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THE LAND QUESTION IN KENYA

LEGAL AND ETHICAL DIMENSIONS

Patricia Kameri-Mbote

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I. INTRODUCTION

Land in Kenya remains the single most explosive issue. It was a major issue in the quest for independence. Various commissions have been tasked with looking into the land question from colonial times to the present time. The Njonjo Commission Report lays out the land question very clearly tracing its genesis to the colonial times when the objective was to entrench a dominant settler economy while subjugating the African economy through administrative and legal mechanisms. It also problematises the issue with respect to the ten-mile coastal strip and the entire country. The land question, the report posits, has over time been shaped by economic, political, social and legal parameters. These include the dependency of the economy on land making the issues of tenure, access, distribution and regulation critical. Indeed contestations over land are at the core of tribal clashes that have been witnessed in Kenya over the years.¹ Most recently, the violence that was sparked off by a disputed presidential poll result had land as one of its underlying causes. The Annan led mediation talks that brought the contending parties together to form a grand coalition government identified land reform as critical to finding durable peace in Kenya.

Looking at the way grievances over land have been articulated over time, it is apt to say that there is not a single land question in Kenya but multiple land questions begging for attention and resolution. The draft national land policy attempts to resolve these issues using different strategies and mechanisms. While there is consensus among Kenyans that the land question(s) need(s) to be addressed and some reports have detailed prescriptions on what should be done, the proposals have not been implemented.² The contention is largely between using land rights to achieve broader goals of justice and equity on the one hand and protecting legal titles to land however obtained. The latter debate is captured within the provisions of Section 75 of the Constitution on the protection of property which is read as making property rights sacrosanct. The former seeks to restructure land rights' holding taking into consideration the gross disparities in land ownership and gender and transgenerational discrimination in succession, transfer of land and land decision making processes.

We argue here that an effective and holistic way of dealing with the land question requires reconsideration of the dictates of legality taking into consideration economic, social, cultural, environmental, political and ethical dimensions from the colonial times to date. Putting out

¹ 1992, 1997 and more recently in 2007.

sacrosanctity of title when past acquisitions and dispositions are perceived as unjust will not result in respect for property rights by those who feel unjustly treated. Moreover, there are other interests over land such as catchment functions and ecosystem services that dictate a reconsideration of the land question. For instance, the case of the Mau Forest, a major water tower in Kenya illustrates that the regime of land rights in Kenya is a barrier to sustainable management of a critical ecosystem and that there is need to consider ways of dealing with such issues when they arise without being unduly constrained by law. This paper proceeds from the premise that land is a very critical resource in Kenya, has multiple values, and as the basis of Kenya's territorial sovereignty, needs to be addressed in such a way as to secure those diverse values. More fundamentally, land has to be dealt with in a way that embeds the greater public interest which is the maintenance of the country's social, political and economic integrity for the best interest of all Kenyans. Other broad issues that require consideration relate to fairness, inclusion and equity. There are categories of persons that have been excluded from land ownership and access such as women and youth. It is important that these categories are addressed in land reform programmes. Pastoralism as a land use has also been marginalised despite its persistence and it needs to be addressed.

This paper is divided into four parts. Part I is the introduction which lays out the purview of the paper and the nature and basis of property rights in land. Part II outlines the historical and contemporary manifestations of the land question. Part III looks at the legal and ethical considerations of the land question(s). Part IV outlines the draft National Land Policy Proposals for addressing the legal and ethical dimensions of the land question underscoring the fact that legality must be tempered by considerations of justice if stability in property relations is to be achieved in Kenya. Part V comprises the conclusion.

A. PROPERTY AS A SOCIAL RELATIONSHIP

It is the duty of law as the expression of the will of the people expressed through the sovereign to provide mechanisms for the protection of property in the interest of all its citizens. This brings to the fore the conception of property as a social relationship even whilst it has an individual side. The Ghanaian Constitution captures this in the following parlance

The State shall recognise that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the State shall recognise that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of

² Bomas Draft Constitutions and the Ndung'u Report on Illegal/Irregular Allocations of Public Land.

Ghana, of the stool, skin, or family concerned and are accountable as fiduciaries in this regard.³

This supports the social utility theory view that law should promote the maximum fulfillment of human needs and aspirations and that legal protection of rights should do that. The social utility theory places emphasis on the individual as the locus for the grant of rights. Within a country with plural legal entities such as Kenya and Ghana, it is clear that there is need to include other actors such as communities and families.

Property deals with value enhancing relationships regarding assets as the legal enforcement of property rights enhances the owner's probability of retaining possession. It could mesh with assets that are not capable of being commodified⁴ as property such as belonging to a group for a bereaved widow, kinship and other familial ties. Indeed the value of property increases with each additional subscriber and the utility of property draws from the network of subscribers who can keep away the free-riders. The state provides the mechanism for public enforcement of property as a public good ensuring that the law standardizes forms of property and reduces the costs of investigating.

B. LAND AS PROPERTY

Land as property draws from the universality of the theory of property in time and space with the earliest theoretical explanations of property being *occupation where* property belongs of right to him who seizes it first. Other theoretical explanations of property draw from:

Natural Rights – property right as a natural right, part of nature;

Social utility – property as index of social progress since property was originated for social reasons and has developed under public sanction;

Labour - real title to property derived from the toil and trouble experienced by creating it;

Legal theory – whatever is recognised as property by law is deemed to be property and land is one. The legal theory of property tells us *what* is property as opposed to the economic theory which explains *why* something is property.

