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RIGHTING WRONGS

CONFRONTING LAND DISPOSSESSION IN POST-COLONIAL CONTEXTS

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RIGHTING WRONGS: CONFRONTING LAND DISPOSSESSION IN POST-COLONIAL CONTEXTS¹

I. INTRODUCTION

'Tension as mobs invade 'idle' land at the coast', read the first page of the Daily Nation Newspaper on September 4th 2006. The paper went on to describe how residents of parts of Mombasa, mostly youths wielding pangas and other weapons had invaded plots they claimed belonged to absentee landlords. A few days earlier the Kenyan President had been reported in the local newspapers as having put absentee landlords on notice. This incident as many others in the last twenty years have illustrated how owners of land can lose their land to others who believe that they also have a claim to the property in question. As Cronon has argued, ownership is a complex social institution that varies widely between and among cultures and therefore only makes sense if the people with whom the property rights holder lives recognise that ownership and vest on that person the rights to impose sanctions against the violation of those rights by anyone else.²

Dispossession is a common phenomenon in many parts of the world where colonization entailed the process of taking over land owned by natives and passing this over to the colonizers and their vasals. The underlying assumption was that the colonised had no rights to land either as individuals or as groups. For instance, in the case of *Isaka Wainaina & Another v. Murito wa Indagara & Ors*³, Chief Justice Barth's interpretation of the provisions of the 1915 Crown Lands Ordinance in Kenya was to the effect that Africans were mere tenants at will of the Crown with no more than temporary occupancy rights to land.⁴ This ignored any rights existing under customary law. The nullification of natives' rights to land in favour of new 'owners' through processes that were not understood by the natives created a duality of rights' systems. Indeed the acquisition of land rights for settlers was mainly done through political processes (declaration of protectorate, designation of land as owned by the

¹ Patricia Kameri-Mbote is an Associate Professor of Law, School of Law, University of Nairobi. This paper was originally conceived as a Keynote Speech at a Conference on Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa, held on 13-15 September 2006 at Houw Hoek Inn, Cape Town, South Africa.

² William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England*, Farrar Straus & Giroux (Hill & Wang), NY (1992).

³ (1922-23) Kenya Law Reports Vol. IX 102.

⁴ Ibid.

colonizer) that were followed by legal instruments giving the political acts the requisite binding force.

Dispossession from land also entailed dispossession from resources that people depended on for their livelihoods. Wildlife and forest preservation areas were carved out of land previously occupied by the natives but that had been expropriated from them and declared crown land. In other cases, areas were declared protected and the interests of wildlife and forest conservation promoted in total disregard of the concerns of the communities living in them. The boundaries of what was designated as the Southern game reserve in Kenya, for instance, practically coincided with those of the Maasai native reserve.⁵ Thus communal wildlife and forest resources were formally made state property and managed by wildlife and forestry departments in total disregard of the prior rights of the natives to those resources and products. Some areas were declared national parks because the colonisers saw no other use for them.⁶ In this general schema, however the rights of the settler farmers to their land and other resources found therein were rigorously protected.

Evidently, the establishment of protected areas entailed the dispossession of people's land (as the habitat for the wildlife or forests) as well as the animals and forest products. This process severed the connections that existed between the natives and their physical environment. It introduced new values for wildlife and forests based on commercial exploitation which were the preserve of the new 'owners' of land and resources. Consequently, the parks were culturally alien to the communities living in and around them.⁷

The process of dispossession was not uncontested. Communities resisted it but were overpowered and subjugated under the new property ownership systems. Confronting dispossession in many countries thus remains a critical part of the resolution of land and resource crises. This is in a context where such dispossession is not acknowledged and the rights have passed on to new holders. It is also exacerbated by new forms of dispossession through privatization of resource rights (land, water etc) and the consequential passage of public goods into private hands without securing the interests of all actors that have previously had access to the resources. It is within this context that restitution is discussed.

⁵ See Colony and Protectorate of Kenya, Land and Land Conditions in the Colony and Protectorate of Kenya 17 (1931).

⁶ See J. H. Patterson, *The Man-Eaters of Tsavo and other East African Adventures*, St. Martin's Press (1912) giving account of lions terrorising railway workers.

