

The Philosophy of Non-Violence and its Application in the Management of Kenya's Constitutional Conflicts

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Introduction

On August 5, 2010 Kenyans adopted a new constitution by the approval of almost 70% of voters. This was the culmination of almost two decades of mainly non-violent struggle for constitutional reform. Kenya's previous constitution was anomalous from a structural violence perspective.¹ Johan Galtung defines structural violence as existing in those conditions in which human beings are influenced so that their actual somatic and mental realizations are below their potential realizations. Kenya is not currently in a state of war but it could also be argued that neither does peace prevail. A central theme of this essay is that peace is more than simply the absence of war. Kenya's previous constitution had ceased to meet the needs and expectations of Kenyan society and therefore became a major source of structural conflict.² A central theme throughout this essay is therefore that it is the constitutional conflicts that have given rise to the need to overhaul the current constitution, although whether such an overhaul is necessary is itself sometimes debated. Whereas constitutional issues have been widely analyzed from other perspectives, such as legal and political-science perspectives, there is a dearth of literature on constitutional reform issues that adopts a conflict-theory perspective. This essay applies the tools of conflict theory to shed light on the

process of Kenyan constitutional conflicts. However, in the application of analytical tools in conflict, fundamental epistemological issues are also raised. Constitutional reform is ultimately about a fundamental paradigm shift.³ A constitution can be viewed as a paradigm that defines the way relationships in society are organized. An existing constitutional paradigm is acceptable as long as it adequately reflects the aspirations and expectations of a given society. However, social dynamism implies that constitutions will over time begin to develop significant anomalies, thereby making an existing constitutional paradigm inadequate and obsolete. This essay is therefore to some extent concerned with the epistemology of constitutional conflicts. Other fundamental epistemological debates, such as whether conflict is subjective or objective, also inform this essay.

The rationale behind adopting a conflict perspective in this essay is that conflict is ultimately about incompatibilities of goals.⁴ The incompatibility of goals is fundamental to the existence of conflict situations, whether one is dealing with structural or behavioral conflict. The more valuable the objectives being sought, the more intense is the conflict. The central constitutional conflicts Kenya has experienced for the last two decades are fundamentally about incompatibilities of goals among different actors involved in the constitutional review process. These conflicts have often been particularly intense, albeit mainly at a structural level because of the value of the objectives involved. A fundamental objective of value, which for a long time intensified constitutional conflicts in Kenya, has been the distribution of power, particularly executive power, implied by alternative constitutional arrangements. The constitution has often been seen as a power map whereby the constitutional order became not an arbiter in the power process, but a fundamental element in political warfare.⁵ These constitutional conflicts have continued even after the adoption in 2010 of a new constitution. Recent constitutional conflicts in Kenya have focused on the implementation of the new constitutional order. Advocates of deep-rooted change have resisted the implementation of the new constitutional order or have sought to dilute some of

its provisions at the implementation stage to retain the status quo.

Conflict is an intrinsic and inevitable component of social change.⁶ Conflict is an expression of a diversity of interests, values and beliefs that emerge as new structures generated by social change come up against established constraints. This implies that Kenya's constitutional conflicts are part of its social change process and indeed should be seen in this context. These conflicts on a very fundamental level represent the challenge posed by a new constitutional dispensation to the existing social structures whereby elites with vested interests seek to preserve the *status quo*. The reward structure in such societies is a built-in transfer of value from underdog to the topdog, where the latter inevitably gets more than his due through a process of accumulation.⁷ When an existing structure is threatened, those who benefit from the accompanying structural violence particularly a country's elite will try to preserve the status quo which serves their interests.⁸ The challenge to the *status quo* posed by deep-rooted constitutional reform and the attendant resistance to reform attempts by Kenya's political elite is a fundamental theme of constitutional conflicts in Kenya, even after the adoption of a new constitutional order in 2010.

This essay proceeds by developing the philosophical basis for the notion that peace is more than the absence of war. This is a central theme of the paper, since Kenya is currently not in a state of war; but it is vital to consider whether this implies that Kenya is at peace. It then considers the subjective/objective debate, which analyzes whether a conflict needs to be perceived in order for it to exist. This debate is central to understanding the idea that peace is more than the absence of war. The fundamental theme of the paper, which is the philosophy of non-violence, is then analyzed. The application of non-violence in addressing Kenya's constitutional conflicts over the last two decades is then considered. The vital linkages that occur between non-violence and direct violence are then critically appraised. The essay concludes by briefly considering some case studies from other African countries, so as to provide an assessment of non-violence as a

means of achieving needed social change.