The term land has a wide connotation both in African customary laws as well as under modern systems of law. Its subject matter includes the surface of the soil, the things on the soil enjoyed as part of the land such as the air, water and growing trees or artificially fixed attachments such as houses, buildings and other structures. It also encompasses parts of

³ Constitution of Ghana

⁴ See Margaret Jane Radin explaining the distinction between fungible (not unique and not linked to persona) that is easily amenable to transaction in the market and non-fungible property (unique and

buildings with the division anticipated to be either vertical or horizontal or otherwise and includes tenancies, easements, rights, privileges or benefits in, over or derived from land.

The maxim *Cuius est solum eius est usque ad coelum et ad inferos* (He who owns the land owns everything reaching up to the very heavens and down to the depths of the earth) underscores the sacrosanct nature of property rights in common law which vested the owner of property with all the rights necessary for enjoyment of property. By dint of the maxim, any conveyance of land includes all erections, fixtures, sewers, drains, watercourses appertaining to the land. This was further amplified by the maxim *Superficies solo cedit* (a building and other constructions become part of the ground). It is therefore not surprising that commentators like Blackstone should opine that

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right to property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.⁵

This has been explained in the context of Kenya by Miller who notes that a land fever grips Kenyans intertwining modern and traditional values since it offers basic survival opportunities in an insecure situation where there is no welfare system and no other forms of wealth are available.⁶ This view colours the value of land and land use patterns.

The question to ask at this point is whether the institution of property rights in land as currently enforced in Kenya enhances social relationships and whether it takes on board the social dimensions that have great implications on its efficiency and effectiveness. In answering that question, it useful to look at some of the pointers to a working property rights system namely: predictability, stability, just and fair. Land in Kenya is currently designated as government land, trust land and private land. The most predominant mode of land holding is trustland which is managed by local authorities on behalf of communities. Trustland was further divided into two, that awaiting adjudication and registration under the Registered Land Act and that which was to remain as trustland. The process of adjudication and registration has not been completed and the management of trustland has over the years grossly undermined communities' rights and interests defeating the original intention. Tenure is not secure for people living in these lands.

personal as part of owner's personality; sentimental, emotional link) whose value to the owner is beyond the market.

⁵ Blackstone, Commentaries on Laws of England

⁶ See ROGER YEAGER & NORMAN K. MILLER, WILDLIFE, WILD DEATH: LAND USE AND SURVIVAL IN EASTERN AFRICA 98 (1986).

Another category of landholding which traverses both community and private land holding is the group ranch system.⁷ The group ranch status in Kenya is granted to a group of herders that is shown to have customary rights over the range or pastureland in question. Group ranches have progressively been converted to individual holdings and the land use changed from pastureland to agricultural holdings. This circumvents the original intention of keeping the integrity of the range and in some areas has impacted negatively on the conservation and management of wildlife.

While individual land holders, who comprise a minority of Kenya's population, enjoy predictable property rights, our argument is that the competing contestations over property held under formal law makes such rights unpredictable. The contestations arise because of a number of reasons. *One* is the creation of private land rights from trustland without consultations with the communities. *Two* is the creation of private holdings in group ranch areas without considering the compatibility of land uses and the interests of the broader community. *Three*, there may exist gross disparities in land holdings between people living in the same area. *Four*, there are dispossessions such as historical injustices, gender and generational exclusions and marginalisation of some land uses and users. These have lingered for a long time creating perceptions of unfairness and wrong in the creation of land rights and thus nuancing any claims to these rights. The possession of a legal title to property in these circumstances does not guarantee uninterrupted enjoyment of the property precisely because the legal title is laced with contesting claims. Land as a social relationship depends principally on the acceptance by one's neighbours of the legitimacy of their claims and it is this acceptance that makes people keep off. Where people perceive some inalienable rights in the *res* that is claimed as property by another, the costs of protecting the property rise exponentially.

The 'bundle of entitlements' over land is as extensive as is the importance of land in a country such as Kenya where land is critical to the economic, social and cultural development of the country; is linked to sovereignty and was a key factor in the struggle for independence; is a politically sensitive issue and culturally complex; and has spiritual and religious dimensions in communities that perceive it as a host of the spirit of the community and the residence of the deity. The question to be asked at this juncture is whether given the

⁷ See REPORT OF THE EAST AFRICA ROYAL COMMISSION OF 1953-1955, Cmd. 9475 (1955) concluding the policy on land tenure in the East African Protectorate as Kenya then was, noted that while individualisation of land ownership should be the main aim, such ownership should not be confined to

importance of land, the bundle of entitlements should vest in any one person or entity. Decisions may need to be made about unbundling land entitlements and vesting diverse aspects on diverse entities while securing the broader public good over the land. The National Land Policy proposes three possible loci for entrusting the bundle: Individual; Community; National Land Commission. This approximates to the different types of landholding identified.

II. ORIGINS OF THE LAND QUESTION

The Njonjo Commission and the draft national land policy both trace the genesis of the land question from the colonial times when the objective was to entrench a dominant settler economy while subjugating the African economy through administrative and legal mechanisms. It also problematises the issue with respect to the ten-mile coastal strip and the entire country. The land question, the report posits, has over time been shaped by economic, political, social and legal parameters. These include the dependency of the economy on land making the issues of tenure, access, distribution and regulation critical. The political nuance of the land question is pegged to the administrative and political control of the economy based on land. The land-social structure nexus is clearly discernible in the African economy where the communities remain largely dependent on land for livelihoods as well economic activities. Law's functions in this context and from a historical perspective has been instrumentalist and geared to secure the dominant actors' interests both to give it legitimacy as well as to entrench it. The process of land tenure reform, it has been argued, introduced a novel and alien concept of property relations in Kenya, namely, the state-land relationship with the assertion of the protectorate as a political entity owning land and granting to property users subsidiary rights.⁸ At the time of independence, there were three substantive regimes in property law⁹ and five registration systems¹⁰ supported by administrative institutions to effect the objects of the regimes. The net effect of this was to perpetuate a dual system of economic relationships consisting of an export enclave controlled by a small

individuals but could also be extended to groups such as companies, co-operatives and customary associations of Africans.