⁷ See D. H. M. Cumming, 'Conservation Issues and Problems in Africa', in *Voices from Africa - Local Perspectives on Conservation* 23 (World Wildlife Fund, Dale Lewis & Nick Carter, eds., 1993).

II. RESTITUTION

A. Definition

According to Black's law dictionary, restitution is

the act of returning to the proper owner property or monetary value; the act of making good or giving equivalent for any loss, damage or injury; and indemnification

According to Professor Paul Maurice Syagga of the university of Nairobi

land restitution refers to some kind of compensation not necessarily relating to the value of land but also to other losses emanating from expropriation by the colonial government.⁸

1. Foundations of the Right to Restitution

The right to restitution has its foundations in the law of property, torts and criminal law. From time immemorial, the right to restitution developed as a proprietary right. The Roman law of twelve tables prescribed repayment schedules for theft of property according to when, and under what circumstances the property was stolen.⁹ Subsequently, in the 19th century, under the law of Great Britain offenders were required to restore peace by making payment to the victim and the victim's family.¹⁰

The remedy of monetary or property restitution still exists under the common law of torts and contracts. Similarly, in criminal cases, restitution has traditionally been one of the penalties imposed in return for stolen goods to the victim or payments made to the victim for harm occasioned. Hence, restitution in criminal cases aims at repairing the victim and making the offender a productive person as opposed to other criminal sanctions like retributive and rehabilitative sanction. Anthropological accounts of the practices of many African communities have tenets of restitution.

2. Restitution in Contemporary times

The term restitution has become a term of art in the quest for justice and equity in the realm of property rights to land in post-colonial contexts. Many countries have however, not managed to implement the concept. Indeed restitution is carried out within the context of concretized rights protected by law – a law that may have been sculpted with the express aim of extinguishing and expropriating one entity's rights to land and passing them on to another

⁸ Dorthe Skovgaard Mortensen, Reclaiming ancestral land, <http://www.ms.dk/sw7754.asp> (last accessed 31st Aug. 2006)

⁹ 449 B.C, <http://www.restorativejustice.org/intro/tutorial/outcomes/restitution>

entity in a form that is sacrosanct in law. Where the rights taken have been exercised without formal legal recognition, there is a conflict of both ideology and law which leads to hair splitting about the nature of the rights and the standing of those rights in law. There is recognition of the fact that a libertarian society needs to protect the rights of all to land and resources. In post-colonial and deeply divided societies, the protection of the rights of all remains a mirage. For instance, the need to protect the rights of all has not been followed by a critical analysis of the processes of dispossession and how this affects people's perception of property rights' holding. Successful restitution must not only address landlessness. It must also go to the core of unjust expropriation and extinction of one entity's rights and the terms of their transmission to another entity. Justice entails that the terms of restitution be mutually agreed by all concerned parties. Failing to do this will amount to perceptions by those whose rights have been expropriated as legal validation of injustice and will colour their perception of the rights protected by law making their enforcement onerous. The right to restitution thus has to be crafted on terms agreed to by both the 'restitutee'¹¹ and the 'restitutor'.¹²

This has to be seen against the background of colonial tenure policies. James¹³ characterises these into three: dualism, paternalism and transformation. The policy of dualism allowed traditional tenure systems to coexist with introduced European tenure concepts. In some jurisdictions, traditional and statutory tenures were compartmentalised and were not allowed to mix. For instance, the reservation of the 'white highlands' of Kenya for introduced European tenure rights and the application of customary rights in the 'reserves'. This duality remains to date despite attempts to bring all land under one law allowing for registration of rights to land for individuals.

Paternalistic policies regarded the 'natives' as incapable of looking after their land affairs sought to protect the indigenous population against the "wiles and trickery" of the "non-natives". Such reasoning was used to justify creating 'reserves' where land alienation was forbidden, especially to a non-native. Paternalistic land policies go the further step of the government assuming substantive title to all land, which it holds and manages for the benefit of all members of the society. From this pool of land, it then allocates rights of use and enjoyment to individuals, families and groups. It further stipulates that government must approve any rights created in land by any of the assignees for the rights to be valid.¹⁴

10 Ibid.

11 The one to whom land is restituted

12 The one who is giving up land for restitution

13 R.W. James, *Nigerian Land Use Act: policy and principles*. Ile-Ife: University of Ife Press. (1987).

14 Ibid. at p. 11

The policy of transformation seeks to introduce a single system of registered holding by substituting traditional titles into fee simple. Its main thrust is to give landholders security and incentives to develop land.