Peace as More than the Absence of War

A vital philosophical question is whether peace is simply the absence of war. Adam Curle⁹ develops the idea of structural violence by challenging the traditional dichotomy between war and peace. In the classical discourses there was a situation of either war or peace. It was not possible to have both simultaneously. Curle, however, argues that it is possible to have a condition in between the classical notions of war and peace which is characterized as “unpeaceful.” The absence of peace is characteristic of many situations where there is no overt conflict. In unpeaceful situations, human beings are impeded from achieving full development, either because of their own internal relations or because of the types of relationships that exist between themselves and other persons or groups. Curle provides the prototypical unpeaceful relationship as that of a master and a slave.¹⁰ The slave is unaware of the enormity of his position and of the fact that it could ever be changed, and so apathetically accepts it. In other words, the slave is objectively in a situation of conflict which he does not realize. However, polarization of the conflict changes this structure so that the formerly happy slave eventually subjectively realizes that he is in a situation of conflict. Curle argues that this can occur through the role of a third party who can do something about the happy slave situation by polarizing the conflict so that the slave realizes what kind of condition he is living in. This implies some growth of awareness in his position as a slave through the empowerment by a third party. Once the slave is aware, he struggles to reach a position of equality with his master, so that their relationship can be reordered in accordance with principles of justice. This, according to Curle, represents the stage of confrontation. Kenyan society conforms to Curle’s conceptualization of an unpeaceful society in that there are relatively few instances of overt conflict and yet the relations in society are structured in such a way that many Kenyans are impeded from achieving their full development. The

constitutional setup in Kenya has been a fundamental contributory factor to this situation. This is fundamentally because the previous constitution had ceased to meet the needs and expectations of Kenyan society.¹¹ Constitutional conflicts arose prior to 2010 on the basis that the Kenyan constitution did not tackle many fundamental concerns of its citizens, such as equitable resource distribution, the delivery of justice, and the recognition and protection of individual and minority rights.¹² In this situation incompatibilities of goals in turn developed, which are essence of conflict. This situation still to some extent persists, even after the adoption of the new constitution in 2010, since the implementation of the new constitution requires subsidiary legislation which has been the subject of considerable debate. Provisions in the new constitution on devolution, for example, require the setting up of a new country-based administration and the development of appropriate revenue-sharing mechanisms. The details of exactly how the new counties will function are still largely unresolved. In addition, the new constitution did not adequately address all of the issues that had given rise to the push for constitutional reform. The new constitution in practice still provides for a relatively high degree of central control, even though decentralization was one of the key themes of the constitutional reform agenda prior to 2010.

The Subjective/Objective Debate in Conflict

Curle¹³ introduces an interesting theoretical dimension in respect of the degree of perception or awareness of the conflict. He argues that in many unpeaceful relationships the parties are perfectly aware of the discordance of their aims. In others, however, the conflict is not clearly recognized. Curle distinguishes between various types of unpeaceful relationships on the basis of whether the power relations are balanced or asymmetrical and whether there is considerable awareness of the conflict. He argues that in situations where conflict is absent because of low awareness, there is at least latent or potential conflict. Individuals in such a society may be politically unaware, but this does not imply that they are hap-

py;they normally live in circumstances conducive to misery.

This leads to a fundamental epistemological debate in conflict theory, which revolves around the question of whether for a conflict to exist it has to be perceived by the participants in the situation.¹⁴ If one holds an objectivist view of conflict, conflict need not be felt for it to exist. Conflict is, therefore, not dependent on subjective perceptions and can be perceived by third parties, even if it is not perceived by the actors. This is the standpoint of the peace researcher who argues that the victims of adverse structures may not be unhappy with their lot and may then be considered as “happy slaves.”¹⁵ Conflict emerges from a clash of real interests, rather than a perceived clash of interests, although actors may not perceive who their real enemies are. This implies that if in a particular social system one group gains what the other loses, structural conflict exists even if the loser does not understand what is happening. However, in order to define a situation as conflictual, dimensions of social existence have to be emphasized which are considered as vital to the observer. This implies that even the objectivist perceives social reality through the lens of his or her own values. If the values of the observer were different, this would in turn affect the perception of the conflict. This explains why in Kenya some individuals recommended an overhaul of the constitution during the constitutional reform process, whereas others considered it to be fundamentally sound and only needing piecemeal changes. These individuals clearly had different values and hence perceived the constitutional conflict situation in Kenya differently. A key challenge relating to constitutional implementation even in the post-2010 era is the lack of a concept of the common good among Kenya’s leaders. Kenya’s leadership since independence has been largely self-serving. Many politicians in Kenya enter politics not to serve the people but to seek rewards and privileges for themselves. The majority have a vested interest in maintaining the present governmental system, which provides opportunities for corruption, high salaries, and preferential treatment.¹⁶ Many of these politicians have therefore opposed the full implementation of the 2010 constitutional dispen-

