The perception of corruption to the general members of the public means that if the police arrest your brother for a petty crime, you offer a bribe, say Kshs 5,000. And he will take the Kshs. 5,000 and make sure your brother is not charged. If you want a licence to mine gemstones, you could offer senior personnel at the Department of Mines and Geology Kshs 20,000, etc. They would tell you to go back on Friday and get your licence.

But what happens when corruption becomes so endemic? Today, one police officer will take your Kshs 5,000, and say come on Friday your charges will be dropped. On Friday, you probably will not find him. You go back on Monday, Tuesday and Wednesday, but you finally





meet him on Friday. He, however tells you, “You know, “there is another senior officer here who is a very difficult man; we must also look after him.” By that he means that you give him Kshs 2,000 more and you go back on Friday to make sure that your brother’s file is cleared. Typically, the corruption chain could prove to be bottomless. The police officer could keep telling you to go back and appease all manner of other senior officers — the inspector, the Officer Commanding Police Station, the prosecutor, the magistrate, etc. At the end of this exercise, not only is your brother still languishing in remand prison, you have paid Kshs 100,000 to the police officer, probably more.

At this level, corruption becomes utter theft, pure robbery from the public. I am not saying that corruption is moral or excusable at any stage, but when it takes the direction of sadist extortion, it becomes one of the greatest evils of our time. To the average *mwananchi* who faces these forms of robbery everyday, corruption is perceived as a brutal violation of one’s basic rights by those who have the power. Now, back to the discussions today, let me summarise the best way I can.

First we have all recognised that there is and there have been economic crimes in this country. Economic crimes have resulted in the erosion of the economic, political, social and family values in this country. As a result, because we now have a political transition in our hands, we must agree on how to deal with the crimes that have been committed, and secondly, how to ensure that the new administration does not follow the same route, nor are they allowed to. So, having considered and recognised that these crimes have been committed, some key issues have been raised:

1. what do we define as economic crimes?
2. how serious are they, are they heinous?
3. which ones do we deal with first?
4. which ones can we forgive?

These are all issues related to definitions. To start addressing the problem we need to come up with consensus on the key concepts involved in economic crimes. What do they mean? Secondly, we need consensus on the body or forum that is going to define these crimes. I come from the conservative group of people who believe in the three-tier system: the executive, the judiciary and the legislature. Now, the genesis of this division of powers came about because of the recognition that every human being, given the opportunity to lead, has an inclination to abuse the powers of that office. If the best of us were given the powers some of these offices hold, we will most likely do exactly what we now complaining that past Kenyan leaders have done.

I have heard the argument that we must identify incorruptible people to place in important positions. This is all very well, but I also want to point out that — and this came out strongly from Prof. Hyder’s Islamic analysis and Rev. Musyimi’s Christian analysis — we need to go beyond the individual, inasmuch as individual is an personification of the machine that gets the institutions in place. We must re-institutionalise the checks and balances that have been eroded in the past and the central responsibility to do this lies in parliament.

We know that in the past, parliament did not always act like a responsible institution. They need to go back to work so that Kenyans know how to define economic crimes, who is going to do the defining and what crimes were actually committed. Are we going to have a truth and reconciliation commission? Are we going to have other types of commissions? Who are going to be the arbitrators? Are we going to give the responsibility to the same body of people who have demeaned our country? I hope that those in the Constitution of Kenya Review Commission will forgive me because I am going to remind them of the suspicion that many of the commissioners hold their posts not on account of their qualifications but because they represent particular interests. The minute we started from that premise, we undermined the integrity of that particular body.

As I understand it, today you have attempted to define economic crimes. You have also discussed the models for transition justice from different countries and reflected on how those might work in Kenya. To move ahead, we need to discuss how to sensitise the Kenyan public. What pressure do we bring to cause the people who committed these crimes to own up? I doubt that they are going to volunteer. If they own up, are we going to have an institution of amnesty? How is the process of amnesty going to work? How do we deal with those who say, "Yes, I am guilty of this particular offence, please forgive me, I want your retribution, and I can give you reinstatement."

The question of reinstatement was raised today, but we need to define what happens if the crime was caused to the state itself, and it resulted into loss of life and property that cannot be recovered. Indeed, there are crimes that resulted in the future of three or four generations of Kenyans completely going to waste. There are those children who are fathers and mothers today but did not succeed at school because they were denied opportunities. There are those who died because they did not have access to health services. How do you compensate this? How, then, do we ensure that after amnesty, the next government does not go the same way?

These are some of the issues and questions that have been raised today. We may not have agreed on all of them. However, I come from the school that believes that it is the application of the law that went completely wrong. I agree with my colleague, Hon Martha Karua, when she said that the law if "properly applied we would not be having a crisis." As we say in the legal profession, every time an advocate who is a member of LSK contradicts any laws or regulations, violates any moral ethic, then all of us do. The same thing is happening in Kenya today. In the eye of the world, we are condemned collectively as the Kenyan community.

The transition allows us to re-establish certain basic modes of political, economic, moral, ethical conduct, irrespective of where you come from in Kenya. It is a opportunity to redefine what our nation is. From the cries that came out here today, it is evident that we are beginning to think like Kenyans, not as people who belong to a particular tribe, race, religion or sex.