The net effect of these policies was to create different systems of ownership for different groups because even where transformation was sought, it has remained incomplete because of the resilience of the customary norms of ownership that the new forms sought to replace.

B. Restitution, Justice and the Inalienability of Rights

According to Rawls¹⁵, the concept of justice must achieve three cardinal ends. *Firstly*, the maximization of liberty subject only to such constraints as are essential for the protection of liberty itself. This, according to Rawls, means that there are some rights, which include *inter alia* the right to hold personal property that every system must respect. *Secondly*, justice must achieve 'equality of all' subject only to the concept of differential treatment where inequality produces the greatest possible benefit for the least well off in a given scheme. *Finally*, justice must achieve fair equality of opportunity and the elimination of all inequalities of opportunities based on birth or wealth.

Viewing the right to land restitution through the spectacles of Rawls concept on justice, it is imperative that states must put in place mechanisms to ensure the protection, respect and promotion of individuals' rights to their land and resources. This entails making amends where the taking of the land was wrongful. If we apply the equity maxim that 'no cause arises from a base act', it is clear that dispossession was wrongful and must be redressed if the institution of property is to serve the purposes that it is intended to serve in a country. By so doing, the rights of all citizens to maximize their right to liberty, personal equality as well as equality of opportunities based on wealth will be actualised. This is indeed critical where individuals continue to depend on land for their livelihoods and the national economies of countries are dependent on land and natural resources.

Indeed land remains a crucial determinant of economic wealth in African countries and the availability of land is important for both individual and national development. Poverty has therefore come to be linked with the dispossession from past land injustices. Dispossession is also linked to the development of slums in the urban areas which have remained a thorn in the flesh of land owners. The landless poor in urban slums have found new ways of

¹⁵ John Rawls, *A Theory of Justice*, Harvard University Press ; M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 7th Edn, London Sweet & Maxwell 2001, pages 523-534, 566-585

survival through the informal sector which now provides jobs but the overall conditions in the slums are wretched making it fertile ground for political discontent. Indeed both colonial and post-colonial authorities target slums for demolition as a way of enforcing political control.¹⁶

This analysis in itself captures the inalienable nature of human rights. For the right to land restitution to exist, the state must first of all guarantee the right to hold personal property, the right to security, the right to development, the right to a healthy environment *et cetera*. Hence, the right to restitution cannot be achieved in isolation of other rights. There is for instance, need to be aware of some attributes of land. *One*, land appreciates in value and there is need to consider the entitlements of different holders within that context. *Two*, land can be passed on from generation to generation and there are therefore multiple claims and claimants. *Third*, land marks the dignity of a nation and is linked to the sovereignty of the state. Further, the state's claim to permanent sovereignty over its natural resources is predicated on land.

C. The Right to Restitution at International Law

The right to restitution is contested under international law even though restitution is considered the primary form of reparation and redress when states have committed wrongful acts under international law. At the international level restitution may pertain to a wide range of matters. As described in the 2001 report of the International Law commission (ILC) these include the return of territory, persons or property or the reversal of some juridical act or some combination of them".¹⁷ As concluded by the ILC:

... because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation.¹⁸

¹⁶ Jacqueline Klopp, Remembering the Muoroto Uprising, gives an analysis of the demolition operations as follows: in 1953, Mathare shanties seen as a key area for of support for Mau Mau were destroyed rendering 7, 0000 people homeless. Several other evictions followed suit in which 24, 000 Kikuyu, Embu and Meru were rendered homeless. See also For instance, on 2nd Nov. 1990 a village (Kileleshwa Nyakinyua) of 3,300 people was demolished, similarly, on 5th Nov. 1990 a village of over 3,000 people at Gigiri was demolished, on 8th Nov. 1990 Kwambiu village of over 3,000 residents was demolished as well as Kibagare slum which rendered 30,000 people homeless.

¹⁷ Report of the International Law commission, 53rd session (23 April-1 June and 2 July-10 August 2001) in U.N. GAOR.

¹⁸ Ibid. At p. 6.