⁸ See H. W. O. OKOTH-OGENDO, TENANTS OF THE CROWN: EVOLUTION OF AGRARIAN LAW AND INSTITUTIONS IN KENYA noting that the introduction of new tenure system constituted "legal-structural authoritarianism". This is the origin of government ownership and eminent domain theory in property relations in Kenya. See also NORMAN LEYS, THE COLOUR BAR IN EAST AFRICA (1941).

⁹ The Transfer of Property Act of India, 1882, the Registered Land Act, Cap. 300 of the Laws of Kenya and customary law

number of European settlers and a subsistence periphery operated by a large number of African peasantry. The duality was manifest in:

- Systems of land tenure based, in the one case, on principles of English property law and, in the other, on a largely neglected regime of customary property law,
- A structure of land distribution characterised by large holdings of high potential land, on the one hand, and a highly degraded and fragmented small holdings on the other;
- An autonomous and producer controlled legal and administrative structure for the management of the European sector, as opposed to a coercive control structure for the African areas; and
- A policy environment designed to facilitate the development of the European sector of the economy by under-developing its African counterpart.

A. COLONIAL UNDERPINNINGS OF THE LAND QUESTION

It was expected that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of that legacy. This did not materialise and the result was a general re-entrenchment and continuity of colonial land policies, laws and administrative infrastructure. This was because the decolonisation process of the Kenya colony represented an adaptive, co-optive and pre-emptive process which gave the new power elites to gain access to the European economy.¹¹ It had to be moulded firstly, in a way that allowed the settlers to adapt to the changed economic and political situation by identifying new centres of influence that were not overtly political. Secondly, it had to achieve the aim of socialising the new elite into the colonial political, economic and social patterns to ensure that this elite was able to rule functionally on an inherited political structure and co-operate with the outgoing rulers. Finally, the process was geared towards preventing the mobilisation of a nationalist base that would be opposed to continuation of colonial policies after independence.¹² Property rights protection was deemed imperative for the conclusion of the independence talks held in Lancaster House from 1960-1962.¹³ Having worked out an acceptable bargain, the new rulers set about consolidating their power in the new state. The issue of the landless natives proved a thorny one for this new government prompting it to institute measures to

¹⁰ Registration of Documents Act (Cap. 285), the Registration of Titles Act (Cap 281), the Government Lands Act (Cap. 280) the Land Titles Act (Cap.282) and the Registered Land Act (Cap. 300)

¹¹ See Gary Wasserman, *The Independence Bargain : Kenya Europeans and the Land Issue 1960-1962*, 11 J. COMM. POL. STUD. (1973).

¹² *Ibid.*

¹³ See REPORT OF THE KENYA CONSTITUTIONAL CONFERENCE (1962).

appease the vocal Africans still clamouring for the land taken from them.¹⁴ Within a few years into the independence period, small holders in Kenya had become the main driving force behind agricultural production.¹⁵

The alienation of customary African lands formed part of a larger pattern of restructuring African land use systems.¹⁶ The introduction of tenure reform in Kenya leading to individual rights to land was not informed by the needs of agricultural production or ecosystem sustainability. It was informed by a perceived need by the colonial authorities to entrench themselves firmly in Kenya and maintain the rights they had to land without having to give back any of them to the natives. The African landed gentry, a small and very powerful minority, proved invaluable and ensured that property rights systems introduced during colonialism continued operating even after power was passed on to the new government at independence.¹⁷

Thus the granting of property rights to the ordinary Kenyans was more in a bid to justify the rights already granted to the settlers and the elite Kenyans.¹⁸ The content of these rights was only co-extensive with the latitude the state permitted the property holder given the insulation of these ordinary Kenyans from the effects of property rights so as to prevent massive landlessness.¹⁹ The assertion that a privilege or liberty is valueless if its holder does not have the economic or physical strength to use it rings very true for ordinary Kenyan property rights holders. Indeed most African communities whose entire existence was predicated on land and environmental resources perceived colonial policies as a direct intervention in the relationship between them and their means of subsistence and production.

¹⁴ The white highlands remained settler occupations and the settlers who wanted to divest themselves of rights in them sold their land for full value to Africans who could afford to buy it. Settlement schemes were however established in the Rift Valley to accommodate the landless. Some Africans questioned the repayment of loans advanced by the British government to the independence government to buy settler farms for resettlement of Africans. See Ann Seidman, *Agricultural Revolution*, 7 E. AFR. J. 25 (1970) and J. OGINGA ODINGA, NOT YET UHURU (1967).

¹⁵ See Aaron Segal, *The Politics of Land in East Africa*, XIV AFRICA REPORT 46 (1967).

¹⁶ See BIODIVERSITY SUPPORT PROGRAMME (USAID, WWF, NATURE CONSERVANCY, WRI), AFRICAN BIODIVERSITY: FOUNDATION FOR THE FUTURE 4 (1993).

¹⁷ See SORRENSEN *supra* note **Error! Bookmark not defined.** See also NG'WENO OSOLO-NASUBO, A SOCIO-ECONOMIC STUDY OF THE KENYA HIGHLANDS FROM 1900-1970: A CASE-STUDY OF THE UHURU GOVERNMENT (1977).

