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Competing Notions of Land in Colonial Kenya and the Impact on Present-Day Land Governance
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1. Introduction

Land governance remains one of the key challenges facing Kenya and reflects in all sectors – social, economic and political. Many efforts have been undertaken to resolve the challenge, but it still persists. The promulgation of the current constitution in 2010 was viewed as a gamechanger in governing all sectors of the country, particularly as it was seen to be a result of a people-driven process. However, the gains are yet to be fully realised.[1] In the case of land governance, for example, the reassertion that the radical / ultimate title rests with the people of Kenya as a nation, communities and individuals is very significant as one of the foundational concepts in addressing land issues. Unfortunately, as is discussed below, this is yet to be translated to the statutes and practice, especially in the situation of community land.

This chapter posits that the notions of land originating in and which were central to the construction of the colonial state still hold a key sway in the treatment of community land. Using a spatial justice lens and a settler colonial framework, the chapter traces the notions of land in precolonial, colonial and postcolonial Kenya and demonstrates that community land holding is still treated as a transitory phase to individualisation, and consequently, policy, law and practice is directed to that end. It does this by discussing the key land governance events. This section of the chapter sets out the layout of the chapter, while sections II and III address the spatial justice lens and the settler colonial framework respectively. Section IV traces

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1 Mutunga (2020).

the notions of land in precolonial Kenya. Section V traces the notions of land in colonial Kenya, while section VI traces the notions of land in post-colonial Kenya and their impact on land governance. The final section draws the conclusions of the chapter.

2. Spatial justice lens

In tracing the notions of land throughout the precolonial, colonial and postcolonial period, the chapter takes a spatial justice lens using the spatial justice theory as conceptualised by Edward Soja.[2] According to Soja, the spatial justice lens "refers to an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice."[3] This implies "the fair and equitable distribution in space of socially valued resources and the opportunities to use them."[4]

Adopting spatial justice is not to abandon the other conceptions of justice. Spatial justice does not seek to replace the existing perspectives of looking at justice; it seeks to amplify and extend the existing concepts into new areas of understanding. This is because geography or space has not always been given due consideration in studying the various phenomena in society. Geography or space has been seen "merely as external environment or container, a naturalized or neutral stage for life's seemingly time-driven social drama".[5]

The above depiction of geography or space has partially been out of disciplinary precaution among geographers to avoid simplistic environmental, climatic and geographical determinism that dominated geographical thinking before and its role in colonialism and eurocentrism.[6] Additionally, it has been recently realised that the "neutral stage" treatment of geography or space is a missed opportunity to gain more diversified insight into human activity and the world. This has led various researchers to the "spatial turn",[7] a realisation that "[g]eographies […] are consequential, not merely the back-

2 Soja (2010).
3 Soja (2010) 2.
4 Ibid.
5 Soja (2010) 103.
6 Soja (2010) 4.
7 Soja (2010) 3.

ground onto which our social life is projected or reflected".[8] We are spatial as well as temporal beings, and "[w]e make our geographies, for good or bad, just or unjust, in much the same way it can be said that we make our histories".[9] Therefore, incorporating spatial thinking in our analysis of phenomena "cannot only enrich our understanding of almost any subject but has the added potential to extend our practical knowledge into more effective actions aimed at changing the world for the better."[10]

Steps have to be taken to incorporate the spatial perspective. For Soja, the following three principles underpin critical spatial thinking:

a) the ontological spatiality of being (we are all spatial as well as social and temporal beings),
b) the social production of spatiality (space is socially produced and can therefore be socially changed),
c) the socio-spatial dialectic (the spatial shapes the social as much as the social shapes the spatial).[11]

The first principle implies that as human beings, we exist within time and space; we have a historical as well as a geographical presence. The second principle notes that our geographies are made. Geographies have inbuilt justice and injustice arising from their initial state. While this is the case, human activities either add or reduce the inbuilt justice and injustice, hence the social production of space. The third principle alludes to the fact that the initial state of geography influences human activity and in return, human activity shapes geography. This relationship moves back and forth, hence the socio-spatial dialectic. From these principles, we realise that we make our geographies as well as our histories, and that the geographies or spaces we make have both positive and negative impacts as is the case with our histories.[12]

An essential thing to note in the social production of space is the place of notions of land. As noted above, human activities shape geography. However, not all activities shape every part of geography, and in the same manner. The determination as to what activity takes place, in what space and in what manner is crucial and is the place where ideas and power manifest.[13]

8 Soja (2010) 103.
9 Ibid.
10 Soja (2010) 2.
11 Soja (2009) 2.
12 Soja (2010) 104.
13 Said (1993) 7.

Through various activities, people look for space. This creates an avenue where various notions of land compete for the available space. The notions are represented in policy and law, which are formulated to achieve certain objectives in practice. In some instances, differing notions can be accommodated in policy and law, while in other instances some notions prevail over others. The dominance of some notions to the disadvantage of others represents power and influence over land resources by one group over others. Notions of land are therefore instruments of social construction of space and geography.

3. Settler colonial framework

The place of various notions of land and their impact in Kenya is further explained by the settler colonial framework. The framework is a tool for understanding landscape, hegemony and the construction of settler colonialism. Its aim is to examine how a "body of ideas could, by way of its apparent objectivity, or by way of its historically and geographically specific capacity to appear neutral, undergird the construction of settler colonial landscapes".[14] It accomplishes this objective by deconstructing arguments and revealing the assumptions which facilitate the construction of settler colonial landscapes, and situates the discourse in its geographical and historical context in relation to positions taken in the contest for land resources.[15]

The shaping of land resources through various uses reflects ideology and hegemony. Public discourse on land shapes the land by providing ideas that go into land issue discussions, policy, law and practice: "as a material component of a particular discourse or set of intersecting discourses, 'the cultural landscape' at once captures the intent and ideology of the discourse as a whole and is a constitutive part of its ongoing development and reinforcement".[16] Settler colonialism, for example, is "founded on the dual logics of Indigenous elimination and territorial appropriation".[17] This is why settler colonial landscapes are constructed by portraying settler notions of land as being universal, inevitable or "natural".[18] This is in addition to "narratives

14 Proulx/Crane (2020) 56.
15 Proulx/Crane (2020) 50.
16 Schein (1997) 663.
17 Dang (2021) 1004.
18 Proulx/Crane (2020) 48.

that render Indigenous ways of representing and valuing places invisible".[19] The aim is to acquire land, whose control is considered the most "specific, irreducible element" of settler colonial contexts.[20]

In looking at the ensuing struggles for access to and control of resources between the communities and the state and corporations, the settler colonial framework uses the Gramscian conception of hegemony. This conception interprets discourses around contestation for resources as "articulations of ideological constructs by individuals who are entangled in ongoing struggles over power".[21] When the various articulations are fronted, "the hegemony of a particular social sector depends for its success on presenting its own aims as those realizing the universal claims of the community".[22] To accomplish this, the Gramscian language of hegemonic struggle notes that the corporation or project proponent takes on "a function of universal representation" but at the same time retains its particularity.[23] For example, the proponents present the project as one that serves national interests, while in fact the project continues to serve their own goals:

> Discourses promoting these projects as universally beneficial rely upon reference to supposedly value-neutral or objectively good outcomes in order to silence or make invisible Indigenous claims both about the land from which they are or could be displaced and about the consequences of national development projects for their lives and identities.[24]

The claims to universality in the discourse on construction of settler colonial landscapes are pegged on subjects including national interest, economic growth, law and order, sovereignty and private property. They are premised on "assumptions that private property, environmental efficiency and economic growth benefit the whole community".[25] These outcomes are deemed "value-neutral" as they are said to serve the needs of the whole nation, including those communities who are protesting. In representing, for example, that a project is important for the national interest since it is a source of

19 Proulx/Crane (2020) 49.
20 Wolfe (2006) 388.
21 Proulx/Crane (2020) 49.
22 Laclau (2000) 50.
23 Laclau (2000) 56.
24 Proulx/Crane (2020) 52.
25 Proulx/Crane (2020) 56.

tax revenue,[26] the project, while maintaining its individual and partisan identity, takes on a national identity in order to facilitate its completion and portray opposing views as being against the national interest. Communities opposed to the project are therefore seen as being opposed to the increase in generation of tax revenue for the nation, hence opposed to the national interest.