The primacy of restitution was also confirmed by the Permanent Court of International Justice in the factory at Chorzow case when it said that the responsible state was under

the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification which value is designed to take the place of restitution which has become impossible.¹⁹

The draft U.N. Declaration of the rights of Indigenous Peoples that was unanimously approved in 1994 affirms in Art.27:

Indigenous people have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.²⁰

In the context of land, restitution is critical to indigenous people. Opponents of Article 27 claim that such a right to restitution would enable indigenous peoples to reclaim virtually all, or at least huge portions of existing states. As a result non- indigenous persons or other third parties would be unjustly impacted if not also totally displaced. Article 27 itself recognizes that restitution may not be possible in all situations. In determining whether or not restitution is possible, the right of all interested parties including state governments and other third parties would be systematically considered. States have also generally insisted upon restitution as an effective remedy for their own interests in the context of the new international economic order. Within the context of multilateral environmental agreements, differential treatment that entails assisting developing countries (through financial grants and technology transfer) to fulfil their obligations has been recognised as a way of dealing with past injustices that have impacted on the capacity of these countries to abide by the obligations.

Art. 21 (2) of the African Charter of humans and peoples rights explicitly provides for the right to restitution.

In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

¹⁹ *Case Concerning the Factory at Chorzów (Indemnities)*, Permanent Court of International Justice Order November 21st, 1927 Twelfth (Ordinary) Session Publications of the Permanent Court of International Justice Series A - No. 12; Collection of Judgments ,A.W. Sijthoff's Publishing Company, Leyden

²⁰ In regard to other forms of property, see also Art. 12 of the draft U.N. Declaration: Indigenous people have.....the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

The primacy of restitution as an effective remedy has also been underlined in other specific contexts in international law, such as “housing and property restitution”.²¹

D. Is the Right to Restitution Absolute?

The right to restitution is subject to the respect of the rights of others following from the Hohfeldian jural correlatives²² of rights and responsibilities. It is subject to the rights of third parties who should not be deprived of their rights. Restitution may in some cases not be possible, in which case, there is need for just and fair compensation taking into account the social, cultural, political as well economic issues.

Like many other rights, the right to restitution of land is qualified under several circumstances. For instance where land disposition was predicated on the payment of just and equitable compensation, there is no right to restitution. A vexed question however relates to the time frame for consideration of claims for restitution. Countries have found it useful to define a date. For example, under the South African Land Rights Restitution Act, such rights can only be claimed with regard to land disposed before 19th June 1993. In Kenya, the question has arisen within the context of the National Land Policy Formulation Process as to the cut-off date for claims for restitution. Do we begin in 1895 and where do we end? This is within a context where the independence process insulated beneficiaries of colonial dispossession from claims by contestants and where at different times after independence, dispossession has been orchestrated through political processes rendering landless people that have had title to land.

III. EXAMPLES OF HISTORICAL INJUSTICES CALLING FOR RESTITUTION/REDRESS

A. Bunyoro's Land Problem (Uganda)

The Bunyoro kingdom officials have said from time to time that the Bunyoro land problem is a historical problem that must first be corrected before any further deals can be reached.

²¹ “Housing and property restitution”, Resolution 2004/2, adopted 9 August 2004, para 3 (in the context of return of refugees and internally displaced persons), in U.N commission on human rights, Report of the Sub-commission on the promotion and protection of Human rights Geneva, 26 July-13 August 2004. E/CN.4/2005/2 Affirms that the remedy of compensation should only be used when the remedy of restitution is not possible or when the injured party and knowingly voluntarily accepts compensation in lieu of restitution....

²² Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial reasoning and other Essays*, (Cook, ed., 1922).

"That injustice hasn't been corrected. The colonialists grabbed our land. Now the Uganda Land Commission which is supposed to arbitrate is instead abetting the grabbing of our land," Byenkya said.²³

The kingdom's issues with the central government stem from a 1933 Colonial Government policy that banned the acquisition of land titles by native Banyoro; an edict that allowed aliens to acquire land there. But subsequent legal amendments and the compensation of absentee landlords have not resulted in the return to the kingdom's control of those land titles. Uganda Land Council, they say, does not have Bunyoro's best interests at heart.

"The kingdom is saying that that is wrong. We should correct those injustices," Byenkya said. "Banyoro are now squatters on their own land. The Land Act has not touched the Bunyoro case."