sation, especially in areas that aim to reduce their privileges. Thus constitutional conflicts in Kenya did not end with the adoption of a new constitution in August 2010, as many implementation challenges have remained. The new constitution, for example, provides that those vying for public office should have high standards of integrity. This provision has been difficult to implement and has been undermined by some political leaders.

According to the subjective view, for a conflict to exist there has to be at least some perception of the incompatible goals by the social actors. For subjectivists, therefore, if people cannot subjectively perceive a conflict and its effects, they are not in a situation of conflict.¹⁷ This is the position of the conflict researcher who considers conflicts as subjective. This is because the parties can change their goals or reassess their values, thereby changing the nature of the conflict.¹⁸

In the Kenyan situation, there exist individuals who are politically unaware; but it is clear that they are confronted with the consequences of the deeply embedded structural conflict. A number of Kenyans are, however, clearly aware of the structural conflict situation in which they live. The evidence for this assertion is the increasing role that members of the public play in criticizing the conduct of the government. Their participation in debates in the media also shows some awareness of the conflict issues they face. It will be argued that it is not necessary for all Kenyans be aware that they are in a conflict situation in order for that conflict to exist. Civil society and the media have a very important role in increasing the general awareness of Kenyans about the anomalous state of the constitution.

The distinction between objectivists and subjectivists is important, because it has extremely important implications for conflict management.¹⁹ Since the subjective viewpoint considers that for conflict to exist the parties to a conflict must experience it, conflict management must focus on the efforts and inputs of the parties themselves. On the other hand, objectivists hold that people can be in a

conflict without realizing it and as such third parties can enter into a conflict and play a role in its management. Objectivists focus on changing the conflict generating structure. Curle²⁰, for example, considers it essential for relationships to undergo radical change if they are to be made peaceful. In the case of all revolutions, there must have been, at some stage, a movement from a lower to a higher awareness of the situation. In the case of deeply embedded constitutional conflicts, a complete overhaul of the constitution is necessary in order to change the conflict generating structure. Those who favored this approach during the constitutional reform process argued that the previous constitution was fundamentally flawed. Given that structural conflict in Kenya to a considerable extent arose from the non-representative and non-inclusive nature of the negotiations that led to the birth of the previous constitution, it was argued that what was required was a fundamental overhaul of the entire constitution on the basis of a widespread participation of the citizens in the process.²¹ This was aimed at removing the conflict-generating constitutional structure in Kenyan society. A re-writing of the constitution and not amendments of the existing one were required, because many constitutional amendments that have been made since 1963 have destroyed the principle of constitutionalism in terms of the necessary checks and balances that a limited government needs.²² Since 2010, constitutional amendments have also been used by politicians to attempt to frustrate the goals of the new constitution.

An alternative approach to constitutional reform recommended piecemeal constitutional change aimed at dealing with the most overt defects in the constitution. Those opposed to fundamental reform wanted a constitutional repair job.²³ This approach was based on the assumption that the previous Constitution of Kenya was basically sound and the solution was therefore to fix those parts of the constitution that were causally related to the constitutional conflicts. Ultimately, the new constitution adopted in 2010 could be considered to have been informed primarily by the overhaul approach. The new constitution aims at equal rights for all Kenyans and aspires to a situation where every Kenyan has the basic necessi-

ties of life. It attempts to make government more accountable to the people. A key challenge in achieving these lofty ideals is, however, attempting to change the deep-rooted political culture in Kenya that is still fundamentally lacking in a vision of the common good.

