

Infusing restorative justice into the land debate

What does restorative justice demand?

In memory of.....



A disclaimer....



Anecdotal evidence suggest...

- ❑ Land debate has been hijacked for political party or elite gains
- ❑ An absence of a genuine re-distributive agenda
- ❑ Poor and working class people don't feature (i.e. Sa people)?
- ❑ Lack of public imagination and interrogation
- ❑ Thus: **which land, why, for whom** imperative to interrogate

62. It was during the early 1950's that the Haijjom People were removed from Etosha. I do not recall which year it was but I am advised by my legal representatives that according to the official records it was 1954. I do not know exactly how old I was but I already had a small bow and arrow and was strong enough to carry the meat home. I was, however, old enough to remember what happened. Farm owners came with their vehicles to take us to work on their farms. Others were forced to walk to the farms. The people did not resist or question the decision because they were afraid. There was no discussion or consultation and we were given no choice about whether to stay or to leave. No alternative land or compensation was provided for us. People were just loaded onto trucks and others had to walk. My family also had to walk. We left with only what we could carry. Everything else we lost in the process.

64. My family was separated in the process. My father was taken to the farm Leeudrink. I went with my mother and grandmother to Onguma. Other relatives were taken to Outjo and to this day I have not seen them and do not know what happened to them.

65. We do not know what happened to the old people who were not strong enough to walk. I heard that one old woman just walked back into the bush. Nobody knows what happened to her. Others also disappeared. It was a cruel process.

What is restorative justice?

- ❑ No single comprehensive definition
- ❑ Several associated features though
- ❑ These include:

“...the provision of an opportunity to share experiences, a focus on restoring relationships, a requirement of an apology and/or reparation, active participation by the parties in negotiating a just resolution and an emphasis on creating a dialogue between the parties.”- OHCHR

- ❑ Justice processes can address a wide range of issues, e.g.
 - i) past injustices towards indigenous peoples (OHCHR)
 - ii) National Human Rights Commission of Malaysia conducted national land inquiries re systemic dispossession of indigenous peoples' lands

Eight “giant steps” in the process of achieving **reconciliatory justice** – per Robert Andrew Joseph

1. **Recognition**: finding truth and describing injustices;
2. **Responsibility**: the acknowledgement of responsibility for injustices;
3. **Remorse**: a sincere apology for injustices;
4. **Restitution** of lands and resources, and the power to determine their use;
5. **Reparation** for injustices in financial terms, recognizing that many harms are untouched by this compensation;
6. **Redesigning State political-legal** institutions and processes to empower indigenous participation in self-government and State governance;
7. **Refraining from future injustices** by assuring past and present injustices will not be repeated;
8. **Reciprocity in the obligation on the harmed** to do unto others as they would have done unto them

Applying “giant steps” to **Ancestral Land**

- ❑ Recognised under IHRL i.e. ILO Convention 169, Article 26(1) of UNDRIP
- ❑ From case law:
 - i) *Ogiek case (ACHPR), 2017: eviction from Mau Forest (ca 15,000)*
 - ii) *Endorios case (African Commission), 2009: Lake Bogoria in Rift Valley*
 - iii) *Sesana case, 2006: Botswana HC, denying access to Central Kalahari Game Reserve (CKGR)*
 - iv) *Richtersveld decisions, SA ConCourt, 2014 confirmed that **Richtersveld Community had a right in land based on customary law interest at the time of colonization***
- ❑ *Obligations to respect, protect & fulfill i.r.o indigenous land rights*
- ❑ *Take responsibility for past injustices of land dispossession*

Applying “giant steps” **Ancestral Land** (cont’d)

❑ *Draws inspiration for Ogiek (art.16) viz. property:*

↔ *“Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” (art 26 UNDRIP + art 14 ACHPR)*

↔ *both individual rights & a collective right*

↔ *encompasses land & territories previously owned by IPs*

❑ *Restitution*

❑ *Reparation*

❑ *Which ancestral land, territories ? Also, who indigenous?*

❑ *Let the big indaba begin!*

Applying “giant steps” to Communal land

- ❑ Recognising that not everyone benefits in the same way
- ❑ Who benefits & who's left out?
- ❑ African Commission since 2005 consistently urged GRN to provide the San community communal land
- ❑ *“one of the most fundamental interventions to expand the San's land rights & secure their sustainable livelihood”* – African Commission, 2011
- ❑ Stop/halt current injustices of illegal fencing, privatization of communal land
- ❑ Refraining from future injustices: issue a moratorium

Applying “giant steps” to Urban Land

- ❑ Recognise inextricably link btw urban land & broader land debate
- ❑ Problem more systematic than simply “fixing” a backlog.
- ❑ Treat housing informality with the urgency that it deserve
- ❑ Emphasise on individual title part of problem
- ❑ Regulate the housing sector (building codes, lending institutions, rent control)
- ❑ Reform eviction laws
- ❑ De-emphasis homeownership
- ❑ Look into the range of tenures that exist outside the formal property system.

Applying “giant steps” to **Agricultural Land**

- ❑ Recognised: various land redistribution programs have been hijacked
- ❑ Recognise too that term *‘Previously Disadvantage People’* open to abuse and perpetuate inequality
- ❑ Discard the term PDP (present disadvantage)
- ❑ Attend to the injustices caused by i) under-utilized land, ii) willing-buyer-willing selling ‘tammaletjie’, iii) absentee landlords, etc.
- ❑ Grant security of tenure & secure livelihoods to generational farm workers (cf. Extension of Security of Tenure Act , 1997- SA)
- ❑ Tangible way to address generational poverty and poverty

Proactive disclosure of information

- ❑ Access to information is a human rights
- ❑ Right to know
- ❑ *'public bodies hold information not for themselves but as custodians of the public good'* – African Commission on Human and Peoples' Rights
- ❑ Presupposes information on land must be proactively disclosed
- ❑ **Proactive disclosure → facilitates public engagement, participation, greater transparency, accountability and trust in government.**
- ❑ Results in proactive transparency

A restorative justice approach call for...

- Nam 'CODESA'

- Informed by FPIC

- i) Free (no coercion, intimidation or manipulation)

- ii) Prior (before adopting & implementing)

- iii) Informed (full knowledge)

- iv) Consent

- Not manufactured consent!

- Enact imaginative & progressive laws & broader/purposive interpretation of current legal provisions

- Can we really have the 2nd Land Conference in two weeks time?