¹⁸ See REPUBLIC OF KENYA, AFRICAN SOCIALISM AND ITS APPLICATION TO PLANNING IN KENYA (1965).

¹⁹ The registration statute in Kenya was accompanied by the Land Control (Native Lands) Ordinance whose purpose was to control all dispositions in registered land including transmissions by way of succession except where no sub-division was involved.

B. POST-INDEPENDENCE NUANCES OF THE LAND QUESTION

Immediate post-independence handling of the land question brought forth other contestations over land. The Swynnerton Plan²⁰ had recommended tenure reform through the consolidation of land holdings of families into one, followed by the adjudication of property rights in that land and the registration of individuals as absolute owners of land adjudicated as theirs. This process coincided with increased political agitation among Kenyans for the return of land that had been taken by the settlers. The tenure reform process coincided with a deteriorating political climate centred on the land issue and this undergirded the handling of the land question in post-independence Kenya. *One* was the grant of land belonging to freedom fighters to loyalists during the Mau Mau revolt and the insulation of the ensuing land rights from contesting claims.²¹ For instance, a large part of Central Province was consolidated in 1956 with a state of emergency in place.²² The net effect of these laws was to close avenues available to aggrieved landholders and dispossessed peasants. Subsequent laws on land tenure adopted these provisions.

Two, was the resettlement programme through which the government allocated land to squatters in parts of the country other than where they emanated from, principally the Rift Valley and the Coast. The perception that ‘outsiders’ had been brought to take land belonging to ‘insiders’ without taking into account the rights and interests of the ‘insiders’ has made the ‘outsiders’ vulnerable as their rights to land are contested. The ‘outsiders’ comprise not only the resettled people but people who bought land either through land buying companies or other private transactions.

Three is the failure of post-independence national leaders to craft a cohesive national polity resulting in people relying principally on their tribal/ethnic alliances to access resources including land. Successive governments, particularly the Kenyatta and Moi ones have used allocation of public land to reward supporters, gain favours from its supporters or to ensure political patronage. The quest for different ethnic communities to get one of their own in

²⁰ See R. J. M. Swynnerton, A PLAN TO INTENSIFY THE DEVELOPMENT OF AFRICAN AGRICULTURE IN KENYA (1954).

²¹ African Courts (Suspension of Land Suits) Ordinance was passed in 1957 to bar all litigation to which the 1956 Rules applied.

²² The Kikuyu districts of Kiambu, Nyeri and Fort Hall (now Murang'a) (comprising Central Province), and Embu and Meru (comprising part of Eastern Province) were among the first areas where tenure reform was carried out. See e.g., figures given in J. D. MacArthur, *Land Tenure Reform and Economic Research into African Farming in Kenya*, 8 E. AFR. ECON REV. 82 (1961). Consolidation consisted of the process of amalgamating all the pieces of land owned by one person to determine the acreage such person was entitled to. It would be followed by adjudication, namely, a determination of the rights each person to that land and then registration that vested absolute rights in the registered proprietor to the land.

State House has a lot to do with perceived enhanced access to resources that ‘their Man’ will ensure going by past regimes. Consequently, there are very high stakes in each general election for different ethnic communities and their allies. Interestingly, Moi’s defence of the single party state was based on his belief that multi-party politics would undermine ‘the State, polarize the country along tribal lines and plunge it into ethnic violence’.²³ His prophesy has been fulfilled because politically instigated tribal clashes touching on land have been witnessed in Kenya from the first multi-party election in 1992 to the 2007 one which was by far the worst.

Four is the persistence of customary practices and beliefs that marginalise women and the youth and exclude them from land ownership in favour of older males. With the HIV AIDS pandemic, many women and children have lost access to land to male relatives of the deceased husband because of the customary belief that women cannot own land and the minority legal status of children. The emergence of child headed households necessitates a reconsideration of the exclusions.

Forty years after independence, the land question is still a vexing one. This can be attributed to a number of issues which are well documented in the Issues and recommendations report produced as a background to the National Land Policy. These include:

- Over-emphasis on land as the major productive resource;
- Rapid population growth resulting in severe land pressure and fragmentation of land holdings into sub-economic holdings especially in Central, Eastern slopes of Mount Kenya and Western Kenya;
- The breakdown in land administration and land delivery procedures;
- Over-centralized and inaccessible land administration and land delivery procedures;
- Rapid unplanned urbanization and resultant uncontrolled developments;
- Diminishing forest cover that threatens survival of the populace as well as the pivotal role that land plays in Kenya - declining land carrying capacity;
- The rise in the level of poverty due to lack of capacity to gain access to clearly defined, enforceable and transferable property rights;
- The multiplicity of legal regimes that relate to land and the confusion caused by involvement of unauthorized persons in land administration matters;
- Emergence of environmental management legislation which require the development of land to be carried out sustainably and demand a positive environment impact assessment study;

²³ Kenya Human Rights Commission & International Federation for Human Rights, *Massive Internal Displacements in Kenya due to Politically Instigated Ethnic Clashes: Absence of Political and Humanitarian Responses*, No. 471/2, (2007).

- The gross disparities in land ownership with regard to gender and generational discrimination in succession, transfer of land and the exclusion of women and the youth in land decision-making processes;
- The poor management of essential infrastructure that inhibits sustainable development of rural areas, particularly roads, communications, power and water supplies; and
- The privatization of public land through wanton and illegal allocation of such land to private individuals and corporations in total disregard of the public interest in the post-independence period, popularly known as land-grabbing.