The Philosophy of Non-Violence

The issue of whether situations of structural violence are best addressed by violently overthrowing the existing structure or by non-violence can be critically assessed. There is a school of thought which advocates non-violence as the best way even to change situations of structural violence. Non-violence in a generic sense refers to abstention from physical force against human beings.²⁴ Violence is not the only way to bring about dramatic social change and eliminate unjust relationships in society.²⁵ A vital goal of non-violent action is the preservation of human life. Non-violence literally implies restraining from taking up arms or killing or wounding people. Non-violence may be described as insistence on the freedom of conscience and the struggle to find a correct relationship with an established authority. Given that freedom is never voluntarily given by the oppressor, it must be demanded by the oppressed. Such freedom is adopted as a moral force in a revolutionary non-violent struggle in the quest for a just social order. Non-violent action is based on translating courage, dignity and assertiveness into an effective form of struggle. Although non-violent struggle is non-military, it is revolutionary in its comprehensiveness of the changes sought. The democratic impulses in the use of popular non-violent power are part of the process of social transformation. It is argued by advocates of non-violence that violent action by one party to a conflict does not justify retaliation in terms of violence. The objective of non-violent struggle is not victory over the other side but mutual gain through realizing an intrinsically good end. Indeed, the non-violent resister does not seek to defeat the opponent but to win his friendship and understanding.²⁶ The aftermath of non-violence is reconciliation. The non-violent

resister seeks to attack the evil system rather than the individuals who happen to be caught up in the system. It is a means of awakening a sense of shame within the oppressor but the end is reconciliation. It can be considered as struggle between justice and injustice. Non-violence rejects a completely deterministic outlook by focusing on the power of the individual to bring about change.²⁷

Non-violence can be understood as a basis for social organization based on the principle that the organization of violence is itself undemocratic and inequalitarian. It recognizes that the removal of an elite by assassination or other violent means does not guarantee a real change of structure. Indeed, some violent revolutions, such as the French and Russian Revolutions, demonstrated that an attempt at violent social change may sometimes bring about more violence and human misery. In the African context, many violent revolutions, such as the one that overthrew President Mobutu in the former Zaire, only bred more violence, largely because the underlying social structures remained unchanged. Non-violent approaches argue that the overt violence of physical conflict does not constitute an effective tool for change, since the means and the end should be consistent and wrongful means cannot be used to secure a just end. In addition, mass violence has heavy human costs and dehumanizes and brutalizes both the victim and the executioner. Proponents of non-violence argue that the probability of reaching an agreement with an opponent is much higher when non-violence rather than violence is used.

Non-violence as a strategy for change was fully developed by Mahatma Gandhi in his campaign to secure independence from Britain between the 1920s and 1940s. Gandhi's non-violent principle was known as *Satyagraha* and constituted a means for converting the power in non-violence into political action.²⁸ Gandhi applied the non-violent strategy by attracting a large number of people to a commitment of non-cooperation and civil disobedience, as demonstrated by his protest against the Salt Acts, which required the purchase of salt only from the British government. Gandhi held on to the tenet of non-violence no matter what

the circumstances.²⁹ He had also earlier applied *Satyagraha* in South Africa as part of the struggle of the Indians against discrimination and repression by the White community in South Africa.³⁰ He therefore recommended non-violent resistance, even in situations where it appeared unviable. A fundamental element in this strategy was the belief that the opponent would be moved to improve when confronted with the power of truth and love. When in a non-violent campaign discipline is maintained despite repression or more suffering is taken on oneself than the pain imposed by the opponent, it throws the adversary off balance.³¹ The sight of unarmed resistance in the face of superior or military force may cause many in the general population to lose faith in those giving orders to repress the non-violent group. The opponent may lose the support of its police or soldiers.

The Application of Non-Violence in the Context of Kenya's Constitutional Conflicts

The principle of non-violence has been applied to some extent in the context of the Kenyan constitutional reform process, where civil society organizations have called for mass action accompanied by civil disobedience, while specifically discouraging violence. Thus, for example, mass action began in Kenya on May 3, 1997 and ended on October 20, 1997.³² This mass action took forms such as rallies, demonstrations, processions, strikes, sit-ins, vigils and prayers. Mass action challenged the legitimacy of the existing legal order by attempting to use non-violent means of protest. Mass action in this sense was used as an alternative to armed struggle. However, even this mass action has its negative consequences, resulting in some deaths at the hands of police and also some individuals engaging in looting. The Likoni-Kwale violence in that year was a desperate way for the regime to deal with the reform movement and mass action. Private armies and militia groups such as *Jeshi la Mzee* were set up by the Kenya African National Union (KANU) regime to intimidate the reformists and some of the reformists were subjected to repression and torture. However, it helped to build a culture of

resistance to an illegitimate authority by the Kenyan people. This mass action created a crisis for the KANU regime and immediately after *Saba Saba* in 1997 President Moi summoned religious leaders and asked them to mediate between KANU and the National Convention Executive Council (NCEC). The Kenyan case, however, demonstrates that even mass action based on a non-violent ideology is still likely to result in casualties of violence, as an oppressive regime struggles to maintain its grip on power. Mass action was a means used to attempt to pressure the regime of President Kibaki to undertake constitutional reforms. Despite the fact that the Kibaki regime undertook to have a new constitution within one hundred days, a new constitution was only adopted eight years later, in 2010. The failure to enact a new constitution became a key electoral issue in 2007. Elections can also be considered as a non-violent means of achieving needed social change. The extent of implementation of the 2010 constitution in Kenya was a critical electoral issue in the March 2013 elections.