As requested by the LSK and TI-Kenya, therefore, I now need to challenge you: Do you feel that this seminar has incited sufficient interest in you? Do we now need to arrange a structured seminar so that we can discuss these issues in greater detail and create specific recommendations? At the end of the process, we should be able to come up with views of a cross-section of Kenyans on the management of the country's transition.





## Conference Themes

### Defining the Issues in Transitional Justice

While there was general consensus that the ills and crimes of the past must be dealt with, conference participants grappled with the particular issues that should be addressed. Two issues that emerged from the discussions were those of land and the natural environment. One speaker postulated that the wanton destruction of forests and biodiversity, and the eradication of species, were fundamental issues that needed to be addressed in themselves and also as crimes against future generations. Parallels were also drawn between the destruction of the environment and extermination of humanity.

There, however, appeared to be dispute about the particular actions warranting consideration as transitional justice issues. One speaker objected to the comparison of the destruction of the Enosopukia water catchment area to ethnic cleansing. While the former actions deserve grave consideration on the one hand, the rampant destruction of the Mt. Kenya and Mau forests could not be identified as such, the speaker said.

Any discussion on transitional justice issues necessarily raises concerns as to how far back into the past we ought to delve. In identifying a timeframe, therein lies an inherent danger of arousing suspicions of partiality. One participant submitted that the time span should date back to 1963 when Kenya attained independence. There was no logical imperative, however, that crimes to be addressed be dealt with in a chronological manner, the argument ran. It is possible, it was argued, for the relevant anti-corruption body in force at the time to deal concurrently with fresh atrocities committed while investigating and dealing with those of the past. Inasmuch as current law stipulates that there are no time limits on criminal prosecutions, there was recently a court ruling against a prominent politician that a criminal case brought to court after seven years was time barred. The move, it was argued, set a precedent that was liable to be used in future by those contesting crimes committed over seven years ago.

### An International Perspective

The issue of amnesty remains highly emotive and controversial as evidenced by its resonance throughout the conference discussions. There was no apparent consensus as to whether amnesty should be granted and if so under what circumstances and to what extent.

Proposals for the inclusion of a limited amnesty clause in the Corruption Control Bill were objected to with one discussant highlighting the fact that Kenya was now a signatory to the International Court of Justice set up to try the most grievous crimes under international law. The creation of the Court was changing the scenario to include economic crimes under the principle of universal jurisdiction. It was thus contended that the transitional arrangements proposing the granting of amnesty for economic crimes would be tantamount to allowing impunity -- a move that should be resisted because the rest of the world is moving to eradicate impunity.



In response, it was pointed out that the two issues of amnesty and impunity were not necessarily irreconcilable, as the proposition for amnesty was based on the premise that offences regarded as cruel or grievous would be exempted. Further, it was imperative to avoid bogging down the already overloaded legal system with minor corruption charges. On the issue of presidential amnesty, one speaker advocated for the linking of any proposed amnesty with non-partisan political behaviour, contending that worldwide trends illustrated that several ex-presidents played an active role in partisan politics, which defeats the logic of the amnesty.

It was suggested by one participant that the discussions on models of amnesties around the world should be more focused on the Eastern European countries than Latin America, Africa and Asia as those countries had undergone transitions similar to the Kenyan one, hence could offer invaluable lessons.

## Dealing With the Past

Two main divergent views emerged on this issue. On the one hand, it was considered imperative to confront the past so as to avoid repeating the errors. Debate ranged as to the appropriateness of establishing the South African-style Truth and Reconciliation Commission. One discussant submitted that such a commission can only be effective in situations where there have been gross violations of human rights and where the perpetrators and victims of atrocities could be readily identified.

In response, one participant, whilst admitting to the difficulties that may arise in setting up a truth and reconciliation commission, took the view that if Kenyans were to aspire for a cathartic experience, it was imperative for perpetrators of past atrocities to confess their misdeeds, return that which was taken and seek forgiveness from the aggrieved. Only then would justice be achieved.

In recognition that it was prudent to determine a cut-off date when dealing with crimes committed in the past, one speaker proposed that the starting point should be when economic growth started to decline from 6% per annum all the way to the current 0.4%. Other speakers took an alternative view, suggesting that Kenyans focus on the future rather than dwell too much on the past. With the difficulties and seemingly insurmountable task that lay in attempting to forget the wounds of the past, there was the grave danger of getting bogged down in that past, they argued. Past experiences should be ground for harmonising energies into building credible systems and institutions, and more importantly, for cultivating the rule of law. Such efforts would ensure that the mistakes of the past are not repeated.





## The Way Forward

The objective of the conference was to stimulate debate on transitional justice issues and begin the process of developing a suitable model for Kenya. To this end, it was deemed imperative to develop strategies to help consensus building on the issues of amnesty and other transitional justice mechanisms.

### *Strategies/Resolutions*

1. The absence of political will and/or vision by politicians to spearhead this process placed an onerous duty on members of the civil society to take ownership of the process, build capacity and raise awareness of the issues through joint efforts with the media. This was with a view to generating momentum and focus on transitional justice issues.
2. Recognising the link between poor governance and economic crimes that had culminated in the current state of destitution and economic decay, the participation of private sector, charged with the responsibility of steering economic growth, was considered very key in the process.
3. Rhetoric in itself would not prompt remorse or confessions from alleged perpetrators, hence it was imperative to adopt a more practical approach such as restitution. Further it was critical to desist from precepts of communal guilt and engage, instead, in the pursuit of particular individuals.

