

Conceptualizing and Defining Historical Land Injustices;

A route not taken before?

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A definition of 'historical land injustices' (HLI) is a challenging task. This is so, not least, because a discussion of HLI is often a delicate and complex subject to address in Kenya. Even when a HLI is recognized and acknowledged there is little clarity on how to define it. Attempts to define HLI run into technical and methodological challenges.

It is important to observe at the outset that neither the constitution nor the statutes define HLI. A characterization of HLI addresses itself to a convolution of events, which relate to cause and effect; the past, present and future. Defining HLI requires an appreciation of history that looks backwards while facing forward. Any definition of HLI must have the end in view. We must bear in mind the consequences of any given definition. What will it entail? What will the scope, range and breath of the definition involve?

There are two possibilities of rendering a definition on HLI: One, it may be styled either as an exclusive definition or two, as an inclusive characterization with a prospect of elongation through interpretation by a court established under the relevant Statute.

Perhaps it is important to point out that an understanding of the constituent elements of HLI may provide conceptual clarity and a firm ground on which to pitch a definition. A central theme in rendering a definition of HLI is taxonomy in sufficient width to cover all probable contexts and yet effectively restrictive so as not to open fraudulent claims that have no merit.

In seeking to define HLI several issues require clarification. First, how do you determine the cut off dates? What are the unique events in our nation's history that should direct our choice of a commencement and cut off date? In other words what is the bracket of historical period to which the statute should relate? Do we pick events in the history of the country and use them as point marks? What will such choices bear in mind? For example when Kenya became a British protectorate, gained independence or promulgated our current constitution? This dilemma is not

surprising since the issue is not really the period when a problem started manifesting itself. Rather, the historicity of the HLI problem lies in its widespread and resilient nature; calling for a comprehensive and long-term solution, which is all-inclusive.

Secondly, what is 'land?' Article 260 of the constitution defines land in these terms; 'land' includes—the surface of the earth and the subsurface rock; any body of water on or under the surface; marine waters in the territorial sea and exclusive economic zone; natural resources completely contained on or under the surface; and the air space above the surface;

In a capitalist paradigm, land is subsumed in the generic concept of property. It is therefore a commodity for exchange in the market place. In African epistemology land means much more: land is the basis of all life on earth and there can be no life detached from land.¹ Land is not only the material and spiritual basis of life for individual human beings but is also a component of the means of social production and reproduction, and statehood.² Thus in an agrarian economy, like Kenya, land not only defines social status, it is the only means to survival. Moreover, as Africans we are organically tied to land. To the African, land is more than mere property. For this reason, land rights and the remedying of HLI are important not only for economic empowerment but as a means of addressing the prevailing social and political inequalities and disparities.

Thirdly, we may seek to answer the question: What is an 'injustice'? It is a violation of another's rights or of what is right; lack of justice. It is when a thing is not fair or just. It is an injury; a wrong. An injustice signifies an absence of justice. But is the finding of injury founded on law, its violation or abuse or the absence of positive law? What do we make of an injustice aided by law?

In seeking to define HLI we must realize that competing historical claims to land can be sources of conflict within countries and the cause of wars between countries. The crafting of a definition must therefore be fashioned so as to provide a remedy for HLI and yet maintain political unity and stability and preserve and support economic development. This is especially the case in Kenya

¹ Gutto Shadrack Re-theorising and re-conceptualizing land, sovereignty, socio-economic rights and responsibility in the context of pan-Africanism and African renaissance in the 21st Century International Journal of African Renaissance Studies 5 (1) June 2014.

² Ibid.

where 'colonization and postcolonial policies oversaw expropriation of large tracts of land to the detriment of local communities'³ but which lands may already be under some form of economic function. The reality of our situation is that a resolution of land claims portends a conflict between legality and the multiple dimensions of justice: distributive, retributive, procedural, and restorative justice.

As we think about a definition of HLI we cannot help but ask: Can and should HLI be redressed? Who should be held accountable for HLI? Who should be held responsible to offer redress for HLI? Should the descendants of persons and communities who have suffered due to HLI be compensated?

Further, why should an injustice that occurred decades ago, by people now dead against people, who are also now deceased, be a matter of justice today? On one hand, it would appear obvious that the past informs the present and the future and that a remedy of yester-years should clear the path for a clean future. Within this thinking, it would be morally insensitive and possibly unfair to simply dismiss all claims to HLI and ask the victims to forgive the perpetrators and simply move on. Yet, on the other hand, the passage of time changes the legal and political terrain of landholding even within communities that have suffered HLI. Does this also change our appreciation of the moral significance of the past? In addressing HLI are we dealing with morality or law? Is a law dealing with HLI concerned only with the past? These issues demonstrate that the challenge of dealing with HLI is its intricate association with contemporary political philosophy, such as the nature of justice, rights and responsibility. But, also, quite apart from law and morality, addressing HLI is also a matter of dealing with political questions of the moment.

In my view, a credible definition of HLI must have within sight several interrelated questions: What is the level of normative significance that we must accord the past as we look to the future? How far into the past ought we to look? How far into the present may we look? Does the scale of alienation matter? Should the remedy be in form of restoration, reparations or memorials? Who is owed a remedy? Who should remedy the injustice; the state or the beneficiaries of HLI? Finally,

³ Two Review Commissions (the CKRC and the Njonjo Commission) concluded that historical land claims must be redressed as a sure means of dealing with insecurity, landlessness and poverty among the majority of citizens.

what is the political and economic effect and consequence of remedying HLI? Is this likely to open a Pandora box that may interfere with the political economy of the state and threaten nationhood?

What then is a possible definition of HLI? Several options may be considered. Firstly, HLI may be perceived as prejudices, inequalities and wrongs suffered by persons whose land was alienated either in violation or abuse of the law. What cut off date do we give this description? This definition requires certain refining. For example, were land alienations irregular because they were done in violation of the law or in spite of the legal procedures being followed?

Secondly, HLI may be defined as 'a land grievance, which stretches back to the colonial land policies and laws that resulted in the disinheritance of communities from their land.'⁴ Such grievances were not resolved upon the attainment of independence. They have persisted through out the Kenyatta and Moi regimes.'⁵

Thirdly, HLI may be defined as 'those harms and wrongs committed by individuals, groups and institutions (including rulers and regime elite) against other individuals and groups who may be dead but whose descendants are alive.'⁶ These are grievances that stretch back to colonial land administration practices and laws that resulted in mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date.⁷ It is important to note that whilst these suggested definitions provide a thinking background no final definition has been crafted as yet. The TFHLI is still in the process of research and considerations on this matter.

Overall it will be observed that HLI relate to wrongs committed in a setting that has become historical by virtue of some fundamental change in the social political structure such as colonial rule, non-representative government or a break in governance. This presumes a cessation in the continuity of the nature and scale of the injustices. The challenge for Kenya is the discordance in the normative framework in which we are trying to resolve HLI because, whilst we seek to address the history of the past, we are busy creating history for the future in much the same terms and with the same consequences.

⁴ Kenya Land Alliance, Issues Paper no. 2/2004 The National Land Policy in Kenya addressing Historical Injustices.

⁵ Ibid.

⁶ Historical injustices; A complimentary Indicator for Distributing the Equalization Fund CRA Working Paper No. 2012/02.

⁷ National Land Policy Sessional Paper No. 3 of 2009