The Linkages between Structural Violence and Direct Violence in Kenya's Constitutional Conflicts

This essay argues that there is an important interrelationship between structural and direct violence. Prolonged exploitative conditions eventually produce violent resistance.³³ Coercive mechanisms are often used to force people to accept unjust conditions or economic inequality. On several occasions, the reluctance of the government to address the issues raised in the constitutional conflicts contributed to direct violence aimed at exerting pressure on the ruling elite to make concessions with regard to the constitutional review process. For example, in 1997 the NCEC agitated for a new constitution before the 1997 general election and, owing to resistance from the KANU government, the streets of Nairobi turned into battlegrounds between the Government and the reformers. The country witnessed violence and deaths on July 7th (*SabaSaba*) and August 8th (*Nane Nane*) and was gearing up for October 10th (*Kumi Kumi*). President Moi had ruled out any

reforms before the 1997 elections, while the opposition had also taken a hardline stance, vowing to ensure that the country would not go to the polls unless the constitution was changed. In the Kenyan context, mass action advocating constitutional reforms has often contributed to direct violence or the threat of it. This threat of widespread direct violence has often been used to pressurize incumbent governments since the early 1990s to undertake reforms. It could also be argued that a root cause of the post-election violence in Kenya in 2008 was the anomalous constitutional order that was in place at the time. This constitutional order, by virtue of the considerable power that it gave to the executive, contributed to making the election a very high stakes game in which competing political parties were willing to use any means, including violent ones, to ensure their desired political outcomes. The Kenyan case illustrates the principle that prolonged and deep-seated structural violence eventually gives rise to direct violence.

An Assessment of Non-Violence as a Philosophy for Achieving Social Change

However, reform movements inspired by fundamentally non-violent ideologies are arguably preferable to violent ones that seek to overthrow an existing structure. In the Kenyan context, the application of non-violence succeeded in starting the process of constitutional reform process. Some progress was also made by the Constitution of Kenya Review Commission in collecting and analyzing views from Kenyans on the preferred direction of constitutional change. The review process in Kenya often stagnated over the two decades of agitation for constitutional reform. At such times non-violent means, especially mass action and elections, were used to jumpstart the constitutional review process, eventually culminating in the adoption of a new constitution in August 2010. There is no guarantee that even violent revolutionary movements will necessarily bring fundamental change or whether they will merely seek to maintain the *status quo* to their own advantage once they are in power. This latter phenomenon has been

illustrated by number of recent cases of violent revolution in Africa. For example, in 1980 Samuel Doe violently overthrew William Tolbert's regime in Liberia, promising to liberate the masses from corruption and oppression; yet he continued to rule by decree for more than ten years, without bringing any fundamental change to Liberia.³⁴ Charles Taylor later violently overthrew Doe's regime on the pretext of bringing revolutionary change; but he later continued to rule by repression and even contributed to the outbreak of violence in neighboring Sierra Leone. In Nigeria, General Sani Abacha overthrew the incumbent regime, promising change, but later instituted one of the most repressive regimes in Nigerian history. In the Democratic Republic of Congo, the army of Laurent Kabila, supported by Rwanda and Uganda, overthrew the Mobutu regime in 1997; but he turned out to have no political vision or strategy and refused to engage with established opposition groups or civil organizations. While Mobutu had in the past packed his administration with supporters from his home province of Equateur, Kabila also pursued a similar policy of handing out key government positions to members of his Lubakat tribe of Northern Katanga. On the other hand, a more reconciliatory strategy of non-violence pursued by leaders such as Nelson Mandela in Southern Africa in the 1990s was more effective in producing relatively deep-rooted change. The eventual triumph of the non-violence movement in Kenya in contributing to the adoption of a new constitution in 2010 also strengthens the case for the use of non-violence in achieving social change. Whether the philosophy of non-violence succeeds in achieving a full implementation of the constitution adopted in 2010 remains to be seen.

Notes

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- ¹⁹ Mwagiru, *Conflict: Theory, Processes and Institutions of Management*.
- ²⁰ Curle, *Making Peace*, 1-26.
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