The Omukama himself, Mr Solomon Gafabusa Iguru, has had his fair share of the land agony. His estate in Kyangwali, a 35-square mile stretch of land from Lake Albert to Bugoma forest that was traditionally the king's hunting ground, has been the subject of dispute. Although a 1993 common understanding between the kingdom and President Museveni allowed the Omukama to identify and claim ownership of certain plots of his choice, armed herdsmen who claim links to State House, according to Kingdom Spokesman Henry Ford Mirima, have since dragged the Omukama to court claiming ownership of the land. A civil suit HCT-01-CV-CS-001 of 2003 is still pending at the High Court in Fort Portal.²⁴

B. The Maasai

1. Tanzania

The highlands of West Kilimanjaro, of Mount Meru, of Ngorongoro, the Ngorongoro Crater and the Serengeti plains was originally Maasai land. None is today occupied by the Maasai. Some were taken from the 1940s onwards by the colonial rulers and given to white settlers on 99-year leases. Some were taken by the colonial rulers, and later by the post-independence government for national parks and conservation areas. As a result, the Maasai were pushed aside to the marginal lands on which their survival has been nomadic and full of uncertainty. It is surprising to note that over the last twenty years, the government of Tanzania has again been allocating land from the Maasai Districts to large-scale export bean farmers (mostly

²³ The Monitor (Kampala) Uganda. Bunyoro Oil land rush intensifies. 14/08/2006

²⁴ Ibid.

‘foreigners’), game reserves, military camps and recreational facilities. The Maasai people have had enough of being pushed around and have gone to courts of law to petition against some of these allocations, while in some cases physical confrontation has been preferred. There is also serious dispute between the Maasai and the Chagga tribe because the latter began cultivating part of the land of Endoinyoormorwak hill which is used for worship by the Maasai. The Maasai have pleaded with government to remove intruders and have also applied for ownership of the hill. A legal body has been formed as a Maasai Trust and its constitution submitted to the government for official registration.

2. Kenya

Of all the Kenyan communities, the *Maa* speaking people have suffered the most from constitutional dispossession that displaced them from their ancestral lands and territories, dispersed them into inhospitable arid lands, fragmented them and set a pace a process of community disintegration that continues to date. The Constitution enshrined a historical injustice against the Maasai whose redress they continue to hope for to date as constitutional review and land policy reform processes continue. In a memorandum to the Constitution Review Commission, the Maasai noted that

The individual land ownership concept is alien to the Maasai community, which held its land collectively on behalf of all its members irrespective of age and gender. The concept was ignored to facilitate the taking of the Rift valley by the British, the subsequent losses of portions of present Maasailand to non-Maasai who came to be known as “acceptees”, the unlawful parcellation of community land in the name of individuals whether Maasai or otherwise. This historical injustice began with the colonial treaties or agreements of 1904 and 1911 in which the British dispossessed the Maasai of the best of their land. By 1904, Maasai institutions of governance were deliberately dismantled and contrary to culture a medicine man was installed as paramount chief of all the diverse Maasai sub-nations. That was curious because the British had not been invited to fill the vacancy in the Maasai leadership. That appointment of Olonana Ole Senteu was self-serving for the British. In the new capacity, Olonana was enabled to deliver Maasailand in the Rift Valley to the British. Of the 16000 square miles alienated for European settlement, 11500 square miles (70%) of what became the white highlands was from Maasai land. The British found in Olonana a person they thought acquired such great influence over all the Maasai sections. However, Sandford dispelled this notion of universal leadership in a medicine man. He said that such was the result of misunderstanding the normal state of affairs, which he said had been rectified but not early enough to reverse the ceding of the rift valley to the British.