Appeal to the sovereignty of the state in the construction of settler colonialism is meant to accomplish a "rhetorical transformation of the physical properties of ancestral land into natural resources" to be used by the state and those in control to arrive at industrial ends.[27] The communities are told that the resources will be used to benefit everyone. Private property and the accompanying notions of land are then naturalized "as objective and neutral to the exclusion of other place-based norms of access and value of the land".[28] Communities which oppose the projects are portrayed as being against processes which are "legal and proper", and engaged in violation of private property. Owing to this, they are characterised as disturbing the peace hence the need for the state to intervene, through the police,[29] to enforce law and order and protect private property.

4. Notions of land in precolonial Kenya

Land resources (referred to as the commons) in the local communities were administered using customary tenure.[30] They were managed by families, clans and communities as corporate entities. The management had structural and normative parameters.[31] Structurally, the social hierarchy for managing the commons took the form of an inverted pyramid with the family at the tip, the clan and lineage at the middle and the community at the bottom.[32] Decisions on allocation, use and management would be made at the family, clan, lineage and community level, and even when not done collectively, the decisions would adhere to shared values. The shared values "ensured that a

26 Proulx/Crane (2020) 55.
27 Proulx/Crane (2020) 51.
28 Proulx/Crane (2020) 59.
29 Proulx/Crane (2020) 53.
30 Kariuki/Ouma/Ng'etich (2016) 49.
31 Okoth-Ogendo (2000) 2.
32 Ibid.

reasonable balance was achieved between resource availability, technology of use and the rate of consumptive utilisation".[33] The decisions made by the community related to the interests of the group as a whole and assigning of areas for use by clans, which would in turn set out specific areas for families, and similarly, the families to individuals.[34] The normative aspect related to the determination of membership and access to the resources through social obligations. Resources were allocated based on the category of the collective (clan, lineage or family) or individual, and the use to which the resources would be put for example, cultivation or grazing.[35]

The management of the commons reflected the social ordering in the community and was geared towards ensuring that the interests of the individuals were safeguarded but not at the peril of the wider community.[36] Individuals would have responsibilities to perform in return for access to the commons.[37]Additionally, the community, through shared values, ensured that its members took care of those who were disadvantaged. This greatly reduced instances of landlessness.[38]

Land was understood to be more than the soil; it represented the source of life and a place to practise cultural, economic and political activities. This explains the treatment of land as having a special place – not just one more commodity for exchange:

> It is impossible, for most people, to abstract land from the social and cultural meanings associated with it. Besides being the main source of livelihood for the majority of families, land also supports a wide network of kin relationships, and functions as a status symbol. To sell land – particularly ancestral land – is a monumental decision.[39]

Through land, individuals, families, clans and lineages would show their care for vulnerable members by providing food, a place to stay and cultivate. This provided a safety net for people who were experiencing difficulties.[40] Additionally, the inclusive approach helped to mitigate some of the unfair-

33 Okoth-Ogendo (2000) 3.
34 Okoth-Ogendo (2000) 2.
35 Okoth-Ogendo (2000) 3.
36 Kariuki / Ouma / Ng'etich (2016) 90.
37 Okoth-Ogendo (2000) 3.
38 Mafumbate (2019) 8.
39 Nyamu-Musembi (2006) 18.
40 Mafumbate (2019) 8.

ness that people were experiencing due to the geographical aspects of the land. The land resources were the main basis for bringing and binding people together. Racheal Mafumbate notes in this regard that:

> Living together' and the sense of 'community of brothers and sisters' are the basis of, and the expression of, the extended family system in Africa. This arrangement guaranteed social security for the poor, old, widowed, and orphaned which is one of the most admired values in the traditional African socio-economic arrangement.[41]

Additionally, Macaulay Kanu explains that members of the community would allow others to live on their land:

> Africans easily incorporate strangers and give them lands to settle hoping that they would go one day, and the land would be reverted to the owner. This is usually done with the belief that one will never opt out of his own community.[42]

As this section shows, the prevailing notions of land in the precolonial period conceptualised land resources as places for practicing social, economic and political activities of the communities. The section further notes that the use of the resources was viewed from an angle of responsibility; all the members of the community had reciprocal duties to discharge while accessing the resources. Additionally, the responsibility over the resources extended to using the resources to take care of the less privileged in the society. These aspects were achieved, as the discussion points out, through the making of decisions using shared values aimed at achieving sustainability.

5. Notions of land in colonial Kenya

It is important to examine the colonial period and its impact while looking at land governance in Kenya or any colonised place:

> To study modern laws of private property ownership without accounting for the significance of the colonial scene to their development is to disaffiliate the development of modern law from its deep engagements with colonial sites in ways that parallel the literary disavowals of colonialism […]. [M]odern property laws emerged along with and through colonial modes of appropriation.[43]

41 Mafumbate (2019) 8.
42 Kanu (2010) 155.
43 Bhandar (2018) 3.

In Kenya, colonialism implied spatial reordering; the colonial enterprise was based on laying claims to land already within the hands of indigenous/traditional communities.[44] An essential aspect to this objective was, therefore, denial of the fact that the lands were already owned by the communities.[45] This was achieved, as is shown below, through steps including formulation of policies, enactment of laws and creating and spreading the narrative that the lifestyle, forms of tenure and land holding practised by the traditional communities would inevitably come to an end as the communities would eventually transition from pre-capitalist to capitalist societies. As new notions of land were introduced on the basis of private ownership of land, the ground was set for competition between the new and existing notions for the available land. While the existing notions were already rooted in the lives and practices of the local communities, the new notions started to penetrate the land practices since they had the legal backing of the colonial administration.[46]

While these notions competed, the crucial aspects in the land governance system were based on the framing of answers to the key questions such as where did the radical/ultimate title (original ownership) of the land vest, and what constituted use/occupation of land. The approach of the notions of land among the local communities was that the radical title vested in the community as a whole, and was held in trust by the leadership of the community.[47] On the question of land use, the communities practised different social and economic activities[48] such as farming and pastoralism, and the use of land took different forms including leaving the land vacant in order for pasture to grow back or for the land to regain its fertility in the case of farming.

The new notions of land had different answers to the above questions. As to the question of radical title, the new notions answered that it should vest in the Crown.[49] And in regard to land use, the new notions deemed places not physically possessed as "waste and unoccupied land" available for the

44 Coulthard (2014) 125.
45 Okoth-Ogendo (2000) 7.
46 Kariuki/Ouma/Ng'etich (2016) 165.
47 Kariuki/Ouma/Ng'etich (2016) 202; and Bentsi-Enchill (1965) 132.
48 Okoth-Ogendo (1989) 10.
49 *Crown Lands Ordinance 1915*, *Kenya (Annexation) Order-in-Council 1920* and *Kenya Colony Order-in-Council 1921*.

Crown to grant as it pleased.[50] Section 30 of the 1902 Crown Lands Ordinance set out the rights of the native communities on the basis of occupancy only. Consequently, under Section 31 of the same Ordinance, land not occupied by the communities was deemed "waste or unoccupied land" and could be leased or sold. The determination of these two key aspects – radical title and land use – resulted in a major shift in power in land governance; the power of spatial (re)ordering was moved from the communities to the colonial state. As a consequence, the state was empowered to displace communities and individuals. Additionally, the state exercised political influence over land governance. Pursuant to this, new legal provisions were put in place to take away the land from the communities and avail it for the use of the colonial administration and settlers. Such practices were also undertaken in Ireland and African countries which the British colonised.[51]

In order to arrive at the conclusion that land did not belong to the communities, the colonial administrators came up with their own interpretation of the customs of the local communities. John Ainsworth, for example, observed that the Kikuyu land custom would be interpreted

> as we think best for the country […]. Of course we can stretch such customs to almost any meaning within their reasoning: if we say it means a freehold then it becomes a freehold, but in our interpretation of the laws and customs I think it wiser not to recognise any system of freeholds; we want some control over non-native holders of land.[52]

In doing this, the colonial administrators denied ownership of land by local communities, hence conferring on the Crown the original title in the land.[53] This enabled the colonial administrators to take control of the land so that they could give it to the settlers on condition. The administration encouraged Europeans to settle in Kenya with one of the aims being to generate economic activity to sustain the East African railway project, which would help the British keep hold of India through the Indian Ocean and the Suez Canal. The "White Highlands", one of the highly productive areas in Kenya, would in return be reserved for the settlers.[54]

50 Kariuki/Ouma/Ng'etich (2016) 211.
51 McAuslan (2015) 341 and 344.
52 Ainsworth to Crauford, 19 July 1899, enclosure 1 in Crauford to Salisbury, 24 August 1899, as quoted in Sorrenson (1968) 179.
53 Sorrenson (1968) 45.
54 Harbeson (1971) 232. See also Robinson/Gallagher/Denny (1961).

To ensure the new notions of land were reflected in practice, the administration deployed strategies including using coercion and fraud to procure "agreements / treaties"[55] (for example, the 1904 Anglo-Maasai Treaty procured under coercion and the 1911 Anglo-Maasai Treaty procured under fraud)[56] with communities to cede some of their land to the Crown and moving communities to reserves. It also depicted native land use as backward and retrogressive, subjugated customary law to statute and common law[57] and gave incentives to facilitate the private ownership of land. The incentives included the ability to apply for financial credit by offering the private title as security[58] and the opportunity to participate in the new economic set up, for example through buying and selling of land.[59] When the Maasai challenged the legality of the treaties in *Ole Njogo and Others v The Attorney General*,[60] contesting the authority of the chiefs who signed the 1911 Treaty, the Eastern African Court of Appeal dismissed the case on the basis that the treaties were concluded between sovereign states – the Maasai were deemed to be a sovereign state under the protection of the British. This decision gave the administration "the best of both worlds".[61] The justification for the extension of jurisdiction over the East Africa Protectorate in 1815 was on the basis that traditional chiefs and elders were "practically savages in whom sovereignty could not possibly reside".[62] However, the chiefs and elders would later conveniently, and perhaps magically, become sovereign when the administration needed a treaty to be concluded, for example in the case of the 1904 and 1911 Anglo-Maasi Argreements, as discussed above. The Crown had its cake and ate it, and the judicial system cheered on.

At the protectorate stage, as the British were deciding on a form of government over the territory, various initiatives were undertaken in coming up with a policy on how to deal with the natives. Sir Percy Girouard, the Governor of the East Africa Protectorate, opted to introduce the Lugard

55 *Anglo-Maasai Agreements 1904* and *Anglo-Maasai Agreements 1911*.
56 Ole Simel (2003) 3. See also Ruto (2005) 30.
57 Kariuki / Ouma / Ng'etich (2016) 72.
58 Colony and Protectorate of Kenya (1954).
59 Government of the United Kingdom (1955) 323.
60 Civil Case No. 91 of 1912 (E. A. P. 1914), 5 E. A. L. R. 70.
61 Seidman (1970) 180.
62 Okoth-Ogendo (1991) 11.

indirect rule policy – "rule mediated through one's own"[63] – local chiefs were appointed to govern specific areas using a mixture of local customs and statute law, and answerable through a chain of command leading to the district officer, provincial officer, and the governor at the top. In doing so, he noted that South Africa would offer more insight than West Africa since the presence of the white settlers and racial issues in the Protectorate resembled those of South Africa. As a result, in his report to the Colonial Office in 1910, he followed the recommendations in the South African Native Affairs Commission Report of 1905 which "envisaged four stages of African evolution towards civilisation: at first Africans lived in a tribal society in reserves; then they laboured for European farmers; next they obtained urban employment; and finally, they moved into professional occupations".[64] At this point, "East Africa was in the first stage, though the second and third were rapidly approaching".[65] The "progress" in civilisation would be undertaken through measures including "gradual modification" of tribal institutions, encouraging individualization of tenure and European education.[66] The aim was to ensure that "[i]n the long run, through education, the African areas would become 'civilised Black states under White control'. With help from European supervision 'the Black may have the chance of working out his race salvation'."[67]

The above thinking was continued in the colonial period. Colonial administrators John Ainsworth and C. W. Hobley, for example, observed that

> [i]n dealing with African savage tribes we are dealing with a people who are practically at the genesis of things […] and we cannot expect to lift them in a few years from this present state to that of a highly civilised European people […]. The evolution of races must necessarily take centuries to accomplish satisfactorily.[68]

Additionally, many of the district officers – "Little Tin Gods" –

> felt it their duty to change the lives of the Africans they ruled, and against great odds they did. Sent out by their superiors in London and Nairobi as policemen and tax collectors, they saw themselves as secular missionaries for a superior culture. Work-

63 Mamdani (1999) 870.
64 Sorrenson (1968) 249.
65 Ibid.
66 Sorrenson (1968) 254.
67 Ibid.
68 C. O. 533/63, memo. on native policy, 2 October 1909, in Girouard to Crewe, 13 November 1909, as quoted in Sorrenson (1968) 227.

> ing in the decade before the catastrophic first world war, they were the last generation of Europeans who easily believed their own superiority.[69]

Individuals and local communities were incentivised to embrace the new ways by being given access to the new social, economic and political space.

Strategies were designed to provide productive lands to the settlers. This would be the beginning of a campaign of sustained enactment[70] targeting land occupied by traditional communities and the communal tenures they practised. However, "an intractable legal problem" stood in the way in the period when Kenya was a protectorate. This was because

> [a]ccording to British law the Crown was the source of all title in land. Thus, unless the Crown established an original title to the land, normally a consequence of sovereignty, it was legally impossible to make grants in fee simple or under any other form of tenure recognized in British law. As protectorates were technically foreign territories it was difficult for lawyers to see how the Crown could assert a title to land or grant titles to British subjects. It was possible to obtain rights to deal with land by treaties with the existing sovereign authority of a protectorate; but then, the Crown acted by delegation of authority, according to the terms of the treaty.[71]

Solving the above legal problem started through the extension of the 1890 Foreign Jurisdiction Act to permit control over foreign lands. It was enacted to consolidate statutes relating to the exercise by the Queen of jurisdiction outside of her domains – that is in relation to jurisdictions obtained by "treaty, capitulation, grant, usage, sufferance or any other lawful means".[72] The Foreign and Colonial Offices initially doubted the ability of the Act to grant control to the Crown over the land in Kenya. They advised that the Crown could only give certificates of occupation but not leases since the Crown did not own the land.[73] Arthur Hardinge, Commissioner of the East Africa Protectorate, urged the Foreign Office that the government should abandon the "juridical fiction" and assert title over the area by virtue of its protection.[74] He noted that "since Africans owned land only in terms of occupational rights", the unoccupied/waste land ought to revert to the Crown as the territorial sovereign.[75] He saw, "small chiefs and elders as

69 Thomason (1975) 145.
70 Manji (2020) 9. See also Blomley (2003) 114.
71 Sorrenson (1968) 45.
72 *Foreign Jurisdiction Act 1890* [53 & 54 VICT. CH. 37].
73 Sorrenson (1968) 50.
74 Okoth-Ogendo (1991) 11.
75 Ibid.

practically savages in whom sovereignty could not possibly reside; the only reasonable alternative was Her Majesty's Government".[76] The Foreign Office was warned that "if not put on legal lines", land administration "may give rise to much future trouble".[77]

Accordingly, the Foreign Office asked for advice from the Crown's legal officers. The situation had developed to the extent that "The Law Officers were left in no doubt that the Foreign Office required a favourable verdict".[78] The advice was given on 13th December 1899, and was to the effect that the Foreign Jurisdiction Act empowered the Crown to control and dispose

> waste and unoccupied land in protectorates where there was no settled form of government and where land had not been appropriated either to the local sovereign or to individuals. Her Majesty might, if she pleased, declare them to be Crown Lands, or make grants of them to individuals in fee or for any term.[79]

This position was reflected in the 1901 East African (Lands) Order-in-Council and later in the 1902 Crown Lands Ordinance. These two legal instruments

> had the effect of conferring upon protectorate administrators enormous discretion with respect to what land they could lawfully dispose of within the Protectorate. The vagueness associated with public lands left them power to determine more or less on an ad hoc basis what waste and unoccupied lands were.[80]

Consequently, a spatial reordering was set in motion. The provisions of the 1915 Crown Lands Ordinance, the 1920 Kenya (Annexation) Order-in-Council and the 1921 Kenya Colony Order-in-Council extinguished all native rights to the land occupied by natives, and vested the land in the Crown.[81] The local communities were therefore rendered "tenants at the will of the Crown".[82] The colonial state was vested with powers to fundamentally alter the spatial relations of local communities by unilaterally declaring some parcels of land as "Crown land".[83]

76 Ibid.
77 F. O. C. P. 7401, No. 143, Gray to F. O., 21 June 1899.
78 Sorrenson (1968) 51.
79 See F. O. C. P. 7403, No. 101.
80 Okoth-Ogendo (1991) 14.
81 *Isaka Wainaina Wa Githomo and Kamau Wa Githomo v Murito Wa Indangara (2) Nanga Wa Murito (3) Attorney-General* (1922–1923) 9 KLR 102.
82 Ibid.
83 Kariuki / Ouma / Ng'etich (2016) 164. See also *East African Order-in-Council 1901*.

Furthermore, pursuant to the 1920 Kenya (Annexation) Order in Council by which Kenya was made a British Colony, there was also the application of English common law to adjudicate civil and criminal matters in the colony, hence subjugating the customary laws of the communities. The customs are integral to the management of the commons. The effect of all these legal changes was to deem African commons as *terra nullius* resources. Additionally, the new legal system "paid little regard to the established community principles or mechanisms".[84] This impacted the continued application of inclusive notions of land. Social systems were disrupted, and communities moved to the less productive and challenging terrains in the "reserves".[85]

Once the communities were pushed to the "reserves", it became necessary to address the questions on land tenure in those areas since the places soon became crowded as more land was acquired for the settlers, for example, though the continued displacement of the Maasai pursuant to "treaties" with the British. As the "reserves" became crowded, the communities started to agitate for the land occupied by the settlers.[86] This started to build up sentiments of resistance to colonial rule and calls for independence. To address this, the colonial government set out to engage in land law reform within the reserves. The objective was to gaslight the communities in the reserves by "enlightening" them that the problems they were facing arose not from the fact that they had been confined to the reserves to create space for settlers but that the customary tenure was derailing development:[87]

> So as not to disturb the existing pattern of land distribution, it was tenure rather than land reform that was required. Tenure reform would freeze that pattern while at the same time justify it to the African peasantry on what were considered as sound economic grounds. As such, the reform was simply a means to an objective which was not necessarily consistent with those grounds.[88]

The stage was thus set for the further undermining of the commons, communal tenure and attendant practices. Two main things needed to be accomplished – denying the proprietary nature of the commons and the juridical character of customary law. These were sentiments already present at the

84 Okoth-Ogendo (2000) 6.
85 Ibid.
86 Sorrenson (1968) 292.
87 Kariuki / Ouma / Ng'etich (2016) 166–167.
88 Okoth-Ogendo (1991) 71.

heart of the colonial enterprise. Sir Frederick Lugard, one of the chief architects of British colonial rule observed that:

> Speaking generally, it may, I think, be said that conceptions as to the tenure of land are subject to a steady evolution, side by side with the evolution of social progress, from the most primitive stages to the organization of the modern state […]. These processes of natural evolution, leading up to individual ownership, may, I believe, be traced in every civilization known to history.[89]

From the discussion above, dispensing with customary law was therefore another key component of the colonial project. Customary law is "the domain which defines the structural and normative parameters of the commons".[90] The denial of the proprietary nature of the commons would be incomplete without the "legal and administrative contempt of customary law".[91] The sentiments were harboured throughout the administrative framework. Okoth-Ogendo notes that there was

> the strong view held by colonial anthropologists and administrators that 'native law and custom' was merely a stage in the evolution of African societies. It was expected, therefore, that relations defined by customary law, including common property systems, would wither away as Western civilisation became progressively dominant in African social relations. There was, therefore, no need to acknowledge, let alone develop, customary law as a viable legal system and customary land tenure as a system of rights and duties.[92]

It appears that the attempts to get rid of the commons and customary law were treated as moving the African communities along the "civilisation" trajectory.

To accomplish these objectives, the campaign of legislative enactments which started with the extension of the 1890 Foreign Jurisdiction Act was sustained through colonial government reports, policies, laws and regulations seeking to move land holding from customary tenure to individualisation/privatisation. For example, section 3 of the Native Tribunals Ordinance[93] empowered provisional commissioners to establish native tribunals. This merging of the administrative function with the judicial function "enabled administrators to align the development of customary law not only to their own values, but also to the political imperatives of the colonial

89 Lugard (1922) 280.
90 Okoth-Ogendo (2000) 7.
91 Ibid.
92 Okoth-Ogendo (2000) 8.
93 No. 39 of 1930.

state".[94] The practice was later implemented through District Law Panels "which were given the responsibility *inter alia* for guiding the development of customary laws and making recommendations for changes therein".[95] It is observed of the panel in the region of Murang'a that it "played a key role in transforming customary law in a fundamental (manner), filling a vital gap in political machinery left by the removal of what traditional organs of legislative action had once existed".[96]

A key policy document in the legislative campaign was *A Plan to Intensify the Development of African Agriculture in Kenya* (popularly known as the Swynnerton Plan due to the work of Roger Swynnerton – who was then the Assistant Director of Agriculture in Kenya – in developing the plan).[97] The Plan recommended changes in the agricultural sector and was meant to address the unrest among Africans in relation to land. By design, the Plan did not investigate the root causes; it instead "contemplated economic answers to what were in large measure political and social problems".[98] It noted that:

> Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer a unit of land and a system of farming whose production will support his family […]. He must be provided with such security of tenure through an indefeasible title as this will encourage him to invest his labour and profits into the development of his farm and will enable him to offer it as security against such financial credits as he may wish to secure […].[99]

This required the communities to forget about the land taken from them and adapt to the new ways of land holding and farming.[100]

Another consequential document in the legislative campaign was the 1955 Report of the East African Royal Commission, whose objective was to identify ways of improving the welfare of African peasants. The report noted that:

> individual tenure has great advantages in giving to the individual a sense of security in possession and in enabling by purchase and sale of land, an adjustment to be made by the community from the present unsatisfactory fragmented usage to units

94 Okoth-Ogendo (1991) 64.
95 Okoth-Ogendo (1991) 65.
96 Morris/Read (1972) 205.
97 Colony and Protectorate of Kenya (1954).
98 Harbeson (1971) 236.
99 Colony and Protectorate of Kenya (1954) 9.
100 Harbeson (1971) 236.

> of economic size. The ability of individuals to buy and sell land by a process of custom, opens the door to that mobility and private initiative on which a great sector of economic progress tends to depend […]. The specialist farmer is relieved of the liability of providing a place for the subsistence of his clan relations.[101]

What is notable from both the Swynnerton Plan and the Report of the East African Royal Commission is the deliberate framing of "the land question in specific ways so as to avoid pointing to colonial expropriation of land as the root of the ongoing land problems".[102] African land tenure systems are portrayed as the problem,[103] hence the justification for "reform" through individual/private tenure. The call for individual tenure was being translated into colonial government policy. In noting that "[t]he specialist farmer is relieved of the liability of providing a place for the subsistence of his clan relations", the report depicts the care among the members of the community as a "liability". This was aimed at breaking down the inclusive nature of social and land relations in the communities. As these measures took effect, the safety net in the community that would help the vulnerable disappeared; the spatial relationship between the communities and the land was changed.

To give effect to the above proposals, the Native Tenure Rules[104] were enacted to apply to "Emergency Districts" – Kiambu, Nyeri, Fort Hall (Murang'a) and Meru. These enabled the Minister to put in place measures for adjudication and consolidation in native areas "within which the Minister considers that a private right-holding exists".[105] To ensure the process proceeded without obstacles, the African Courts (Suspension of Land Suits) Ordinance[106] was passed "to bar all land litigation in all areas to which the Rules applied".[107] Additionally, the Indemnity Ordinance[108] was passed "to absolve any person in government service from liability arising from 'any act, matter or thing done within the Kikuyu Native Land Unit during the emergency […]'."[109] In February 1957, the Working Party on African Land Tenure was appointed to look into

101 Government of the United Kingdom (1955) 323.
102 Manji (2020) 39. See also Ngugi (2001) 337.
103 Manji (2020) 39.
104 Legal Notice No. 52 of 1956.
105 Rule 2(1).
106 No. 1 of 1957.
107 Okoth-Ogendo (1991) 72.
108 No. 36 of 1956.
109 Okoth-Ogendo (1991) 72.

> measures necessary to introduce a system of land tenure capable of application to all areas of native lands with particular reference to: (a) status of land in respect of which title is issued; (b) the nature and form of title to be granted; (c) the substantive legislation for the determination of rights, consolidation, enclosure and demarcation; the issue and registration of title […].[110]

It submitted its recommendations in 1958 which included that registration should lead to an absolute title except in cases of succession.[111] The recommendations were captured in the Native Lands Registration Ordinance[112] to introduce a system of registration, and the Land Control (Native Lands) Ordinance[113] to control land transactions in native areas – "to protect uninitiated peasants from improvident use of their rights under the new tenure system".[114]

There were also other ways in which the narrative was strengthened and spread. These included the social, economic and political incentives given to those who would shun the "backward" ways and embrace the "civilised" ways of life. The agricultural reform envisaged by the Swynnerton Plan, for example, was purposely designed to direct credit, planning and extension services to "a select group of educated progressive farmers already engaged in the production of settler crops".[115] The Plan was selectively implemented. A 1960 report by the International Bank for Reconstruction and Development on development of African agriculture in Kenya sets out the details of a loan application to the Bank by the governments of Kenya (borrower) and the United Kingdom (guarantor). The governments applied "for a loan in an amount equivalent to US-$5.6 million to help finance the completion of the so-called Swynnerton Plan of the Kenya Government for the development of African agriculture in 'high potential areas' of the territory".[116] The Plan would be primarily implemented in select provinces:

> The Swynnerton Plan operations are mainly conducted in four of the six provinces of Kenya: Central Province, Nyanza, Rift Valley, and Southern Province. The bulk of the action is concentrated on 'areas of high potential' and most of these areas are

110 Okoth-Ogendo (1991) 73.
111 Ibid.
112 No. 27 of 1959.
113 No. 28 of 1959.
114 Okoth-Ogendo (1991) 74.
115 Okoth-Ogendo (1991) 71.
116 International Bank for Reconstruction and Development (1960) i.

> located in Central Province and Nyanza. Activity under the plan in Coast Province and Northern Province is minor.[117]

Despite the implementation of the various measures, agitation for land restitution and independence grew louder. As this happened, some settlers started engaging with African farmers on ownership of the "White Highlands":

> Multi-racialism was a political and economic philosophy meant to take the steam out of the nationalist kettle […]. Arguments for the extension of the franchise ['White Highlands'] to Africans were limited to those of a certain age and qualified either by property ownership or by their military record; this was to ensure the election of non-nationalist Africans capable of appreciating the European economic contribution.[118]

The multi-racial initiatives were primarily designed to again divert attention and delay questions being raised as to the distribution and occupation of the lands. One way of diverting attention was to create division among the Africans in the fight for land restitution and independence. Those who were rewarded with land would form an opposition to the nationalists hence shifting attention from the "White Highlands" occupied by the settlers, and the accompanying geographical injustices.

Another key aspect used in promoting the new notions of land at the expense of the local ones was the use of language. Under the settler colonial framework, discussions on the construction of colonial landscapes are viewed as "articulations of ideological constructs by individuals who are entangled in ongoing struggles over power".[119] The portrayal and treatment of the Mau Mau fighters offers a good example. The Mau Mau fought the colonial state and its collaborators to get back land taken away from the communities and to attain independence.[120] Primarily made up of squatters, former squatters, farm workers and landless Kikuyu, the Mau Mau wanted to put an end to the settler domination of the highlands – which were the most productive but least utilised land – and called for the removal of limits on economic and political rights in native reserves.[121] While the local communities saw them as advocating for their rights, the colonial state and the

117 International Bank for Reconstruction and Development (1960) 4.
118 Harbeson (1971) 237.
119 Proulx/Crane (2020) 52.
120 See Clough (1998) 34.
121 Boone (2014) 141.

settlers painted them as criminal, rebel and violent groups. Sir Michael Blundell, a settler and member of the Legislative Council, notes as follows in regard to the Mau Mau in his memoir,[122] in a chapter titled "The Kikuyu and the Misery of Mau Mau":

> The second aspect of policy which I stressed was the increasing lawlessness and contempt for government which was being manifested, mainly by the Kikuyu. Already one or two of my constituents, as early as 1950, had told me of a secret society called 'Mau Mau' which was terrorizing the men and women working on their farms with oaths and all the mumbo jumbo of tribal witchcraft. Violent assaults, even serious physical harm, and death were the concomitants of robbery and a general disregard for the law. Whole locations would stage mass disobedience to simple agricultural and soil conservation methods in defiance of authority […]. I therefore put the need for a firm hand in restoring the situation in the forefront of my views.[123]

The above view portrayed the Mau Mau as a group which had a "disregard for law and order".[124] The settlers used this depiction to pressure the government to crack down on the members of this group. In one of his speeches to the Legislative Council, Blundell claimed that the Mau Mau were "a subversive organization which was like a disease spreading through the Colony and the leaders have a target and the target is the overthrowing of the Government […]".[125] This and other views by the settlers and colonial administrators served to undermine the land and independence grievances of the Mau Mau in the ongoing struggle for the control of land and governance in colonial Kenya. These views informed the declaration of the state of emergency in the Colony from 1952 to 1960 in order to deal with the Mau Mau and other rebel groups. The "maintenance of law and order" was presented as important for the interests of all the people in the Colony but in fact served to ensure that the fertile highlands remained within the hands of the settlers, and the colonial state continued its rule over the people.

Additionally, the colonial government embarked on resettlement of natives under private land systems as a political and economic strategy to demobilise the Mau Mau and other groups.[126] The aim was to cause doubt

122 Blundell (1964).
123 Blundell (1964) 88–89.
124 Blundell (1964) 91.
125 Ibid.
126 Kariuki/Ouma/Ng'etich (2016) 422.

in the minds of the Mau Mau members as to whether to continue the fight for liberation or abandon the fight so as not to miss out on the land allocations. Land served as a weapon as well as a prize in the war. For example, the tenure and agricultural reforms proposed under the Swynnerton Plan such as the offering of credit, planning and extension services were initially targeted at the "Mau Mau Districts" in Central Province. And within those districts, "the concern did not by any means include every peasant. It was to a select group of educated progressive farmers already engaged in the production of settler crops".[127] This was meant to cast doubt in the minds of the Mau Mau fighters and the people in the area by presenting a narrative of a new crop of successful people working in tandem with the government.

From a spatial justice lens, the above discussion of some of the key highlights of the colonial land governance in Kenya indicate that the new notions of land – based on the English property law system – were used to enable the colonial administration to engage in spatial (re)ordering. As the discussion notes, for example, the vesting of the radical/original title on the Crown was intended to take away land from the communities for use by the colonial administration and settlers. The initiatives undertaken in the pursuit of this objective are demonstrative of the manner in which settler colonial landscapes are constructed. The colonial administration falsely and intentionally misinterpreted the customs of the communities to the effect that the communities did not own the land but were merely using or occupying it. Additionally, the colonial administration viewed the communities as being in a lower level of civilisation. The traditional chiefs and elders were regarded as savages who could not possibly have sovereignty. It was the duty, therefore, of the colonial administrators to change the communities and move them towards a higher level of civilisation. When the Mau Mau fought back to get the land, the administration and settlers depicted them as agents of lawlessness and branded them terrorists. And when independence was inevitable, strategies including fake attempts at multi-racism were used to divert attention away from land grievances. All these strategies fit within the settler colonial framework; where in the fight for control over resources, discourses are constructed by portraying some views as universal, inevitable and natural while depicting others as backward, lawless and irrational.

127 Okoth-Ogendo (1991) 71.

Appeals to law and order are used to foreclose any questions on the legitimacy of resource acquisition and distribution.

6. Notions of land in present-day Kenya and their impact on land governance

Colonialism "produced a racial regime of ownership that persists into the present, creating a conceptual apparatus in which justifications for private property ownership remain bound to a concept of the human that is thoroughly racial in its makeup".[128] This is seen in Kenya where "Kenyanisation" at independence did not change the fundamental aspects of land relations;[129] the racial discrimination in the colonial state transitioned to class and ethnic domination in the post-colonial state.[130] As the situation in the colony indicated that the time for independence was drawing close, the process was carefully midwifed by the colonial government and settlers to ensure that the colonial economic, social and political interests were protected in the post-colonial state:

> By the time that revolutionary forces from below and the pressures from Whitehall from above had made independence inevitable, the Department of Lands and Settlement had crafted plans for the transfer of lands from European to African ownership in such detail that they could be circulated in international capital markets, appraised, and funded – all within a few months' time.[131]

The colonial and settler interests were secured through guarantees that none of the land would be taken back without compensation. Through the Yeoman and Peasant scheme, administered by the Land Development and Settlement Board, Kenya would obtain funds from the World Bank and the Colonial Development Corporation and purchase land from settlers on a "willing buyer willing seller" basis, and sell it, by way of loans, to the locals.[132]

Eager to ascend to power, the new Kenyan political elite, who had embraced the British colonial lifestyle, agreed to the guarantees. Jomo Kenyatta, who was the Prime Minister then, underwent a "radical" transforma-

128 Bhandar (2018) 4.
129 Manji (2020) 10.
130 Manji (2020) 9.
131 Bates (1989) 58.
132 Leo (1981) 209–210, 216.

tion from having advocated for the return of land by settlers to envisioning an independent Kenya with settlers in it. In his speech to the settlers in Nakuru in August 1963, Jomo Kenyatta stated that

> [t]here is no society of angels whether it is white, brown or black. We are human beings and as such we are bound to make mistakes […] If we start thinking about the past, what time have we to think of the future?[133]

He forged ahead with a message of a "united" Kenya where the past and the "vicious activities" of the colonial government, settlers and their collaborators were "to be forgotten/suppressed".[134] The Mau Mau and their fight for land were given a clear message that such was not needed in the "new" Kenya:

> Over the years, then, those who have sought, in Gikuyu society, to raise issues pertaining to the Mau Mau fighters' arguments have had the regular reminder that they are seeking to destabilize society by 'opening old wounds'. Their very motives have been questioned: they are *andu a muthotho* (gossips) […]. It has been the corporate endeavour of the state and the Gikuyu community to suppress this past, a significant slice of the total Mau Mau experience.[135]

The colonial government ban on the Mau Mau was retained by the post-colonial state until August 2003.[136] The ban was retained to "suppress the narratives of the radical Mau Mau as an embodiment of the struggle for Kenyan nationhood".[137] It ensured that the only politically recognised Mau Mau were those in support of the government.[138] This rendered the contributions of the Mau Mau towards the fight for independence invisible, and depicted those in government as the "fathers of the nation".

The new political elite behaved like the colonial masters (the Crown); they retained the colonial land policies and laws and continued the spatial re-ordering: "Independence led, not to a re-examination of the status and content of the commons, but rather to its more intensified expropriation and neglect".[139] Through the land resettlement schemes, some of the areas previously forcefully taken from communities and designated as the "white highlands" were put up for sale. The manner of allocation by the new leader-

133 Knauss (1971) 134.
134 Atieno-Odhiambo (1991) 303.
135 Ibid.
136 Branch (2010) 314.
137 Mwangi (2010) 92.
138 Ibid.
139 Okoth-Ogendo (2000) 9.

ship followed "a patronage politics logic of transferring land to government-selected beneficiaries".[140] Just as the colonial government had rewarded settlers and loyalists with land and excluded the Mau Mau, President Jomo Kenyatta "used the former settler land as patronage to solidify his support and build alliances, and many former loyalists became prominent in the new KANU government".[141] His successor, Daniel Moi, presided over a period characterised by "irregular allocations of public land to well-connected individuals and land-buying companies" in different parts of the country including forest lands.[142] It was the colonial administration disguised in post-colonial attire.[143]

For example, through the World Bank, Britain and donor funded settlement schemes, "those charged with implementing the scheme settled some landless – and settled themselves too!"[144] At the instantiation of Jomo Kenyatta, a secret settlement scheme known as the Z-Plot scheme was created in 1964. The subject of the scheme was the former European settler farm houses with 100-acre plots around them. However, unlike the other settlement schemes, the "Z-Plot scheme was not for the hoi polloi":[145] "[t]he plots were intended for potential community leaders – a sort of created squirearchy – drawn from political leaders, high-level civil servants and military officers".[146] The Cabinet had not approved any plans for disposal of the plots – all that the individuals fitting in this category were required to do "was to identify a farmhouse and the land and apply to the minister of Lands and Settlement for allocation".[147] Jomo Kenyatta got one in Nyandarua while his successor, Daniel Moi, got one in Eldama Ravine, and so did many other top politicians, ministers and civil servants, with some applying for several of the plots.[148]

The secret scheme came to light in 1965 when it was realised some of the individuals were defaulting on the plots – the repayment from the scheme

140 Boone/Lukalo/Joireman (2021) 6.
141 Klopp (2000) 16. See also Berry (1993) 125.
142 Klopp (2000) 8.
143 Funder/Marani (2015) 90.
144 Kamau (2016).
145 Ibid.
146 Van Arkadie (2016) 65.
147 Kamau (2016).
148 Ibid.

was worse than any other. The British appointed a commission in 1966, led by Brian Van Arkadie. Van Arkadie was given a list which "a cursory glance over the names shows that many of the new plots are owned by ministers, members of parliament, ambassadors, permanent secretaries, provincial commissioners, civil servants and prominent national personalities".[149] The Kenyan government objected to this involvement by the British government. The scheme continued and the Treasury was directed to guarantee the funds needed: "[t]his meant taxpayer money would be used to fund the take-over of land by a select few. When that was done, nobody questioned the Z-Plots again".[150]

Another key aspect at independence was the renaming of "Crown land" to "government land"[151] and vesting the President with powers, through the now repealed Government Land Act, "to make grants and dispositions of estates, interests or rights in or over unalienated government land".[152] The Act did not provide clear procedures on the making of the grants. What ensued was abuse of the power of allocation through corruption.[153] Parcels of land, in both rural and urban areas, would be allocated leading to loss of public land.[154] The presidents and the government treated the land as "belonging" to them rather than being held in trust for the people of Kenya.[155] And even though the Act has been repealed and measures provided in the 2010 Constitution for the holding of the land in trust for the people, the consequences of the "Crown" and "government" land are still felt today. Public projects such as construction of schools, hospitals, roads and railways necessitate massive displacement and eviction of communities. This impact would have been reduced if the land taken from communities and classified as "Crown" and "government" land had not been irregularly allocated to politically connected individuals.

The pattern of development in the country also largely mirrors the colonial designation of areas as "white highlands" and "reserves". Most of

149 Ibid.
150 Ibid.
151 Kariuki/Ouma/Ng'etich (2016) 212.
152 Section 3(a), *Government Lands Act* (Chapter 280, Laws of Kenya) (Repealed), and Kariuki/Ouma/Ng'etich (2016) 212.
153 Republic of Kenya (2004) 12.
154 Republic of Kenya (2013) 254.
155 Akech (2010) 25 and 27.

the resources have been channelled to the "white highlands" as the productive parts, while most of the "reserves" remain marginalised. For example, arid and semi-arid lands (ASALs), which make up 89% of the country,

> have been marginalized in terms of resource allocation, infrastructure development, social-service delivery and economic investment. The population in the ASALs have had little or no participation in political leadership and hence no opportunity to influence policy decisions and actions in their favour.[156]

This marginalization "is partly the result of conscious public policy choices",[157] and brings to mind the selective manner of implementation of the Swynnerton Plan as discussed in the section on the colonial period. Sessional Paper No. 10 of 1965 on *African Socialism and its Application to Planning in Kenya*, Kenya's economic development blueprint at the dawn of independence, stated as follows under heading "Provincial Balance and Social Inertia":

> One of our problems is to decide how much priority we should give in investing in less developed provinces. To make the economy as a whole grow as fast as possible, development money should be invested where it will yield the largest increase in net output. This approach will clearly favour the development of areas having abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development. A million pounds invested in one area may raise net output by £20,000 while its use in another may yield an increase of £100,000. This is a clear case in which investment in the second area is the wise decision because the country is £80,000 per annum better off by so doing and is therefore in a position to aid the first area by making grants or subsidized loans.[158]

As a result of the policy choice, development in the post-colonial state is still primarily concentrated on the areas which had been designated as the "white highlands", while ASALs are "characterized by the poorest indicators in all spheres of social and economic development – lacking in physical and social infrastructure and poorly integrated into the national economy, with their residents isolated and alienated from the rest of the country".[159] This is despite the introduction of a devolved system under the 2010 Constitution, where participation in governance is intended to be brought closer to the people. Many factors curtail the achievement of this objective, including

156 Odhiambo (2013) 159.
157 Republic of Kenya (2012) 1.
158 Republic of Kenya (1965) para 133.
159 Odhiambo (2013) 159.

control of funds by the national government, lack of capacity in the counties and "devolution" of corruption to the counties.

The narrative on the need for private ownership seemed to die down a bit only to pick up more speed in the period around 1970–2000. This is owing to the fact that "in this period neo-liberal ideas, values and constructions come to dominate such that they become 'common sense' in economic and social thought".[160] This continued to occasion many injustices. In many families, for example, the land was in most cases registered in the name of the eldest male member of the family, leading to the rest of the family being evicted when the registered person invoked the new property rights:[161] "[e]ntitlements based on customary rights to land have been rendered vulnerable when title holders assert their absolute rights of ownership against unregistered family members".[162] Additionally, commons were not left behind in the spatial reordering:

> Community rangelands, forests and wetlands were reallocated to local farmers with means to clear these, or co-opted by government for disposal to private interests, or turned into local authority wildlife and forest reserves, controlled by the new county councils. Many were in turn depleted and / or sold off, on the instruction of, or with the endorsement of, the Land Commissioner.[163]

The onslaught on the commons continued as private property systems were introduced even in pastoral and arid and semi-arid areas.[164] This is despite the fact that such land ownership system would not fit well with the community practices of using grazing areas in common and constantly moving according to weather patterns.

This depiction of the commons as not constituting property in the legal sense during this period is traceable to the explanation of Garrett Hardin in his paper *The Tragedy of the Commons*,[165] and Hernando de Soto in his book *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*.[166] According to Hardin, the "tragedy" unfolds as each individual

160 Manji (2020) 10.
161 Wily (2018b) 7. See also Haugerud (1989) 62.
162 Nyamu-Musembi (2006) 20.
163 Wily (2018b) 7. See also Kamuaro (1998).
164 Okoth-Ogendo (2000) 9.
165 Hardin (1968).
166 De Soto (2000) 27.

makes the rational decision to increase their use of the commons while the negative impact of the overuse of the resource increases:[167]

> Each man is locked into a system that compels him to increase his herd without limit-in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.[168]

He posited that the "tragedy" would be "averted by private property, or somethings formally like it".[169] The theory had a significant influence; "[t]he Hardin metaphor was thus translated into legislative policy which advocated the conversion of common property regimes into individualised private property".[170]

The call for private property systems in the commons was later revived by Hernando de Soto in his book *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*.[171] In calling for the adoption of formalised private property rights in the developing world, de Soto observed that

> [t]he only real choice for the governments of these nations is whether they are going to integrate those resources into an orderly and coherent legal framework or continue to live in anarchy.[172]

This call was taken over by many governments in the developing world, with the backing of development agencies such as USAID, the World Bank, High Level Commission for the Legal Empowerment of the Poor, the United Nations Economic Commission for Europe and the United Nations Development Programme.[173] The World Bank noted that "[a]ccordingly, farmers must be given incentives to change their ways […]. Secure land rights also help rural credit markets to develop, because land is good collateral".[174]

The theory by Hardin has been debunked in relation to the African commons. His explanation referred to "a society that believes in the freedom

167 Hardin (1968) 1244.
168 Ibid.
169 Hardin (1968) 1245.
170 Okoth-Ogendo (2000) 8.
171 De Soto (2000) 27.
172 Ibid.
173 Nyamu-Musembi (2006) 7.
174 World Bank (1989) 104.

of the commons".[175] This implies that the resources he had in mind were open access. The case of the African commons is different. As noted in the section above on the precolonial period, the holding and management of the commons has structural and normative frameworks; the customary norms and decisions making bodies outline the basis for access and use of resources and the quantum of the resources. Therefore, the real tragedy of the African commons occurs not because of their intrinsic characteristics but due to expropriation.[176] Celestine Nyamu-Musembi notes that equating formal title with legality is a narrow view of legality and the absence of formal title does not imply anarchy. Property relations across the world are characterised by informal legality. This is because "the legitimacy of property rights ultimately rests on social recognition and acceptance".[177]

Additionally, empirical evidence shows that formal title does not imply access to credit: "the attitudes and lending practices of commercial banks tend to shun small scale (particularly rural or agriculture-dependent) landholders. Title does little to change these institutionalised biases".[178] This brings to mind the Swynnerton Plan measures that farmers would access credit once they acquired title. This was not the case for many small-scale farmers since banks in the colonial period viewed them as being financially risky and that the land parcels would not be adequate in the event of default. There are also thriving informal micro-lending networks.[179] The informal networks also make up an informal market for land transactions.[180] Titling also brings security and insecurity since it means a gain for some but a loss for others. For example, when titles are issued in urban slums security of title comes with the safeguarding of everyone's rights. However, this means when the value of the land rises, the poor beneficiaries "come under pressure to sell off their holdings to developers and slum-lords, forcing them into further marginality and widening inequality".[181] Taken together, the claims of the

175 Hardin (1968) 1244.
176 Okoth-Ogendo (2000) 1.
177 Nyamu-Musembi (2006) 10.
178 Nyamu-Musembi (2006) 16.
179 Ibid.
180 Nyamu-Musembi (2006) 18.
181 Nyamu-Musembi (2006) 20.

inevitability of formal titling and private property rights contain a social evolutionist bias which was used to justify practices such as colonialism.[182]

The above explanations bring out the fact that certain views are held out as being true or universal while in fact such is not the case. It is a reminder of how Hardin's "tragedy of the commons" was coined and the manner in which certain narratives have been carefully woven to facilitate the construction of settler colonial landscapes. De Soto equates common property systems with anarchy in the attempt to depict those systems as bad and needing replacement. However, despite the deliberate attempt to eradicate them, the commons systems of property continue to exist.[183] The approaches fail in part due to the refusal or failure to understand the complexity of the web of relationships in the management of the commons.[184]

Closely tied with the initiatives to eradicate the commons was the subjugation of customary law to common law and statute. This also continued since most of the post-independence laws were modelled on colonial laws.[185] For example, the "[n]ative councils in the 1950s, and then locally elected county councils after independence in 1963 continued to be the trustees of native lands".[186] These councils were empowered to "set aside" some of the lands for use by the government or mining activities, "a process which extinguished tribal, group, family or individual customary rights".[187]

The promulgation of the Constitution of Kenya, 2010, and the enactment of the Community Land Act have improved the treatment of the commons in law. As noted above in the introduction, the Constitution lists communal ownership of land as one of the ways in which people in Kenyan can hold land. Under Article 61(1), the Constitution also notes that radical title rests with the people and not the government, as was the case between the colonial period and the coming into force of the 2010 Constitution. The article states that "[a]ll land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals". This means that in

182 Nyamu-Musembi (2006) 12.
183 Wily (2018b) 5.
184 Wily (2018a) 662.
185 Wily (2018b) 3.
186 Wily (2018b) 7. See also Leo (1984).
187 Wily (2018b) 7.

the case of community land, the radical title rests with the community. This restores the radical title to the position it was before the colonial period.

Further provisions on community land are contained in the Community Land Act which provides for the registration of titles to be held by communities. And while the Act recognises communities as having the ability to hold land, it introduces a new institutional framework of committees to be formed by communities.[188] This fails to recognise the existing structures within the communities. The new structures are state-designed, hence reducing the ability of the communities to fully utilize them. The creation of space carries power through the act of creating it and controlling or influencing the issues under discussion and/or the manner of participation.[189] Additionally, there is bound to be confusion in the process of administering community land since the traditional structures are still functional. There is therefore the possibility of a power tussle between the introduced and the existing structures. While this takes place, it is the community that is going to be at a loss – the back and forth between the two structures only serves to distract from the main issues and provide an opportunity for practices such as land grabbing.

Another aspect of the new legislative framework is the investigation of historical land injustices. Article 67(2)(e) of the Constitution outlines that one of the functions of the National Land Commission is "to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress". This provision holds an emancipatory potential for communities and individuals to make claims in relation to historical land injustices such as the colonial dispossessions. However, this potential is limited through the manner in which Parliament has enacted the National Land Commission Act. The Act, passed in 2012, initially provided that the Commission recommends to Parliament the appropriate legislation for addressing historical injustices. This was never accomplished. In 2016, the Act was amended to empower the Commission itself to address historical injustices directly. Section 15(3)(e) of Act set 21 September 2021 as the deadline for the launching of historical land injustice claims.

188 For example, section 15 of the Act provides for the formation of a community assembly and a community land management committee.

189 Nolte / Voget-Kleschin (2014) 654.

Additionally, section 15(11) gives the Commission a period of ten years as from 2016, to complete the processing of the claims. This is "a ludicrously short time for such a massive problem".[190] The manner of implementation shows that "the amount of vested interest on the part of very important or well-connected people in leaving things as they are has no doubt been a major factor".[191] This brings to mind Jomo Kenyatta's call to the new nation in 1963 to forget the past and think about the future.

Even though the new laws make some good provisions, there is a lack of political will to implement them.[192] Ceding power to the communities from central and elite control is difficult. This is why, for example, despite the provisions on community titling in the new laws, "community titles as only a stepping stone to subdivision is evident in official thinking"[193] with observations that

> there is no evidence that politicians or leading civil servants have grasped the viability of collective tenure as an appropriate basis for economic growth where communities own resources in common and wish to sustain and develop these lands and resources in common.[194]

This is notable in political party manifestos and national development blueprints which seek to move the country in a "forward thrust" as a market economy where private rights are at the centre of economic development.[195] Additionally, "the state's conception of the citizen is first and foremost of a property-owning subject".[196] This is because property law is not only "the primary means of appropriating land and resources",[197] but property ownership is "central to the formation of the proper legal subject in the political sphere".[198] This implies the readiness by the State to ensure that it facilitates the acquisition of property rights to be traded in the market economy, which is taken in most cases to mean private property rights. The commons easily

190 Ghai (2023).
191 Ibid.
192 Wily (2018a) 662.
193 Wily (2018b) 14.
194 Resource Conflict Institute, Kenya Land Alliance, Haki Jamii, Enderois Welfare Council, and Sustainable Community Environmental Programme (2017) 1, as quoted in Wily (2018b) 15.
195 Manji (2020) 8.
196 Manji (2020) 7.
197 Bhandar (2018) 4.
198 Ibid.

become targets for land acquisition due to development of resource corridors and exploitation of minerals and other natural resources, leading to displacements and further geographical injustices.

Another protection for private land ownership and its continuation is in the reliance of a language of "law and order" to discredit those who argue for land reform and redistribution in land governance today. For example, during discussions concerning the 2009 National Land Policy, an

> elite with longstanding stakes in a stable property regime sought to dampen or at least control the extent of reform. It sought to hold onto both concentrated power in the President and the access this arrangement provided to valuable patronage resources in the form of land. As they perceived the dangers to private property rights that might be posed by reform, the private sector sought to play a more prominent role.[199]

The elite saw the Policy as undermining security of tenure through measures including promoting community land ownership and focusing on historical injustices.[200] This "law and order" narrative serves to ensure that no questions are raised in the land discourse even where some have acquired land under questionable means. The "law and order" card categorises any discussions on land redistribution as illegal, just as was the case with the settlers and the colonial state depicting the land grievances by the Mau Mau as subverting the law. The "law and order" narrative preserves the vested interests of the elite, and this is partly why instead of engaging in land reform, the country always resorts to land law reform, which does not touch on the fundamental distributive question. Any calls against the overemphasis of private property systems and commodification are seen as going "against the grain of Kenya's forward thrust as a market economy".[201]

Viewing the above discussion from a spatial justice perspective reveals that the notions of land originating in the colonial period still hold a great sway in the manner in which land governance is conducted. The political elite at independence joined hands with the colonial administration and settlers to preserve the state of affairs. The leadership of the new state told the people to forget the past and think about the future because to think about the past is to destabilize society by opening old wounds. The colonial

199 Manji (2020) 74.
200 The East African (2009).
201 Manji (2020) 7.

ban on Mau Mau was retained until forty years after independence, and those talking about the past and Mau Mau were seen as gossips. The land taken from the communities was not fully given back. The development priorities of the country were also deliberately directed to the productive areas, and an economic rationalization given in the 1965 Sessional Paper. Individualisation and formalisation of rights especially in areas occupied by communities is still prioritised. The 2010 Constitution was seen by many as a sign of hope, but this is not being realized in the implementation. Communities are still required to hold community land using institutions designed by the state and the address of historical land injustices is limited. The state and those in control of it have no time for the past as they are busy marshalling the view of the ideal citizen as the private property owning subject ready for "Kenya's forward thrust as a market economy".[202] As the discussion notes in the section on the colonial period, these strategies mirror those used in the construction of the settler colonial landscape in the protectorate and colonial periods.

7. Conclusion

The discussion above shows how the colonial land policy initiated measures whose consequences continue to be witnessed in the postcolonial state. There was a shift in the power of spatial (re)ordering from the communities to the state through measures including the (re)location of the radical title and the (re)definition of land occupation and use. The colonial state took over key aspects of social production of space; the land was shaped according to the ideas underpinning the colonial enterprise beginning with the definitions of terms such as use and occupation. The postcolonial state has continued these policies with the assistance of the elite who are keen to preserve their interests in land and supress questions from communities.

The land governance framework needs to embrace inclusive notions of land. This would promote the appropriate management and use of existing commons. As long as the system is geared toward a development framework centred on the individual and private property rights, communal notions of land and associated practices will continue to dwindle. Communities need recognition in land governance practice as the as owners/custodians of

202 Ibid.

resources such as water and forest resources. This becomes an important step in including communities in the decisions around the resources in their environment. The administrative mindset of community land and community titles as a stepping stone to private titles needs to change; communities have the right to manage the resources without being directed towards a specific end without their consent. