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TROUBLE IN EDEN

HOW AND WHY UNRESOLVED LAND ISSUES LANDED 'PEACE-FULL KENYA' IN TROUBLE IN 2008

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Abstract

This article looks at the role of land and grievances thereto in the post-election violence experienced in Kenya in late 2007 and early 2008. It argues that the failure of post-colonial governments to craft a cohesive and inclusive national agenda for development has resulted in a fragmented populace. This fragmentation militates against a national ethic as the citizenry congregate around their ethnic groupings as a source of security and guaranteed access to resources such as land. Locating their discourse in the history of land relations in Kenya, the authors argue that the violence experienced was part of a sequence of recurrent displacements stemming from unresolved and politically aggravated land grievances, in a context of population growth, poor governance and static socio-economic attitudes reinforced by absence of alternative policies. They propose that to avoid the recurrence of violence over land, immediate steps should be taken to wean Kenyans off land through providing other avenues for wealth creation, creating a hierarchy of values for land and minimising the returns on speculative landholding. For example, fiscal policies imposing high taxes on speculatively-held land that is not under production would contribute to the releasing of land for production or settlement. They also discuss the need to create new nationalities based on imagined or created identities; these are achievable through educational, bureaucratic, cultural and political pilgrimages in Kenya as opposed to the classical ethnic configuration that currently defines Kenyans' allegiances.

Keywords: Kenya, land, conflict, ethnicity, reconciliation, peace, injustice, dispossession, politics

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1. Introduction

On 30 December 2007, the Electoral Commission of Kenya (ECK) through its chairman, Samuel Kivuitu, announced that Mwai Kibaki had been re-elected President of Kenya for a second five-year term, following a closely contested presidential poll characterised by anxiety, claims and counter-claims between Kibaki's Party of National Unity (PNU) and his key rival Raila Odinga's Orange Democratic Movement (ODM). Minutes after the announcement,

ugly ethnic-based violence broke out in many parts of the country, plunging the country into an orgy of violence. In spite of the violent protests, Kibaki was sworn in as President of the Republic a few moments later, at dusk and in a sombre ceremony devoid of pomp or pageantry. The 'private' swearing-in was not only done in a manner depicting a radical departure from Kenya's electoral tradition since the advent of political pluralism in 1992, but it was also uncharacteristically boycotted by foreign diplomats.[1]

The aftermath of the post-2007 elections was a bloodbath not seen in Kenya since this East African country obtained freedom from the colonial domination of Great Britain in 1963. In total an estimated 1,300 people were killed, 350,000 were displaced, and gross human rights violations occurred, including physical and sexual molestation and rape, as well as restrictions on the freedom of movement, during the two months of sporadic but violent inter-ethnic fighting between PNU and ODM supporters.[2] The violence ended with the signing of the *Agreement on the Principles of Partnership of the Coalition Government* by Kibaki and Raila on 28 February 2008.

While the tenuous agreement led to the establishment of a Grand Coalition Government in which Odinga became Prime Minister and Kibaki retained a weakened presidency, the story of how Kenya, a country hitherto described as a haven of peace in a turbulent region, descended into chaos is still fresh and intriguing.

With many neighbouring countries engaged in inter- and intra-state conflicts – Somalia as a failed state and Sudan in civil war between North and South – Kenya has been a haven for refugees fleeing from conflict situations and even facilitated the peace talks for both Sudan and Somalia.[3] What became clear were the cleavages in Kenyan society that provided fertile ground for politicians to sow seeds of hatred and thus ignite violent conflict. Even though Kenya has not had a conflict of the scale and magnitude witnessed in the region prior to December 2007, there have been high levels

1 Since the advent of pluralism in 1992, the swearing-in of the President has been done in a public ceremony at Nairobi's Uhuru Park, attended by local and international press, foreign leaders and diplomats accredited to Kenya.

2 See *Report of the Commission of Inquiry into the Post Election Violence*, October 2008, available at www.kenyadialogue.org

3 The result of the Sudan talks was the Comprehensive Peace Agreement concluded in 2005 in Naivasha, Kenya, while the Somali peace talks paved way for the formation of the Transitional National Government in 2002.

of structural violence discernible under the veneer of stability and peace (SIDA, 2004: 15). Not surprisingly, therefore, ethnic cleavages, which are a common feature in the region, played a big role in the Kenyan conflict. The inability of the Kenyan state to manage a multi-ethnic society presented a ripe context for conflict as social and political elites played on the ethnic divisions and prevailing stereotypes. This must be seen within the context of a state polity and related institutions that have been weakened by mismanagement over the years and whose ability to guarantee security of the life and property of its citizenry had diminished to some extent (SIDA, 2004: 20).

The Agreement signed by the two protagonists and mediated by former United Nations (UN) Secretary-General Kofi Annan identifies the following as the issues around which the grievances sparked off by the electoral dispute coalesced: the stalled constitutional, legal and institutional reforms; poverty, inequity and regional imbalances in the distribution of resources and power; unemployment, particularly among the youth; lack of national cohesion and unity; the culture of impunity and lack of transparency and accountability; and historical grievances over land.

This article argues that notwithstanding the centrality of all the above issues, it is the last-mentioned issue – land – that is at the root of Kenya's turbulent present and uncertain future. The article demonstrates how a skewed legal, institutional, policy and cultural ideology on land and land tenure since independence has come to bear so heavily on Kenya's stability that the country's future existence as a peaceful democracy hinges on extremely important, if radical paradigm shifts that will re-model the frameworks that define, allocate and regulate land, land tenure and land transactions. Indeed, land and conflict are closely linked as land is perceived as a 'war prize' (SIDA, 2004: 25) where territorial control is seized from losing groups, who are often forced to flee from their homes, fields and properties. More recently, however, increased interest in conflict analysis has revealed various complex relationships between control over land (and land-based resources) and conflict. Internal conflict such as that witnessed in Kenya in January 2008 is often motivated by disputes around access to land, fairness and justice. Additionally, land access is affected during conflict as people are displaced.

The article proceeds from the premise that the land question in Kenya has emerged over time as a major political issue that can erupt at any time and threaten the existence of a state or make the

nation a failed state. Land ownership and distribution issues have over the years sparked off ethnic tensions and suspicion in various parts of the country. This issue has perennially precipitated violence and lawlessness that have for long been connected to such issues as elections. The timing and manner of execution of the skirmishes witnessed after the 2007 election revealed that land is a sensitive and explosive issue that needs to be addressed. It is therefore imperative that this issue is well understood and resolved to prevent further conflicts and acts of lawlessness. The Draft National Policy (2007) points out that 'the land question has manifested itself in many ways such as fragmentation, breakdown in land administration, disparities in land ownership and poverty' (Kenya Draft National Land Policy, 2007: 5). These have in turn resulted in environmental, social, economic and political problems such as deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, underutilisation and abandonment of agricultural land, tenure insecurity and incessant conflict (Kenya Draft National Land Policy, 2007).

Immediately after this introduction, Section 2 contextualises the argument in two aspects. First, the article applies a historical lens to place the post-2007 violence in perspective. It exposes the fallacy of a 'peaceful' and 'exceptional' Kenya, which has deluded many academic and social commentators in Africa as well as in the West. Instead, the article's historical exposé shows that Kenya, like many countries of the post-colony breed, has always been a traumatised nation, the key source of that trauma being the alienation of land and land resources first by colonial oppressors and later by post-colonial African economic predators. Yet Kenyans, like all Africans, have in the past and present exhibited too much affinity to land ownership for economic, political, environmental, social and cultural purposes. The affinity to land and the deprivation of land is the epicentre of the logic of land-related strife over the years, with events like the 2007 elections providing the embers that have kept the fire of violence alive. Secondly, the article traces the history of land law, policy and institutions in Kenya from the colonial time to date, the intention being to demonstrate how these tools (law, policy and institutions) have contributed to political, economic, social and environmental stress in Kenya for many years, frequently resulting in armed conflict, the most serious occurrence being the recent post-2007 election conflict.

In Section 3, the proposals of the Draft National Land Policy (NLP) and their suitability as the antidote for instability and strife

in the future are examined. A central question the article grapples with is: to what extent is Kenya's political economy capable of implementing the NLP? After the discussion of Kenya's land problem, in Section 4 the article suggests the paradigmatic changes that could be used to address the land issue in the long term. This section reiterates some practical legal and policy approaches for the future, including: discouraging the intense love of Kenyans for land; creating a hierarchy of values for land and minimising speculative landholding; creating new imagined nationalities in Kenya based not on the ethnic configuration that currently defines Kenya's *terra firma* but on imagined or created identities achievable through educational, bureaucratic, cultural and political pilgrimages. These and other relatively 'out of the box' approaches are the cure for Kenya's land crisis, and its attendant implications on political stability. This is the message of the conclusion.

2. The Land Factor in Conflicts

Land as a factor in conflict has been discussed in the literature on environmental sources of conflict (Lind and Sturman, 2002; Libecap *et al.*, 2000). It is now generally agreed that natural resources play a role in conflicts between countries and between different groups within countries. Land is a critical resource in most African countries, and has economic, political, social and cultural/spiritual dimensions. The critical role that land plays in many African countries makes it a potential source of conflict (Lind and Sturman, 2002). Kameri-Mbote notes that 'many people in rural Africa still live off the land and depend on what nature offers for their survival. Unfortunately, many of the continent's gravest conflicts occur in these same areas' (Kameri-Mbote, 2006:1). The genocide in Rwanda in 1994 is perhaps the starkest illustration of the capacity of grievances over resources including land to degenerate into grave internal conflicts (Musafara and Huggins, 2005). Land scarcity and the concomitant demand for well-watered and fertile land contributed to Rwanda's civil war as widespread deterioration of the land base resulting from drought in the early 1990s worsened the 'land problem'(Bigagaza *et al.*, 2002: 51).

Yet land and scarcity of environmental resources rarely directly leads to conflict. Intermediate effects such as disruption of institutions, constrained agricultural productivity, migration and social segmentation lead to conflict (Lind and Sturman, 2002). Degradation of land, poor land governance and inequitable allocation of

land are some of the issues surrounding land that act as triggers, sustainers or sources of conflict. As triggers, they spark off and escalate conflict; as sustainers, they aggravate or perpetuate conflict, spoiling opportunities for peace and undermining possibilities for communication; as sources, imbalances between different actors and groups with regard to access to land and related resources such as forests, pasture and water and the absence of opportunities for peaceful reconciliation of diverging needs and interests creates the context for conflict (Peluso and Watts, 2001).

Land is a major livelihood asset in Kenya. Many Kenyans live in rural areas and the economy draws heavily on agriculture and wildlife-based tourism, both of which require land. Most Kenyans aspire to own land since it offers basic survival opportunities in an insecure situation where there is no welfare system and no other forms of wealth are available (Yeager and Miller, 1986). Denial of, or restrictions on, access to land constitute a grievance that lends itself to escalation into conflict. For instance, constraints on access to land for people who are politically or geographically marginalised can prepare the ground for conflict. In this case, poverty acts as a mobilisation factor for armed groups seeking to access resources, making land scarcity a structural cause of conflict (Huggins and Clover, 2004).