The so-called misunderstanding permeated into and was given legitimacy in the courts, which determined the Maasai case. No one individual or the community itself under

Maasai customary law could deliver any part of Maasai land to no one who is not a Maasai as such.²⁵

The Maasai community in Kenya continues to rally around their claim for their land and recently demanded the restoration of their ancestral land following the expiry of the Anglo-Maasai Treaty signed between the British and the Maasai community. Politicians have also used this claims to ensure that they remain in power. For example, the Maasai leader and then Minister for Local Government, William ole Ntimama, in 1992 led a spirited war against communities who practice settled agriculture in his Narok constituency when he launched his so-called water catchment conservation campaign. He is quoted as having asked the Kikuyu in Narok to "lie low like envelopes and threatened to cut them down to size like the Ibos of Nigeria".²⁶ These communities were forcibly evicted from the lands that they owned or had leased without compensation. The government did not raise a finger against the evictions at that point which was just before the first multi-party elections in the country. This was mainly because most of the large tribes such as the Kikuyu, the Luo and the Luhya were overwhelmingly opposed to the incumbent President's party, the Kenya African National Union (KANU) and had joined the opposition parties. KANU was seeking the support of small ethnic communities and needed the areas occupied by these communities cleaned of the members of the communities whose allegiance was suspect to ensure that KANU obtained victory in the elections.

C. Historical Injustices among the Ogiek

The Ogiek people of Kenya are a hunter-gatherer forest-dwelling community of approximately 30,000 people throughout the country.²⁷ They are found mostly in the Mau Forest complex that straddles Great Rift Valley Province. The Ogiek have suffered from dispossession of their land, first by the colonial State, then by the Maasai, and lastly by the post-independence State. A more recent government action to this effect was the 1994 scheme to settle other landless people in the Mau Forest who have been encouraged to subdivide the land and register title deeds in their names.²⁸ On two occasions, in 1997 and again in 2001, groups of Ogiek have challenged the Government's intention to dispossess

²⁵ Memoranda to the Constitution of Kenya Review Commission (CKRC), May 2001 (On file with the author).

²⁶ See Mburu Mwangi & Muliro Telewa, 'Keen Rallies Behind Ntimama', *Daily Nation*, MONDAY, 27 January, 1997.

²⁷ Kamau., J. The Ogiek. The History of the forgotten tribe. Rights Features service. Accessed at <http://www.ogiek.org> <accessed on 21st December 2008>

²⁸ Ibid.

them of their lands in the courts. While the courts' decisions were favourable to the Ogiek, either directly or on appeal, the Government is still attempting to implement the decisions.

D. Internally Displaced Persons

The handling of the land question during the colonial period and the resettlement programmes in the immediate post-independent period have brought forth contestations among land owners in parts of Kenya particularly in the Rift Valley. These are referred to as historical injustices defined in the draft National Land Policy as

land grievances which stretch back to colonial land policies and laws that resulted in mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date.²⁹

Land related violence has erupted during election periods since 1992 with pressure being brought to bear on members of communities who have settled in land belonging to other communities to leave and return to their 'homes'. This has resulted in large numbers of people being internally displaced. In 1992 violence erupted in different parts of Kenya including the Rift Valley where for instance, the Nandi sub-tribe of the Kalenjin and Kikuyu farmers clashed in a farm called Miteitei situated in Tinderet, Nandi District.³⁰ Similar incidents were witnessed in 1997 and in 2007. The post-2007 violence, precipitated by a contested presidential election result, was the worst in Kenya's history. About 600,000 people were displaced; some of them for the third time, and many of them have not been able to return to their land because of fear of attacks.

To deal with internal displacement, there is need to address the issue of historical injustices by redressing communities who feel that their land was unjustly given to members of other communities. Restitution provides one way of dealing with these injustices.

IV. CHALLENGES TO LAND RESTITUTION

A. Deference To Private Rights And Rights Of States

While all property rights are property rights, it is clear that individual property rights and the rights of states to land and resources have been given a lot more emphasis than those of communities or individuals whose claims are under community rights. Deference to private

²⁹ Republic of Kenya, National Land Policy Formulation Process, *Draft National Land Policy*, May 2007

property rights has resulted in reluctance to deal with the injustices accompanying the acquisition of those rights.

B. Lodgement of claims

In most countries and following from deference to private rights, neither dispossession nor restitution are discussed. Few countries have a legally recognised right to land restitution. In the circumstances, the right remains buried and in most cases, it is denied. When it is eventually recognised, potential claimants may not fall within the categories identified and they may also lack the requisite proof to lodge their claims. Limitation periods may catch up with them leading them to never claiming at all. This does not however diminish their feeling of having been wronged and their needing redress.

C. Cost

The process of restitution is costly and needs to be paid for. Money is required to cater for land acquisition, financial compensation and development grants. Related to cost is the issue of valuation of the land subject of restitution. According to Margolius, a valuer, single valuations as are normally required for land restitution are not cost effective.³¹

More than money however is openness to acknowledge the injustices in dispossession and the magnanimity on the part of the dispossessed and dispossessor in negotiating terms of restitution. There is need to move away from dualism, paternalism and transformation in dealing with restitution. Parties must come to the table with all their costs and ways of dealing with social costs such as injury to pride as a consequence of dispossession, disruption of family and community life dealt with in the same way as value added to the land by the beneficiary of the dispossession.

D. Multiplicity of Claims and Claimants

As illustrated by the Maasai and Ogiek cases above, there are multiple layers of dispossessions that have occurred. There are therefore multiple claims to land and multiple claimants under different tenure systems. Having left the injustices to continue for so long, it is easier to recognise rights selectively based on the power positioning of the rights' holder.

³⁰ Akiwumi Commission, (1999) *Report of the Judicial Commission of Inquiry Appointed to Inquire into the Tribal Clashes*. Available online at www.scribd.com (accessed on 1 November 2008), p. 5.

³¹ Jerry Margolius, Valuation for Land Restitution Purposes, http://www.saiiv.org.za/savaluer/savaluer0199_01.htm (last accessed, 1st Sept. 2006)

However, not addressing the underlying claims remains a threat to the rights of whoever has legal protection as the Narok case above amply demonstrates. The draft National Land Policy in Kenya (2006) has had to acknowledge the existence of historical injustices recognising that in the post independence period the problem of historical injustices has been exacerbated by the lack of clear, relevant and comprehensive policies and laws. It provides for the establishment of mechanisms to identify the injustices since 1895 and the establishment of suitable mechanisms for restitution, reparation and compensation.

V. NEW FORMS OF DISPOSSESSION

Restitution has to contend with new forms of dispossession. These include first, denial of rights on the basis of gender or generation. Formalisation of land rights excluded most women and young men from land and resource ownership and the benefits accruing therefrom. It ignored the customary rights of use and left women and young men at the mercy of the title-holder or legal owner and controller of land. Within the context of broader dispossession, the situation of women and youth is more tenuous.

Second, globalisation entailing uniform trade rules and standards for environmental management exacerbates unredressed dispossession. Sustainable environmental management imperatives in the absence of participation by all persons at the national and local levels can occasion dispossession. For instance, displacement of populations from protected forest and wildlife reserves. The quest for national development to remain competitive in a global world also leads to displacement to make way for investment especially where investment is in minerals and natural resources.

Third, the emergence of new technologies that dispossess people of means of livelihood such as saving seed for the next planting season and access to seeds. While extracted natural commodities have since time immemorial been treated as commodities, plant germplasm was treated as common heritage of humankind until 1992. The extraction of biodiversity for biotechnology applications raises different issues relating to the sharing of benefits among the various participants, from local communities and source countries to transnational corporations and developed countries. Conservation and extraction raise different property rights questions. While the former relates closely to permanent sovereignty over natural resources, the latter hinges more specifically on property rights of individuals and

corporations. For instance biotechnology has given rise to genetically modified organisms that are protected through intellectual property rights. Related to this are genetic use restriction technologies which prevent unauthorized use of either particular plant germplasm, or trait(s) associated with that germplasm’.

The relationship between land rights and intellectual property rights were well articulated in the case of Monsanto Vs Schmeiser, an action against the defendant farmer for “using, reproducing and creating genes, cells and canola seeds and plants containing genes and cells claimed in the plaintiff’s patent (...) without the consent of the plaintiffs for the infringement of the defendants.” Judge Mc Kay held in this case that:

‘a farmer whose field contains seeds or plants originating from seed spilled into them or blown as seeds in swaths from a neighboring land or van flowing from germination by pollen carried onto his field from elsewhere by insects, birds or by wind, may own seeds or plants on his land even if he did not set about to plant them. He does not, however, own the right to use of the patented gene or of the seed or plant containing the patented gene cell...’³²

This raises issues of the rights of a land-owner vis à vis those of the owner of a patented gene contained in seeds. Considering common property jurisprudence that holds that what is on the land belongs to the land, this decision raises concerns for dispossession on account of cross-pollination of conventional plants by transgenic ones.

