

POLICY BRIEF

RIGHTING THE WRONGS: HISTORICAL INJUSTICES AND LAND REFORMS IN KENYA



**KENYA HUMAN
RIGHTS COMMISSION**

Introduction

For historical reasons, Kenya inherited a highly skewed system of land ownership at independence in 1963. British colonialism in Kenya was not merely administrative. Rather, it was accompanied by massive and widespread land alienation for the benefit of settler agriculture. As a result the best agricultural land-the White Highlands and the adjacent rangelands were taken from the Africans, without compensation, and parceled out to white settlers. Colonial legislation was enacted to legalize this process. As a result, whole communities lost valuable land that they had occupied over generations. The customary land tenure systems under which Africans had guaranteed claims over the land they occupied were supplanted by the registration of individual title holders under the colonial system.

Independence failed to reverse this loss of African land. The colonial legislation protecting the rights of the land title holders was inherited by the first post-independence government of President Jomo Kenyatta. The Constitution negotiated at Lancaster House in London, provided for an elaborate protection of private property without reference to the history of its acquisition. The successive post-independence governments have continued to uphold the sanctity of privately owned land to the frustration of the large number of Kenyans who had been dispossessed through colonialism leaving them squatters on their ancestral land or landless poor. This situation demands an equitable land distribution process that is capable of providing livelihood opportunities to the landless poor as well as redressing colonial wrongs and re-establishing justice in the land sector.

The severity of the problem of historical injustices has repeatedly been articulated to the various forums established by the government, including the Constitution of Kenya Review Commission, the Presidential Commission of Inquiry into the Land Law System of Kenya and the Presidential Commission of Inquiry into the Illegal/Irregular Allocation of Public Land and the National Land Policy Formulation Process. The Draft Constitution of Kenya which was rejected at a referendum in 2005 recognized this problem of historical injustices and required the government to effectively address them. This is in recognition of the fact that equitable access to land is an essential precursor for economic development in Kenya, as most primary and secondary economic activities- agriculture, tourism, mining, pastoralism and agro-based manufacturing sector -are dependent on land.

The failure by successive governments to adequately deal with historical injustices has allowed the grievances to fester and the problem to ferment into a national crisis. Reports by both government and non-governmental agencies have recorded that the violent clashes and conflicts over land-based resources in the Rift Valley and other parts of the country in the 1990s were ignited by the political exploitation of these grievances. Since then, far from subsiding, these kinds of clashes appear to have gained momentum nationwide. The various studies of the land question in Kenya have established the inextricable linkages between the problems of poverty, insecurity and landlessness.

Key Concerns

Squatter Problem

The Draft National Land Policy developed by the government has identified the problem of squatters as a historical product. Although the precise number of squatters is unknown, it is clearly a problem that dates back to the colonial period when Africans were declared Tenants at Will of the Crown following the Crown Lands Ordinance of 1915. Most of the displaced peasants never got back their

land after independence owing to the limitations of the post-colonial land resettlement policy. After independence, the Kenyatta government opted for a land resettlement programme based on a “willing buyer-willing seller” system rather than direct land repossession and redistribution. However, two serious shortcomings undermined this land resettlement program. First, the market-based system required mobilization of financial resources which many of the landless did not have.

These landless were the poorest of the poor and the loan-scheme that was established to advance credit to the landless to enable them purchase land did not improve their livelihoods and development as many were unable to repay the loans leaving them in an insecure tenure regime and totally inhibiting their economic potential. As a result, the middle class and other economic elites with the resources bought them out of the acquired land on foreclosure. Second, corruption in the land resettlement programme allowed the corrupt political and economic elites within the Kenyatta government to acquire land that was meant for the landless. As a result a large number of the genuinely landless lost out on the opportunity and remain locked in a cycle of poverty which further denies them opportunities for improved livelihoods and development.

In every corner of the country today, there is a significant number of squatters who trace their landlessness to historical injustices and the failure of the post-independence governments to undertake a comprehensive resettlement programme. Their status as squatters has also left them in grinding poverty and vulnerable to all manner of human rights violations, including incessant evictions. This historical failure has given rise to a deep seated sense of grievance among many of these squatters.

Coastal Land Problem

The widespread landlessness in the Coast Province has unique historical origins. It is traced back to the decision by the Colonial government to introduce a system of individual land title deeds under the Land Titles Ordinance to those who claimed ownership rights within the Ten Mile Coastal Strip. Unfortunately, only a few of the local inhabitants were aware of the process and few availed themselves of the opportunity to register land in their names. As a result, the land that they inhabited was declared Crown Land, which later became Government Land at independence.

However, many people of Arab descent acquired vast pieces of land in the Ten Mile Coastal Strip, although they did not occupy it. To this day, they continue to collect rent from the local inhabitants as absentee landlords. This problem is a source of a deeply-felt grievance by the local inhabitants who find themselves squatters in their ancestral land.

The Coastal land problem is further perpetuated by the fact that after 1963, the independence governments embarked on various initiatives to create new economic opportunities that did not address the Coast peoples ‘land hunger’. Initiatives such as the development of tourism industry and the corruption riddled re-settlement programmes, have all failed to address colonial wrongs at the Coast.