In the Mount Elgon District in Western Province, for instance, a guerrilla militia – the Sabaot Land Defence Force (SLDF) – was formed in 2005 with the intention of protecting land claims and resisting government attempts to evict the Sabaot population in the Chebyuk area of Mount Elgon as part of a resettlement programme (ICJ *et al.*, 2008). Similarly, the Mungiki rag-tag militia is said to have originated from the first wave of tribal clashes over land in the Molo area of the Rift Valley. Founded as a Kikuyu youth organisation to protect its community in the Rift Valley, it has developed into a large organisation whose members are drawn from Kenya's poor and marginalised Kikuyu youth (ICJ *et al.*, 2008). At the core of the Mungiki complaint is the failure of the youths, and their fathers before them, to realise the independence dream through secure access to land.

Land can also be a proximate cause of conflict when land disputes, tenure insecurity and inequality in land access are recognised as major grievances which in combination with other factors can motivate violence. Mobilisation of people around the land issue is a key determinant of whether land scarcity will lead to conflict or not. Ethnic identities are often rallied around the land issue where

access is an issue because people rely principally on their tribal/ethnic alliances to access resources.

Ethnic cleavages have been deepened by the failure of post-independence presidents to craft a cohesive national polity. Successive governments, particularly those of Kenyatta and Moi, have used allocation of public land to reward supporters, gain favours from their supporters or ensure political patronage. The quest for different ethnic communities to get one of their own in State House has much to do with the perceived enhanced access to resources that 'their man' will ensure, based on the experience under past regimes (ICJ *et al.*, 2008). Consequently, there are very high stakes in each general election for different ethnic communities and their allies.

Conflicts over land can also be manifested through intra- and inter-community clashes as they compete for diminishing land resources, water and pasture. Cattle raids are common between the Pokot and the Turkana in Northern Kenya, and some marginal pastoralist communities have in some cases been forced to flee from their homes due to conflict with more dominant communities (ICJ *et al.*, 2008). Agriculturists and pastoralists also often conflict over competing uses of land and related resources.

3. The History and Context of Land as a Cause of the Post-2007 Election Violence

Over the years, the land issue has presented itself as a major political issue and politicians have used it to fan the fire of ethnic animosities between different groups since the re-introduction of multi-party politics in Kenya in the early 1990s. Interestingly, former president Moi's defence of the one-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' (Kenya Human Rights Commission and International Federation for Human Rights, 2007: 8). 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 that in 2007, which had by far the worst sequel. Land ownership and distribution issues have sparked off ethnic tensions and suspicion in various parts of the country in the run-up to elections in Kenya.

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 10-mile coastal strip (the area of land at Kenya's coast governed by the Sultan of Zanzibar prior to colonisation and therefore exempted from British rule) 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 derives from 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. The functions of the law in this context and from a historical perspective have been instrumentalist (Okoth-Ogendo, 1991) and geared to securing the dominant actors' interests, both to give these legitimacy as well as to entrench them. 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 subsidiary rights to property users and owners (Okoth-Ogendo, 1991). At the time of independence, there were three substantive regimes in property law[4] and five registration systems[5] 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 number of European settlers and a subsistence periphery operated by a large African peasantry. The Njonjo Report (2004) explains that 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 highly degraded and fragmented smallholdings 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 underdeveloping its African counterpart.

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

5 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).

The fallacy of a 'peaceful' or 'exceptional' Kenya: land alienation and a century of dispossession

The post-2007 election violence in Kenya took many by surprise, not least because the country is usually held up as a model of stability in an increasingly volatile region. However, as this section demonstrates, the concept of 'peaceful' or 'exceptional' Kenya is a fallacy. In fact, Kenya has had a turbulent history and the violence triggered so devastatingly by the disputed poll results should not be seen in isolation.

Colonialism: Alienation of land without compensation

The origin of the land problem can be described as having its roots in political, economic and legal issues (Kenya Draft National Land Policy, 2007: 4–5). Each of these issues can be traced to the pre-independence period. The declaration of a protectorate over much of what is now Kenya on 15 June 1895, which marked the official beginning of British rule in Kenya (Ghai and McAuslan, 1970: 3), laid the foundations of the land problem that has dogged Kenya over the years. This is especially so because the colonial government, as elsewhere during the establishment of colonial territories, gave no consideration to the situation on the ground. The colonial powers were primarily interested in parcelling out territories amongst themselves without regard to Africans and their respective customary tenure systems. As early as 1888 the problem of land dispossession of indigenous Kenyans had started taking shape when the Imperial British East Africa Company (IBEAC) signed an agreement with the Sultan of Zanzibar in which 'all rights to land in his territory except private lands' were ceded to the company. This affected Kenya's 10-mile coastal strip (Syagga, 2006: 294). After the declaration of the protectorate status, the administration set out to acquire land but encountered certain jurisdictional hurdles. As far back as 1833 the British government had been advised by the Law Officers, in respect of the Ionian Islands, that the exercise of protection over

a state did not carry with it power to alienate the land contained therein (Okoth-Ogendo, 1991). The Foreign Office's advice was that unless the right to deal in and alienate waste and unoccupied land was specifically reserved in an agreement or treaty of protection, such a right would not arise. Before the Law Officers changed their opinion in 1899, the administration had to acquire land for various purposes through various means (Okoth-Ogendo, 1991).