Fourth and related to three is biopiracy. This is the appropriation of traditional resources and knowledge associated with them through conversion of those resources and knowledge into proprietary forms without the consent of the original holders and with no sharing of benefits from the sale of the products. This constitutes dispossession of the nurturers of the resources and holders of knowledge related thereto (See Boxes 1 and 2).

Box 1

In 1998, Genencor commercialized an extremophile enzyme Puradax cellulase enzyme derived from a new *Bacillus* species found in the Rift Valley soda lake. In 1999, Genencor introduced IndiAge Neutra, a cellulase derived from a new species of strictly alkaliphilic *Streptomyces*. The bacterium was isolated from the soda mud flats on the shores of the highly alkaline Lake Nakuru in Kenya. For economic production, the endocellulase gene was cloned and expressed in *Streptomyces lividans*. This innovative, easy-to-use enzyme product can treat denim to create the popular stonewashed look. Genencor continues to produce new products by accessing the microbial gene pool. Annual income from the enzyme ranges between 30 and 120 million USD

³² Monsanto Canada Inc. v. Schmeiser, Supreme Court of Canada, Judgement of 21 May 2004, 2004 SCC 34, at §6.

Source: Kent Nnadozie et al, *African Perspectives on Genetic Resources: A Handbook on Laws, Policies and Institutions*, Environmental Law Institute, Washington DC (2003), p.141

Box 2

In the 1970s the US National Cancer Institute (NCI) invested in extensive collection of *Maytenus buchananii* from Shimba Hills of Kenya. NCI was generally led by the knowledge of the Digo communities—indigenous of the Shimba Hills area—who have used the plant to treat cancerous conditions for many years. More than 27.2 tonnes of the shrub were collected by the US NCI from a game reserve in the Shimba Hills for testing under a major screening programme.³³ The plant yields maytansine which was considered a potential treatment for pancreatic cancer. All the material collected was traded without the consent of the Digo, neither was there any recognition of their knowledge of the plant and its medicinal properties.³⁴ A similar example in South Africa relates to the *hoodia* plant used by the San Community when going on long hunting trips. In 1996, scientists from the Council for Scientific and Industrial Research (CSIR) isolated P57 as the hunger suppressing chemical from this plant and later patented it. CSIR later licensed a UK-based firm, Phytopharm, to further develop and commercialize the P57 component. Phytopharm then licensed Pfizer to develop and commercialize P57.

Source: Juma, Calestous, *The Gene Hunters*, Zed Books (1989)

Restitution for historical injustices is therefore compounded by new and emerging forms of dispossession that are occurring at international, regional, national and local levels. Globalisation has led to connections between these realms leading to the entanglement historical issues and grievances (such as poverty and injustice) with emergent forms of dispossession.

VI. CONCLUSION

There is need to acknowledge claims and claimants of historical injustices and dipossessions. This should be followed by identifying suitable means of redressing them devoid of paternalism and assumption that some rights and interests are more superior to others. This calls for dialogue and recognition that the value of land and resources associated with it go beyond monetary value to people's identity and general social and political expression. Restitution is not just about giving land or money back; it is about empathising with people's plight and situations and finding the best ways of compensating them and including them. In some cases, giving land back may not even be feasible. Restitution is about getting people to identify with the forms of property management and to feel that their best interests are taken

³³ Juma, Calestous, *The Gene Hunters*, Zed Books (1989).

³⁴ Ibid.

care of through guaranteed access to resources and sharing of benefits even if they are not the owners or controllers of the resources.

The clamour for restitution cannot be wished away. It must be confronted squarely using all mechanisms – social, political, cultural and economic. Failing to confront dispossession and clamours for restitution is akin to ignoring a festering wound that is covered with band aid. It is made worse by new forms of dispossession and any rights to land and resources are nuanced by the festering wound underneath. It may even flare up to become cancerous causing war and social disintegration.

Aristotle stated, “if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints—when either equals have and are awarded unequal shares, or unequals equal shares”.³⁵

This in my view is not about equal shares of land because land is finite and it is also subject to dynamic relationships. This is about inclusion for all in identifying the injustices, naming them, discussing them and cooperatively finding solutions to them.

³⁵ Aristotle, *Nicomachean Ethics*, 350 B.C.E Translated by W. D. Ross