The impacts of these developments have been many and varied such as:

- Severe land pressure manifested, *inter alia*, in terms of fragmentation and sub-economic parcellation of land particularly in the high potential areas of the small farm sector and changes in land use patterns;
- Deterioration in land quality as a result of poor land use practices; Twin issues of squatters and landlessness;
- Unproductive and speculative land holding especially, by the elite;
- Disinheritance of women and weaker members of the community and at times, biased decisions by land tribunals, committees and boards;
- Utilisation and abandonment of agricultural land especially in areas severely ravaged by HIV/AIDS pandemic;
- Poor health, malnutrition, non-productive labour force leading to low economic growth and productivity;
- Uncontrolled urban squalor and, especially, environmental pollution as a result of lack of proper solid waste disposal;
- Severe tenure insecurity due to the existence of overlapping rights especially at the interface between rural and urban areas; Wanton destruction of forest, catchment areas and areas of unique biodiversity;
- Severe competition between wildlife's needs and those of human settlements;
- Inter-ethnic resource conflicts especially in areas originally expropriated for resettlement; and
- Confusion of the public by the many land statutes.

These problems require a holistic re-examination of the land question. It is no longer tenable to argue that title to land is sacrosanct when title holders are residing in camps as internally displaced people with title documents at hand. Indeed, holders of title to land need to be proactive and work with the government in finding durable solutions to the land question. If this is not done, the cost of protecting property rights in land will escalate as the number of people seeking to access those rights (legally or illegally) increases marginalising the holders of title to land who continue to be a minority.

III. LEGAL AND ETHICAL CONSIDERATIONS OF THE LAND QUESTION(S)

A. A STORY OF DISPOSSESSION

1. Historical Injustices

In addressing the land question(s) in Kenya, one has to look at the history of land relations in the country and the term ‘historical injustices’ has been used to mean

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.²⁴

The reference to colonial land policies may mask injustices suffered at the hands of post-independence governments. It is for this reason that we prefer to use the term ‘dispossession’ which encompasses issues beyond the colonial period. Dispossession has characterised land relations in Kenya since colonial times when land owned by natives was passed over to the colonizers and their vassals. 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*, 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.²⁵ 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 colonizer etc) 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

²⁴ Draft National Land Policy, 2007

²⁵ (1922-23) Kenya Law Reports Vol. IX 102.

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.²⁶ 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.²⁷ 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.²⁸

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.

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

²⁶ See COLONY AND PROTECTORATE OF KENYA, LAND AND LAND CONDITIONS IN THE COLONY AND PROTECTORATE OF KENYA 17 (1931).

²⁷ See J. H. PATTERSON, THE MAN-EATERS OF TSAVO AND OTHER EAST AFRICAN ADVENTURES (1912) giving account of lions terrorising railway workers.

Nigeria".²⁹ 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.³⁰

The post-election violence pursuant to the disputed presidential poll in 2007 resulted in dispossession of 'outsiders' from land in the Rift Valley. For some of these people, this was the third time they were being displaced from their land. This is discounting the circumstances under which they had moved from their ancestral land (some may have moved as a consequence of displacement). The process of resettling the internally displaced persons is not yet complete and it is likely that some people will never go back to their land. Clearly, legal title to land where it exists is not enough to get people back to land that is contested by communities who see it as their land. This underscores the social aspect of property in contradistinction to the legal and economic ones.

2. Gender and Generational Dispossession

The hall mark of African customary law is the dominance of older male members of the community. In some societies, women are considered perpetual minors. During the tenure reform process in Kenya, most families designated one of themselves, usually the eldest son or the male head of the household, to be registered as the absolute owner without realising the latitude that such person would have to deal with the land once so registered. According to the registration statute, a right of occupation at customary law would only be protected if noted on the register which many families did not bother to do for they saw no possibility of a piece of paper vesting any more rights in the family representative than he would have had at

²⁸ 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).

²⁹ See Mburu Mwangi & Muliro Telewa, *Keen Rallies Behind Ntimama* DAILY NATION, Monday, 27 January, 1997.

³⁰ Patricia Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya: The Case of Land Tenure and Wildlife*, ACTS Press, Nairobi (2002)

custom. Cases of such family representatives seeking to evict the other family members from the family land escalated.³¹

The creation of reserves and the migration of male members of native communities to plantations and urban areas to seek paid employment, while redefining the mode of production, deeply entrenched the role of women as managers of the local environment. However, after the processes of consolidation, adjudication and registration, women lost control over the resources that they looked after and depended upon to sustain their families. Further, the individualisation of property rights in land and the vesting of those rights in men alienated the women as managers from the ownership of the managed property. The effect of the processes of land tenure change was to remove certain sections of the population, such as women and younger men, from controlling land. Gender neutral land laws applying in gendered contexts exacerbated the situation of women. The application of statutory provisions in these contexts is mediated by customary perceptions of masculinity and femininity and the association of land and related resources with males.

The role of women as tenders of the land however, continued undisturbed notwithstanding the fact that their claims to the land which they managed became more precarious and tenuous.³² With subsequent introduction of cash crop farming for Africans and the controls put in place to ensure the adherence to good rules of farming, the workload of women increased without a concomitant enhancement of their *de jure* management and decision-making role. Today women and children perform many tasks associated with land management and play a major role in the agricultural sector, which forms the economic mainstay of the country. They provide the bulk of the labour required for day to day management of farms including planting, weeding, harvesting and processing agricultural produce.