In 1897 the Indian Land Acquisition Act of 1894 was extended to the mainland to acquire land for immediate governmental purposes and this allowed the administration to appropriate all land on the mainland situated within one-mile of the Kenya-Uganda railway for the construction of the railway. The Act was also used to compulsorily acquire land for other public purposes such as government buildings. The colonial administration later promulgated the East African Land Regulations of 1897, by acting under the Foreign Jurisdiction Act of 1890, which it used to alienate land in favour of white settlers. This was intended to encourage European settlement that would pay for the railway (Syagga, 2006). These regulations distinguished between land in the Sultan's dominions and land elsewhere in the protectorate. The Commissioner was empowered to sell freehold of Crown land in the Sultan's dominions which did not fall under the category of the Sultan's private property. In the rest of the Protectorate, the Commissioner could offer only certificates of occupancy, valid initially for 21 years but later extended to 99 years. Very few settlers were interested in the rights conferred by the certificate of occupancy. In 1899, after being asked by the Foreign Office for an opinion regarding the interior of the British East Africa Protectorate, the Law Officers vouchsafed a new set of principles to the government. These were that in a protectorate of the African variety where protection was exercised under treaties which did not specifically grant Her Majesty the right to deal with waste and unoccupied land, the right to deal with that land accrued to Her Majesty by virtue of her right to the protectorate, since protection in these circumstances involved control over all lands either by the sovereign or by individuals (Ghai and McAuslan, 1970).

In 1901, the Law Officers' opinion was legalised through the promulgation of an East Africa (Lands) Order in Council. It defined Crown lands as

> all public lands within the East African Protectorate which for the time being are subject to control of His Majesty by virtue of any Treaty, Convention or Agreement, or of His Majesty's Protectorate, and all lands which have not been or may hereafter be acquired by His Majesty under the Lands Acquisition Act, 1894, or otherwise howsoever.[6]

Attempts by the incoming settlers to acquire land through purchase from the native people were frustrated by the lack of capacity and willingness on the part of the natives to sell land, as the settlers would have wanted. Coupled with this was the general view of the colonial administration that Africans had no rights to land either as individuals or as groups.[7] With increased pressure from the incoming settlers, the Crown Lands Ordinance, No. 21 of 1902, was passed. This ordinance vested power in the Commissioner to sell freeholds in Crown land to any purchaser in lots not exceeding 1,000 acres.[8]

These regulations conferred enormous discretionary power on the colonial authorities, giving them a virtually free hand to determine what was waste and unoccupied land. The tendency was to treat all native rights to land as temporary and only exercisable as long as the native was in actual occupation of the land. Such rights, Lord Haldane contended, could be extinguished by the action of a paramount power assuming possession of the entire control of a country.[9] By virtue of this Ordinance, the Crown authorities could grant land, which included native settlements and villages (Kameri-Mbote, 2002). It is through it, for instance, that the Nandi, who had all along resisted British rule, had their land annexed for European settlement. The ownership of these villages would be vested in the grantee once actual native occupancy ceased.

The 1915 Crown Lands Ordinance ended the official pretence of concern for the interests of the natives by declaring all land within the protectorate to be Crown land, whether or not such land was occupied by the natives or reserved for native occupation.[10] The Ordinance mandated the colonial authorities to grant 999-year leases, although the settlers clamoured for perpetual leases.[11] Chief

6 See Section 1 of the East African Order-in-Council, 1901, passed at the Court of St. James on 8 August 1901.

7 See the case of Mulwa Gwanobi v. Alidina Visram (1913) 5 K.L.R. 141, involving the sale of land by members of the Jibana tribe where the Court held that what the tribe members sold were rights to occupy and reap fruits from the land and not absolute rights as the purchaser would have had the Court believe. In the judge's view, the members of the tribal community had only a right of occupancy and they could consequently not pass on by sale a right greater than the one of occupancy.

8 See Section 4 of the Crown Lands Ordinance 1902.

9 See Sobhuza II v. Miller and others [1926] A.C. 518.

10 See Section 5 of the Crown Lands Ordinance, 18 May 1915.

11 See Section 34 of the Crown Lands Ordinance, 18 May 1915.

Justice Barth's interpretation of the provisions of this Ordinance in the case of Isaka Wainaina and Another versus Murito wa Indagara and Ors was to the effect that Africans were mere tenants at will of the Crown, with no more than temporary occupancy rights to land.[12] The land reserved for Africans' use could at any time be appropriated and alienated to settlers. This signified the complete disinheritance of Africans from their land.

Alongside this was the introduction of separate development effected through the Native Trust Bill of 1926 which reserved certain areas for exclusive use by Africans (Syagga, 2006: 296). This was followed by the fixing of boundaries to the White Highlands and the removal of Africans therefrom. African reserves were created to cater for the increasing African population. This process of dispossession of Africans from their land through the superimposition of new property norms that negated African rights was resisted by communities and eventually became a critical rallying point in the independence struggle (Kameri-Mbote, 2002). By 1940, there was severe land shortage within the reserves in Central Kenya prompting demands for the restoration of stolen lands and the Mau Mau revolts (Okoth-Ogendo, 1991).

The failure of the independence pact to resolve the issue and its neglect over the years by the post-independence governments has given rise to what are now termed historical injustices, namely

> 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 (Kenya Draft National Land Policy, 2007: 42).

These have been aggravated by other injustices as we will see below, making the land question an intractable issue. For instance, the British acquired Maasai land through two agreements concluded in 1904 and 1911. The first agreement provided that the Maasai move into specific reservations in Laikipia, away from land open to European settlements. Under the terms of the agreement, over 11,200 Maasai and over 2 million livestock were moved, to pave the way for occupation of their land by 48 Europeans (Okoth-Ogendo, 1991). This agreement was to remain in operation 'so long as the Maasai as a race shall exist'. The Europeans and other settlers were to desist from taking up land anywhere in the reserved area. This

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

agreement was not honoured for long as settlers interested in cattle ranching earmarked the lands set aside for Maasai occupation as necessary for their own occupation and the Maasai were moved again in 1911. The Maasai community continues to rally around their claim for their land and have demanded the restoration of their ancestral land in 2004 following the expiry of the Anglo-Maasai Treaty signed between the British and the Maasai community.[13]

Land reform in the colonial period

With a deteriorating political climate and agitation of Africans for their land, the colonial authorities set up a Commission to investigate African tenure systems and make recommendations on ways of improving them and making them contribute to the economic development of the colony. Having constructed African tenure systems as communal (read open access), the colonial agronomic experts viewed the solution to the African land problem as one of tenure, namely, the structure of access to the use of land in areas occupied by the natives. The factors of the traditional tenure system that made it inimical to proper land use and agricultural development were, in their view, encouragement of fragmentation which cut down on returns from labour and time expended on the land, incessant disputes which were a disincentive to long-term capital investment and an insecure basis for generating agricultural credit and the inheritance practices that encouraged subdivision of the holdings into sub-economic units of production (Swynnerton Plan, 1954).

The Swynnerton Plan recommended the consolidation of landholdings 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 was to end the perceived uncertainty of customary tenure already considerably modified by years of European contact. Between 1959 and 1963, the colonial authorities began transferring land from Europeans to Africans through a government assisted programme. The Million Acre Scheme, introduced in 1962, was the most significant programme which marked the transition from colonial rule to independence (Leo, 1989).

The coincidence of the tenure reform process with a deteriorating political climate centred on the land issue presented an occasion

13 'Maasai Claim their Land', *Daily Nation*, 22 June 2004, p. 4.

for the colonialists to ingrain a political flavour within the process. Through tenure reform, the colonial administrators sought to create a stable landed gentry among the natives. This gentry was to act as a buffer between the settlers and political mavericks hankering for redistribution of land (Sorrenson, 1967).

The instrumentalist role of law perfected by the colonial administrators was very handy in ensuring that the rights granted to the loyalists and the settlers were protected through law from claims by the Mau Mau protagonists who had gone into the forests to fight for land rights. The administrative process of consolidation, adjudication and registration was formalised by the Native Land Tenure Rules of 1956.[14] To ensure that the rights granted through the process were not disturbed, the African Courts (Suspension of Land Suits) Ordinance was passed in 1957 to bar all litigation to which the 1956 Rules applied. It is indeed remarkable that a large part of Central Province was consolidated in 1956 with a state of emergency in place.[15] 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.

The Native Lands Registration Ordinance of 1959 spelt out the rights of the registered proprietor at section 37(a), namely, an estate in fee simple in such land together with all rights and privileges belonging or appurtenant thereto.[16] While the rights of the registered proprietor were stated to be subject to duties that such a proprietor had as trustee, it is instructive to note that customary notions of trusteeship, recognised under some Kenyan communities' native customs, were not included.[17] More specifically, according to the

14 These rules empowered the Minister for African Affairs to set up machinery for the adjudication of areas of 'native' lands within which private rights to land were considered to exist.

15 See, for example, figures given in MacArthur (1961: 82).

16 See Colony and Protectorate of Kenya, (1959) Native Lands Registration Ordinance No. 27 [hereinafter The NLRO, 1959]. The aim of this ordinance as stated in the Preamble was 'to provide for the ascertainment of rights and interests in and for the consolidation of land in the native lands; for the registration of title to and transactions and devolutions affecting such land and other land in native lands and for purposes connected therewith and incidental thereto'. It was the precursor to the current Registered Land Act, Chapter 300 of the Laws of Kenya.

17 Case law has dealt extensively with the issue of trustees and, though there seems to be no general agreement, the removal of formal courts' jurisdiction to adjudicate on land matters and the transfer of that jurisdiction to local chiefs and elders seems to have been an acknowledgement of the need to consider the circumstances surrounding any registration in native areas to determine the interests of all potential beneficiaries. See the Magistrates' Courts Jurisdiction Act, Chapter 10 of the Laws of Kenya.

registration statute, a right of occupation in customary law would only be protected if noted on the register. Many families did not bother to note customary rights on the register because they saw no possibility of a piece of paper vesting any more rights in the family representative than he would have had by custom. Cases of such family representatives seeking to evict the other family members from the family land, however, escalated.[18] The Ordinance moreover declared that a first registration was not to be challenged even if it had been obtained through fraud.[19]

The tenure reform process only took into consideration the rights of people who had land and not the landless or those who had rights that in the colonialists' reckoning did not amount to ownership. This process marginalised categories of people such as the 'ahoi' among the Kikuyu who had lived and worked on other people's lands for generations (Kenyatta, 1945). Further, the Ordinance limited to five the number of persons who could be named as owners of any one piece of land, thus illustrating the commitment to individual tenure as opposed to group tenure.[20]

In most cases 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 a person had to deal with the land once so registered. Women and younger men who had rights of use and occupation under customary law, but were unlikely to be chosen as family representatives, were thus effectively excluded from controlling land and other resources that go with it. The elder male owners were given immense power to deal with land and could mortgage or even sell it without recourse to other members of the family who, though not owning the land legally, had access rights under customary law. This has had negative impacts for biodiversity conservation and management generally (Kameri-Mbote, 2007).

The independence bargain

It has been said that political independence in Kenya, attained in 1963, was granted by the outgoing British colonialists on the basis of continuity of the colonial system and not on its destruction.

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

19 See Section 89 (1) of the NLRO, *supra*, note 16.

20 Section 66 of the NLRO, *supra*, note 16.

Decolonisation of the Kenya colony represented an adaptive, co-optive and pre-emptive process. 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 (Wasserman, 1973). Property rights protection was deemed imperative for the conclusion of the independence talks held in Lancaster House during 1960-62 (Wasserman, 1976). 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 appease the vocal Africans still clamouring for the restoration of land taken from them (Seidman, 1970; Oginga Odinga, 1967).[21]

The alienation of customary African lands formed part of a larger pattern of restructuring African land use systems (Biodiversity Support Programme, 1993: 4). 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 on the part of the colonial authorities to entrench themselves firmly in Kenya and maintain the rights they had to land, without having to give back any land 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. 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 (Republic of Kenya, 1965). The content of these rights was only co-extensive with the latitude the state permitted the property

21 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.

holder given the insulation of these ordinary Kenyans from the effects of property rights so as to prevent massive landlessness.[22] 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 (Gordon, 1989). 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. It is instructive to note that even before independence, Kenyatta was categorical, in endorsing the settlement scheme to include the peasantry, that

> [w]e shall bear in mind that our first duty will be to help those poor and landless people who today have no means of livelihood. I did not say...that such peasants will get land free...our government would help such peasant farmers...by giving them loans on easy terms (Leo, 1989: 91).

These loans were to prove to be a heavy burden on the peasantry (Leo, 1989).

Post-independence handling of the land question

Immediate post-independence handling of the land question brought forth other contestations over land. The implementation of consolidation, adjudication and registration processes proposed under the Swynnerton Plan (1954) coincided with increased political agitation among Kenyans for the return of land that had been taken by the settlers. The deteriorating political climate thuss undergirded the handling of the land question in the immediate post-independence period in Kenya. Land belonging to freedom fighters was granted to loyalists during the Mau Mau revolt and the land rights ensuing from this process were insulated from contesting claims.[23] For instance, a large part of Central Province was consolidated in 1956, with a state of emergency in place (MacArthur, 1961).[24] The net

22 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 subdivision was involved.

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

24 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.

effect of the laws passed was to close avenues available to aggrieved landholders and dispossessed peasants. Subsequent laws on land tenure adopted these provisions. The grievances over land were aggravated by the independence government under Jomo Kenyatta who maintained the system of freehold land titles which could not be challenged, however acquired (HPG, 2008: 3).[25]

To compensate the displaced, the government began a series of resettlement schemes based on a market system, as described above, which was biased towards those with the financial means to acquire land (KLA, 2004: 6–7). The Million Acre Scheme implemented during the colonial period has been criticised as favouring 'a very limited number of relatively prosperous Africans...who had been loyal to the colonial regime' (Leo, 1989: 70). In the post-independence period, it is noteworthy that the government offered to finance private persons, both Kenyans and Europeans, the opportunity of purchasing large farms outside the settlement areas (Leo, 1989: 99). The systematic erosion of the powers of the Land Development and Settlement Board's powers in the immediate post-independence period and the concentration of powers in the minister responsible for land settlement and water development signified a major step towards further abuse of power over land (Leo, 1989: 103).

Meanwhile, corruption and ethnic politics supported patronage networks and favoured certain communities, particularly the Kikuyu elite, who settled in the fertile areas of the Rift Valley, at the expense of others such as the Luo, the Maasai and the Kalenjin (HPG, 2008: 4). Significantly, a programme that should have been used to unite different tribes was implemented in a way that divided the groups by allocating them land in different places. Leo notes that

> [t]he settlement programme not only reaffirmed and hardened existing ethnic boundaries, but in fact reintroduced ethnic uniformity in areas where mixing had already taken place spontaneously (Leo, 1989: 111).

This mode of resettlement and the evolution of agrarian activities in the settlements (where some tribes, principally the Kikuyu and Kisii, were seen to be doing better than others) gave rise to resentment by native communities (the 'insiders') of landowners perceived as 'outsiders'. This has made the 'outsiders', also referred to as

25 The Registered Land Act, Chapter 300 of the Laws of Kenya, introduced upon independence, took on the provisions of the NLRO, 1959, *supra*, note 16.

madoadoa,[26] 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. For instance, labourers on European farms or forest workers saved up and bought land as it became available from the outgoing Europeans (Leo, 1989).

The land-grabbing phenomenon

Rampant land-grabbing further undermined customary mechanisms of land governance, while growing hardship among the majority poor and rapid population growth increased pressure on Kenya's arable land. The report of the Ndung'u Commission on illegal/irregular land allocations demonstrated that massive grabbing of public land occurred during the Kenyatta and Moi presidencies. The report notes that especially in the 1980s and the 1990s, public land was illegally and irregularly allocated 'in total disregard of the public interest' and the allocation of public land for political patronage was part of the gross corruption of this time (Government of Kenya, 2004: 8).

Those involved in the land-related corruption were senior public servants, but also land boards, the courts and a range of officials including members of the provincial administration and politicians. Land was used to reward politically correct individuals and became heavily politicised (Government of Kenya, 2004: 14). The report generally identified extensive corruption involving illegal and irregular allocation of land, both in settlement schemes in the countryside and in the urban areas.

Given that the recommendations of the Ndung'u Commission were never implemented, there has been in Kenya increased frustration in attempting to deal with land tenure disputes. The fact that institutions which could have been used to resolve land disputes have not been impartial has encouraged individuals to take matters into their own hands and to use violence to resolve them (Republic of Kenya, 2008: 32). Furthermore, politicians have capitalised on issues surrounding land to encourage violence during elections.

In the next section, the article makes the link between land-grabbing and ethnicity. Evidence from the Waki Commission demonstrated that the post-2007 election violence was largely a product

26 Swahili word meaning dots.

of longstanding anger over land distribution since independence. Land was alienated by the colonial government and then unfairly parcelled out by both the colonial and post-colonial governments to certain 'outsider' communities, on an ethnic basis.

Ethnicisation of the land question

Following on the footsteps of founding president Jomo Kenyatta, Daniel Moi, the second president of Kenya exacerbated the land problem. In response to the political threat posed by the advent of multi-party politics in the 1990s, Moi, a Kalenjin, sought to portray the opposition as Kikuyu-led, and multi-party politics as an exclusionary ethnic project to control land (Klopp, 2006). This entailed invoking *Majimbo*, a type of federalism that promotes provincial autonomy based on ethnicity. To recover 'stolen' land, Kikuyus were evicted from the areas they had settled in the Rift Valley and Western Kenya. Associated clashes left thousands dead and hundreds of thousands displaced, enabling Moi to gerrymander elections in 1992 and 1997.

Nothing demonstrates the ethnicisation of land in Kenya more than the findings of the Justice Akilano-led Commission of Inquiry established in 1998 to investigate the ethnic clashes related to the 1997 elections (Akiwumi Commission, 1999). The Commission's report attempted to sidestep land as the cause of post-election violence in 1992 and 1997, but found itself repeating the land connection severally. In the 1992 violence, the country plunged into chaos as a result of trouble between the Nandi sub-tribe of the Kalenjin and Kikuyu farmers in a farm called Miteitei situated in Tinderet, Nandi District (Akiwumi Commission, 1999: 5). Although the report finds other causes of the violent clashes, land is mentioned prominently as well. It correctly points out that the other reasons have been 'preferred to conceal the real motive or reason for the clashes' (Akiwumi Commission, 1999: 3).

In relation to the 1992 and 1997 violence in the multi-ethnic Rift Valley Province (the province that has been most affected by all cycles of violence including the post-2007 poll violence) it has been noted that pre-election political slogans advocating for *Majimbo* were rampant. According to the evidence adduced before the Akiwumi Commission, the *Majimbo* campaign turned out to be a crusade, not for federalism in the true sense of the word, but an arrangement in which each community would be required to return to its ancestral district or province. If for any reason they

were reluctant or unwilling to do so, they would be forced to do so (Akiwumi Commission, 1999: 10).

In the larger Kericho District it is the multi-ethnic settlement areas of Kipkelion Londiani and Fort Tenam (Chirchila) that have always been hit by land-related violence. As early as 1957, the settlement of the Kikuyu community in these ancestral Kalenjin areas had reached significant levels, with the District Commissioner's annual report that year noting that tension was already growing between the two communities over land (Akiwumi Commission,1999: 15). In respect of the violence of 1992 and 1997, the Akiwumi Commission found evidence that longstanding Kalenjin aversion to strangers (especially the Kikuyu) living in their midst and on their ancestral land which had in colonial times been set aside for European settlement, was exploited for political gains during the elections.

The same phenomenon applies to the larger Nakuru District, especially the perennially volatile areas of Molo, Olenguruone, Njoro, Ol Moran and Naivasha. Ethnic tensions in these areas were noted as early as 1961 when the District Commissioner said in his annual report that 'inter-tribal tensions…[during the year had] increased markedly', with Kalenjins aiming to flush out Kikuyus to what they termed as their (Kalenjin) ancestral areas.[27] In Nakuru, settlement farms were bought by tribally-based land-buying companies and societies with the result that in those farms one would find occupants wholly from one community. In these areas political objectives were used to stir up and spur on the Kalenjin desire to regain their land (Akiwumi Commission,1999: 54).

The findings of the Akiwumi Commission relating to the ethnicisation of land ownership were corroborated substantially by those of the Commission on Investigation of the (2007) Post Election Violence whose report was submitted towards the close of October 2008 by Judge Philip Waki, the Commission Chairman. The Waki Commission's report notes that the constitutional liberty to own land anywhere in Kenya is merely *de facto* (Republic of Kenya, 2008). Creation of districts is largely ethnic-based, creating exclusive sub-national enclaves akin to 'native reserves' in which there are 'insiders' (ancestral land owners) and 'outsiders' (migrants) (Republic of Kenya, 2008: 31). This state of affairs has been tapped by politicians, and has spread to urban areas like

27 Nakuru District Commissioner's Annual Report, 1961, cited in the Akiwumi Report (Akiwumi Commission: 43).

the informal settlements of Nairobi's Kibera (Luo) and Mathare (Kikuyu) areas. The Waki Report concludes that the overt and covert pursuit homogeneity in land allocation and acquisition has led to a type of 'residential apartheid' as Kenyans move into more ethnically homogeneous areas even within urban centres and towns (Republic of Kenya, 2008: 32).

4. The Nexus between the National Reconciliation Accord and the Draft National Land Policy

Kenya has not had a single and clearly defined national land policy since independence. This, together with the existence of a myriad and sometimes contradictory land laws has resulted in a complex land management system that has somewhat fuelled the land crisis. The National Land Policy of 2007 (still in draft form) seeks to provide the overall framework for addressing critical issues relating to land.

A bold statement of intent, the Draft National Land Policy furthers the objectives of the national accord and reconciliation process (notably the land question in *Agenda 4* of the Agreement signed by Kibaki and Raila) in several ways. First, it provides a framework and benchmarks for land and land tenure reforms essential in the implementation of the land issue in *Agenda 4* by providing the basis for compulsory acquisition of land, development control, the re-categorisation of land, and tenure principles.[28]

Second, the Draft Policy captures the manifestations and impacts of the land question which provide the context for implementing *Agenda 4*. These include: population explosion, rapid urbanisation, disparities in land ownership along gender and generational lines, environmental stress, fragmentation and diminishing quality of land, tenurial insecurity, unproductive and speculative hoarding, landlessness and the squatter problem.[29]

Third, by including the issue of internally displaced persons (IDPs) as one requiring special attention, the Draft Policy is no doubt a policy roadmap for the IDP problem exacerbated by the January 2008 violence. Fourth, the draft document brings out land re-distribution, restitution and resettlement as urgent issues and essential pillars of re-organised land logic.[30] These three, as well as resolution of historical injustices, also tackled in the Draft Policy, are key benchmarks for the national reconciliation and healing process.

28 See National Land Policy, part 3.3.

29 Ibid., part 2.3.

30 Ibid., part 3.6.

However, the Draft National Land Policy falls short in at least three fundamental ways which limit its capacity to inform future thinking on land. First, the Draft Policy leaves out modalities on how to overcome the socio-political difficulties challenges of land, including the ethnicisation of land. To this extent, the draft document is oblivious of the harsh reality of the premium role of ethnicity in the land arithmetic. Further, it does not elucidate on the mechanisms of creating a hierarchy of value on land as a means of resolving land use clashes. Without such mechanisms, the Draft Policy remains seriously curtailed. Second, by its very nature, a policy summarises the political, legal and economic aspects of an issue. The very rich and complex political, legal and economic history of land in Kenya needs to be synthesised succinctly and coherently in a support document so that it informs policy parameters. This needs to be done so that the policy proposals are contextualised.

Third, the Draft Policy lacks a coherent philosophical underpinning strong enough to inform paradigm shifts in the national land management and tenurial allocation process. Despite a section entitled 'Philosophy of the National Land Policy'[31] the document does not articulate a philosophy on land that can wean Kenyans off the land and get the country out of the land crisis. The questions that need to be answered are: what paradigms should inform new thinking on land? What values (and in what hierarchy) will inform land, land tenure and land use?

5. Beyond the National Land Policy: Paradigm Shifts in the Quest for Durable Peace

Land retains a focal point in Kenya's history. It was the basis upon which the struggle for independence was waged. The political, economic, social and cultural root causes of land-related violence in Kenya are manifold and complex. They are also historical. The land question constitutes a highly inflammable mix that fuelled the post-2007 election violence – and that will continue to do so beyond the National Land Policy until and unless the question is comprehensively addressed by a truth, justice and reconciliation commission. This commission must not only address the most recent violence, but also consider past episodes including clashes,

31 Ibid., part 3.1.

displacement, loss of livelihoods, and the physical and psychological injuries associated with these events.

The violent crisis in Kenya following the 2007 elections is not an anomaly; rather, it is part of a sequence of recurrent displacement stemming from unresolved and politically aggravated land grievances, in a context of population growth, poor governance and socio-economic attitudes. Simply focusing on facilitating the return of IDPs – in the absence of efforts to address the underlying structural causes – risks creating the conditions for further rounds of violence and fresh displacement.

Kenya's land minister James Orengo recently announced that he would be taking the National Land Policy to Cabinet for adoption, to be followed by implementation. With or without the implementation of the National Land Policy, Kenya is at a crossroads. How the country approaches the aftermath of the 2008 violence will determine Kenya's survival as a united polity. Of utmost concern is the implementation of the so-called *Agenda 4* on long-term issues, particularly the land question. The current haste to resettle IDPs may provide a sedative effect on the root causes, but it is the long-term legal, policy and institutional measures that will matter most.

The IDP question requires care and investigation. The IDP question has three policy possibilities: return, relocation and local integration. The conditions for return are not conducive, but even if they were; such a process should not be framed as a durable solution but rather a temporary stop-gap until the root causes of the land grievances are addressed (HPG, 2008: 5). Such measures must enjoy local and national political support.

Relocation to alternative sites is favoured by IDPs who do not own land or those who are too traumatised to return, but this is a complex process and is not durable unless accompanied by the resolution of the land problem more broadly. In any case, resettlement may aggravate existing land grievances, especially in Central and Nairobi provinces where the population density is high and land scarce. Moreover, solely focusing on those who have been recently displaced, as is currently the case, will create resentment among long-term IDPs and the landless. Relocation to the so-called 'ancestral homelands' may be even more problematic. First, it may create resentment between the newcomers and the current landholders in those areas. Second, it will set a dangerous precedent as it implicitly supports the goals of those who engaged in the violence and displacement as a means of ethnically cleansing certain regions (HPG, 2008). Third, it fails to consider that that the

concept of 'ancestral homeland' is often an artificial construction of the colonial state, rather than a reflection of historical rootedness. Ethnicity is not a static, homogeneous entity but rather a fluid concept subject to generations of intermarriage. Fourth, relocating IDPs to their 'ancestral homelands would need to determine which communities actually belong to certain areas, and how far back in history one would need to go to find this out, a process that would surely divide Kenya's communities and could even threaten the country's cohesion.

The third possibility – locally integrating the displaced in the areas where they have sought refuge – will depend on the willingness of the displaced and the host communities to promote this option. Considering that pressures on land are already high in rural areas, there is likely to be more movement into urban informal settlements, complicating an already explosive situation. Any of the above three approaches to the IDP problem has its own drawbacks, and perhaps the solution lies in attempting all three of them simultaneously and seeing which one works for which type of IDP cases.

Beyond the National Land Policy, there is need for practical legal and policy approaches for the future. These include, first, discouraging the intense love of Kenyans for land through public education by government, the religious leadership, civil society and traditional leaders; second, creating a hierarchy of values for land and minimising speculative landholding (for example, fiscal policies of highly taxing speculatively-held land not under production would contribute to the releasing of land for production or settlement); third, creating new imagined nationalities in Kenya constructed not on classical ethnic configuration that currently defines Kenya's *terra firma* but on imagined or created identities achievable through educational, bureaucratic, cultural and political pilgrimages.

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