Displacement Occasioned by Land Clashes

The politically instigated violence of the 1990s in the Rift Valley province left a large number of Kenyans displaced from their land. Many of the displaced had acquired title to their land through purchase or as part of resettlement by the government. Although the Rift Valley was the most affected, the clashes spread to all the parts of the country, including Western, Nyanza and Coast Provinces. Some of those displaced have never managed to go back to their land, which in some cases, has since been occupied by politically influential individuals. This has spawned a large number of individuals who legally own the land, but cannot in practice use or access it owing to lack of security.

Other Community Land Claims

Certain communities that lost land under colonialism still lay claim to some of the land which is now occupied by other communities. The Pokot and the Maasai claim that they were pushed into marginal areas by the colonial government which still accounts for the persistent problems they face. The Pokot claim parts of present-day Trans-Nzoia district in Western Rift Valley. The Maasai on their part claim that they were cheated out of their land by the Anglo-Maasai Agreements of 1904 and 1911. These lands are today occupied by members of other communities who purchased them and acquired title deeds after independence. This complicates the process of redressing historical injustices against these communities.

Key Policy Recommendations

1. Forensic Audit

The government should undertake a comprehensive audit of the resettlement programmes that have already been implemented since independence to establish the extent to which they benefited the landless. It is important that accurate data is collected on this, so that the actual status of those historically dispossessed of land is established. This is important because the goal of redressing historical injustices is to restore land and to provide other restitutionary remedies to those dispossessed, in such a way as to provide support to the vital process of reconciliation, reconstruction and development.

2. A Holistic Process

In consultation with local communities, civil society, the religious sector and local leaders, the government should embark on an inclusive, comprehensive, consultative and realistic process of redressing historical injustices once and for all. The new constitutional dispensation shall provide a legal framework for redress of historical land claims against the state. Therefore, the Draft Land Policy recognizes that successive governments have failed to redress historical injustices in a holistic manner. A holistic approach must pay due regard to the rights of other communities that have acquired rights over the years. It is not practical to suggest that individuals who have acquired their land legally over the years be evicted to make way for the re-settlement of the landless. Instead, this process must devise creative ways of balancing the rights of both the landless and those who currently hold legal titles to the land. The parameters of historical injustices redress process shall be determined by the new constitutional dispensation and the Land Restitution Law, which shall elaborate on qualification criteria, forms of restitution, compensation and due process of land claims.

3. Repossession of Illegally Acquired Land

Where it is established that individuals have illegally acquired land, this should be repossessed for the purposes of resettling the landless. There is need to establish an independent and credible mechanism for ensuring transparency in this process. Land repossession can easily precipitate chaos and upheaval as has happened in Zimbabwe. For this reason, it is necessary that the process be based on a legal and policy framework, be predictable and open to public scrutiny.

4. Alternative Measures in Lieu of Land

Since land is a scarce and finite resource, it is necessary to recognize that it might not be possible to settle all those who have been dispossessed over the years. It is therefore necessary to come up with innovative measures to redress this dispossession even in the absence of actual land restoration. These could be in terms of affirmative development interventions by the government. In addition, there is need to explore the possibility of initiating forms of transitory tenure where land can be availed for use by the landless on a temporary rental basis. These alternative measures need to be spelt out in a policy and given the necessary legal basis.

5. Absentee Landlordism at the Coast Province

In the Coast province, the problem of absentee landlordism is intertwined with the landlessness of the local inhabitants. Land that is held by absentee landlords should be appropriated for the purposes of resettling the landless local inhabitants. This should be done in a systematic, orderly and open manner.

6. Victims of land clashes

The identity of those who have been displaced by land clashes should be established and their land claims verified through various documents of ownership. As much as is practicable, it is important that those affected by land clashes be resettled in their own land. Where this is not possible, alternative land must be provided and the state should compensate the displaced for the losses occasioned by their relocation. In addition, the state must put in place security and administrative measures to ensure a lasting solution to the problems of land clashes.

7. National Land Restitution Law and Institutional Framework

To ensure the orderly resolution of historical injustices, it is necessary that a legal framework be established. A Restitution of Land Rights Act should be enacted providing for the mechanism of identification, verification and redress of historical land grievances.

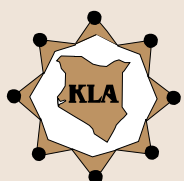
The task of redressing historical land injustices is huge and complex and the establishment of an autonomous institutional framework within the National Land Commission with clear guidelines and systems of handling the redress process is mandatory. To further facilitate quicker, simplified procedures for processing land claims, a variety of institutions such as the Land Claims Tribunal and special desks at District Land Boards and Community Land Boards as proposed by the Draft National Land Policy should be established to fast-track handling of less complicated cases.

Conclusion

To make the historical land injustices redress a success, there must be a complementary infrastructural development. Successful land reform also requires reforming the tenure system so that new landholders will be better placed to access credit that is necessary for diversification of production, the creation of new markets, growth of rural economies, narrowing of the current income gap and better environmental protection. The redress of historical injustices must be linked to comprehensive and radical rethinking of development that transcends the current predominant subsistence framework in land use in Kenya.

References/ Bibliography

1. Kenya Land Alliance, "National Land Policy in Kenya: Addressing Historical Injustices" Issues Paper No. 2/2004
2. Republic of Kenya, *Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land*, (Government Printer, Nairobi, 2004).
3. Republic of Kenya, Draft National Land Policy, 2006



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