3. Land Use Marginalisation as Dispossession

Hunter-gatherers, forest dwellers and pastoral communities have been marginalised in development policy discourses. They are inadequately represented in decision making organs at all levels. The political and economic marginalization of forest dwellers and hunter

³¹ See Obiero V. Opiyo (1972) East African Law Reports 227; Muguthu V. Muguthu Civil Case No. 377 of 1968 (Unreported) and Esiroyo V. Esiroyo 1973) East African Law Reports 388.

³² See, e.g., Barbara Thomas Slayter & Dianne Rocheleau, *Gender, Resources, and Local Institutions : New Identities for Kenya's Rural Women*, in GENDER, ENVIRONMENT AND DEVELOPMENT IN KENYA - A GRASSROOTS PERSPECTIVE 7 (B. P. Thomas-Slayter & D. Rocheleau, eds., 1995).

gatherers can be traced to the colonial period when through the Carter Commission, the settlers failed to recognize them as a distinct community, but instead preferred that they be assimilated into their neighbouring communities such as the Maasai or the Kalenjin.³³ Through the forest preservation policy the colonial government denied them right to live in the forests, forcing them to surrender their community identity through forceful assimilation. In view of this, they became subject to dominant customs of the neighbouring communities who tried to assimilate them.

Hunter-Gatherer communities' rights of access, use and control of land and related resources are threatened by policy and legislative reforms that prohibit the settlement of people in forested areas. This is coupled by other concerns: failure by Government to recognize them as distinct tribe undermines their social-political heritage; non-representation in resources decision making institutions; frequent evictions/lack of titles; incompatible land tenure system; and lack of infrastructure.³⁴

B. LAW'S RESPONSE TO DISPOSSESSION

1. Constitutional Protection of Property

Among the fundamental rights and freedoms guaranteed by the Constitution is protection from protection 'deprivation of property without compensation'.³⁵ This provision is further elaborated at section 75(1) which provides as follows:

- (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied-
- (a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of property so as to promote the public benefit; and
- (b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
- (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

³³ National Land Policy Secretariat, Issues and Recommendations Report (2006)

³⁴ Ibid.

³⁵ Section 70

Proof of ownership of land is therefore critical to the enjoyment of these constitutional protections. The main classifications of land ownership in Kenya are individual, government and group or community. Private ownership of property is accorded greater protection in law than group or community ownership with the result that groups and communities seek individualisation of their property as a defence against perceived insecurity of tenure.

The current constitution does not distinguish land from other property and has been largely ineffective in providing an efficient, accountable and equitable institutional framework for land ownership, administration and management. The Land Policy outlines the following as the results of the Constitutional deficiencies have:

- Centralisation of state responsibility over land matters;
- Lack of governmental accountability in land governance leading to irregular allocations of public land;
- Constitutional protection of private property rights even where they are acquired in an illegitimate manner;
- Mass disinheritance of communities and individuals of their land;
- Inequitable distribution of land in Kenya and denial of access to land rights;
- Ineffective governmental regulation of private property rights resulting in unplanned settlements and environmental degradation; and
- Inadequate framework for the taxation of land rights.

2. Constitutional Protection against Discrimination

Countries have sought to use of human rights norms entrenched in national constitutions as way of dealing with gender discriminatory customary law. They do these through proscribing discrimination generally except in personal law matters; providing for both gender equality and the application of customary and religious laws and leaving the courts to arbitrate on what rights should prevail on a case by case basis; and making customary law subject to the right to equality. These three approaches have their limitations. First, Allowing for customary law application in personal law matters maintains biases against women as are. Secondly, leaving the issue for courts to decide on presupposes that the arbiters will not be influenced by prevailing gendered perceptions. Courts may be progressive or retrogressive. There is also the assumption that people will take matters to court which is fallacious as many land

disputes are solved at local levels where people are more sympathetic to and familiar with customary norms.

C. INADEQUACY OF LAW IN DEALING WITH DISPOSSESSION

So far law has not adequately dealt with dispossession. There are a number of reasons for this inadequacy. *One* is the fact that law has at some point facilitated the dispossession and given legality to it. Indeed law has legitimized property claims in land even where past theft and injustice colours that property. Legality therefore stands in the way of resolution of land issues over time. *Second*, law has not adequately protected the rights of communities and groups and because of its more explicit protection of individual rights, has implicitly encouraged the parcellation of land held by communities and groups into individual holdings in total disregard for the broader community interests and sometimes sustainable land use. *Third*, the development of land law and policy has been largely ad hoc and unsynchronised with land use. There is greater emphasis on land holding than on land use. Not surprisingly, land is parcelled out to individuals without considering the implications of such holding on broader issues such as water catchment functions and productivity.

Responses to law's inadequacy have been self-help remedies as witnessed in the post-election violence and the invasion of land belonging to absentee landlords.³⁶ These incidents 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.³⁷ The issue of the Mau Forest Complex has most recently illustrated the grave consequences of unsynchronised land tenure and use. In this particular case, the argument that communities need to move to make way for preservation of a water catchment area is seen as targeting some communities while others reap rewards from

³⁶ **'Tension as mobs invade 'idle' land at the coast'**, Daily Nation Newspaper, September 4th 2006 describing how residents of parts of Mombasa, mostly youths wielding pangas and other weapons had. A few days earlier the Kenyan President had been reported in the local newspapers as having put absentee landlords on notice.

³⁷ WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1992).

illegally allocated forest land. The complexity of this issue is captured in the following statement

Some say the people in the Mau have title deeds. But the truth is, they should not have been there. It is like buying a pair of suits from somebody who had stolen it. When you are caught, it will be taken away and then you will be charged with handling stolen property. In our case, we are saying, just give us back the suit; we will give you other clothes to wear. The people in Mau will be given alternative land.”³⁸

IV. TEMPERING LEGALITY WITH ETHICAL CONSIDERATIONS: THE NATIONAL LAND POLICY PROPOSALS

The draft national land policy contains proposals that can assist in balancing the legal and ethical dictates of the land question in Kenya. It contains a number of provisions that can be used in the quest for justice and equity. These include: Clear delineation of categories of land holdings into public, community and private with clear mechanisms put in place to govern each category of land; clarifying land management issues; putting in place mechanisms for sustainable management of land; measures for redressing dispossession arising from historical injustices and skewed development policies. I look at three ways in which the proposals of the policy can temper legality with ethical considerations. These include: historical injustices; environmental sustainability; gender and generational equity and regulating land rights in the broader public interest.

A. DEALING WITH HISTORICAL INJUSTICES

To deal with dispossession arising out of different circumstances, the National Land Policy proposes:

- (a) Redistribution to provide the disadvantaged and the poor with access to land for residential and productive purposes; address gross disparities in ownership, environmental degradation, gender and trans-generational discrimination;
- (b) Resettlement to grant internally displaced or historically dispossessed persons access to land, and related facilities; and
- (c) Restitution to restore land rights to those that have unjustly been deprived of land rights.

To avail land for redistribution, restitution and resettlement, the Policy proposes the establishment of land banks and suggests that land for the banks would be obtained through purchase and donations.

³⁸ Prime Minister Raila Odinga, in an article titled ‘Governance: Raila Confounds Friend and Foe with his Pursuit for Service Delivery’, , *The Standard on Sunday*, Sunday August 24th 2008 p. 21.

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.³⁹

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.⁴⁰ 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.⁴¹

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.

1. 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 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

³⁹ Dorthe Skovgaard Mortensen, Reclaiming ancestral land, <http://www.ms.dk/sw7754.asp> (last accessed 31st Aug. 2006)

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

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'⁴² and the 'restitutor'.⁴³

2. Restitution, justice and the inalienability of rights

According to Rawls⁴⁴, 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

⁴¹ Ibid.

⁴² The one to whom land is restituted

⁴³ The one who is giving up land for restitution

⁴⁴ Rawls, *Theories of Justice*, M.D.A. Freeman, Llyod's Introduction to Jurisprudence, 7th Edn, London Sweet & Maxwell 2001, pages 523-534, 566-585

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 Kenya 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 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.⁴⁵

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.

3. 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 correlatives 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

⁴⁵ 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.

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.

B. ENVIRONMENTAL SUSTAINABILITY

Kenya faces many environmental problems such as deforestation, air, land and water pollution, wildlife habitat loss, wildlife species' decline, degradation of marine and inland water ecosystems and beach erosion. Land provides an entry point for imbuing environmental sustainability. There is need to align land tenure with land use and to zone the country into broad land use areas so that each area is put to the highest and best use. Innovative uses of land rights to secure environmental sustainability should be encouraged and used. For instance, granting leases and easements to secure wildlife habitat.

To ensure the protection of ecosystems and overall environmental sustainability, the Policy proposes:

- A survey of all critical ecosystems to determine sustainable land uses for these ecosystems;
- Protection of ecosystems through land use controls;
- Define and maintain beaches at high and low water marks;
- Development of a comprehensive and integrated land use policy and ensuring that all land uses and practices shall conform to land use plans and the principles of biodiversity protection, conservation and sustainable development.

- Zoning forest land comprising water catchment areas to protect it from further degradation;
- Development of procedures for co-management and rehabilitation of forest resources;
- Putting in place participatory mechanisms for sustainable management of fragile ecosystems in partnership with public, private and community stakeholders;
- Declaration of all national parks, game reserves, all islands, front row beaches and all areas hosting threatened biodiversity as fragile ecosystems;
- Ensuring that the development activities in all islands and front row beaches take into account the fragility of the ecosystem
- Prohibition of settlement and agricultural activities in the water catchment areas;
- Identification, delineation and gazettement of all water courses and wetlands; and
- Integrated resource management based on ecosystem structure regardless of administrative or political boundaries.

C. GENDER AND GENERATIONAL EQUITY

1. Gender

There is need to put in place mechanisms for securing access to land for women and children. Implementation of international obligations relating to women's and children's rights would be a good first step to remove structural barriers to the enjoyment of land rights by these groups. The National Land Policy proposes to protect the rights of women through:⁴⁶

- appropriate legislation to ensure effective protection of women's rights to land and related resources;
- repealing existing laws and outlaw regulations, customs and practices that discriminate against women in relation to land;
- enforcing existing laws and establish a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources;
- making provision for joint spousal registration and documentation of land rights, and for joint spousal consent to land disposals, applicable for all forms of tenure;
- securing inheritance rights of unmarried daughters and their children; and
- Ensure proportionate representation of women in institutions dealing with land at all levels.

⁴⁶ National Land Policy Chapter 3

Within matrimonial contexts, the Policy proposes review succession, matrimonial property and other related laws to ensure that they conform to the principle of equality between women and men; protect the rights of widows, widowers and divorcees through the enactment of a law on co-ownership of matrimonial property; put in place appropriate legal measures to ensure that men and women are entitled to equal rights to land and land-based resources, before marriage (in cases of inheritance), during marriage, upon dissolution of marriage and after the death of the spouse; and putting in place mechanisms to curb selling and mortgaging of family land without the involvement of the spouses.

2. Children and Youth

To protect the rights of children and youth, the Policy proposes to:

- Enforce the Children’s Act (Cap 586) and supervise the appointment of guardians for orphans to safeguard their land rights;
- Review the legislative framework to provide that minority does not constitute a barrier to proprietorship where circumstances indicate that conferring ownership rights upon a minor would be appropriate;
- Review, harmonize and consolidate all the laws relating to children’s inheritance of family land in order to recognize and protect the rights of orphans; and
- Review the laws on trusts and administration of estates with a view to ensuring that trustees act in the best interests of the beneficiaries of trusts and estates.

D. LAND RIGHTS IN THE BROADER PUBLIC INTEREST

Given the population growth rates, the sensitivity of the land issue and the importance of land economically, socially and culturally, we need to consider the holding of land as a public trust. We propose that in actualising the principles of land as public trust and to ensure that the regulatory context is clear, we need to have a land use policy and plan which maps the whole country and indicates what areas can be categorised as *jus privatum* and which ones should be *jus publicum*.

The location of the trusteeship over both and the terms of the trust are critical to the success of such a move. In practical terms, it would entail recognition of private, community and public rights as subordinate to the national interest. Allodial title would be in a polity above the diverse holders and clear terms and conditions of grant should be devised which do not strip the allodial holder of the right to take back the land in the greater public interest subject to compensating the rights’ holders. This would support the view that

The deep structure of property is not absolute, autonomous and oppositional. It is instead delimited by a strong sense of community-directed obligation, and is routed in a contextual network of mutual constraint and social accommodation mediated by the agencies of the state.⁴⁷

The challenge is the identification of a polity that the citizenry trusts given their mistrust of the state due to past illegal and irregular allocation of public land and absence of accountability in dealing with trust land. This is the challenge in putting together a National Land Commission.

Currently, eminent domain (compulsory acquisition) and development control (development control) are manifestations of the concept of public trusteeship over which facilitate the regulation of property rights. The concept of eminent domain is derived from the Roman *dominium eminens*, which refers to sovereignty over territory.⁴⁸ It refers to the right of the State by dint of sovereignty to take private property for public purposes. It flows from the fact that the State has radical title over all land in the territory and can, therefore, compulsorily acquire any part of it. The uses for which land has been traditionally acquired include defence, highways, hospitals and education.⁴⁹ In Kenya, the power to compulsorily acquire land is provided for under Sections 75,⁵⁰ 117 and 118⁵¹ of the Constitution. It must be shown that the land will promote the public benefit, such benefit being weighed against the hardship that the acquisition will cause for the owner and prompt compensation must be paid for the acquisition.

Police power refers to the power of the State to regulate land use in the public interest whose earliest manifestations included the right of the State to tax its citizens, 'taking' of property for necessities of war and the regulation of the use of or destruction of land in the event of pestilence, thus interfering with private property.⁵² Not surprisingly, it has been argued that the rights, powers, privileges and immunities of the right holder are determined by the scope of police power and that there is no such thing as absolute proprietorship.⁵³ It is provided for

⁴⁷ Kevin Gray and Susan Francis Gray, 'The Idea of Property in Law', in John Dewar & Susan Bright eds., *Land Law: Themes and Perspectives* 15 (1998)

⁴⁸ Bondi D. Ogolla & John Mugabe, *Land Tenure Systems and Natural Resource Management*, in IN LAND WE TRUST: ENVIRONMENT, PRIVATE PROPERTY AND CONSTITUTIONAL CHANGE 85 (Calestous Juma & J. B. Ojwang, eds., 1996) at 107.

⁴⁹ *Ibid.*

⁵⁰ This section deals with compulsory acquisition generally and the legal framework, therefore, is laid out in the Land Acquisition Act.

⁵¹ These deal with 'setting apart' of trust land by county councils or the Commissioner of Lands and the legal framework for this is laid out in the Trust Land Act.

⁵² Ogolla & Mugabe, *supra* note 48 at 108-109.

⁵³ *Ibid* at p. 109.

in a number of statutes, such as the Public Health Act, the Agriculture Act, the Local Government Act, the Physical Planning Act and the Water Act.

While eminent domain and police power have not been effective in securing the public trust over land, the draft National Land Policy proposes to revamp the powers by ensuring that all land is held 'on terms that are clearly subordinate to the doctrines of compulsory acquisition and development control'. The Policy also proposes that the 'exercise of these powers should be based on rationalized land use plans and agreed upon public needs established through democratic processes'. Moreover, it also proposes that 'the radical title shall be vested in the people of Kenya collectively as a nation, as communities and as individuals' and that 'Kenyans both as communities and as individuals can draw tenure rights from that radical title under specific laws'.

V. CONCLUSION AND WAY FORWARD

The land question(s) in Kenya require a bold and radical departure from past practice which has been deferential to property rights however acquired and neglected the grievances that people have over land. The proposals in the draft National Land Policy provide a framework for reconfiguring land relations in Kenya. The process is likely to be contested by the beneficiaries of the current system. However, if we consider that property is a social relationship, the failure by the property holders to get the acceptance of non-property holders of the legitimacy of their rights will demean the quantum of the property rights. Legality will not be enough to guarantee enjoyment of property and this will raise the costs of maintaining the property.

The frequent land clashes and the inability of some displaced persons to repossess their land after land clashes is a clarion call to Kenyans to deal with the land question before it becomes unmanageable. Dealing with this question is not as much a matter of doing what is legal as it is a matter of doing the right thing in the circumstances. Legality must be tempered with ethics, equity and fairness.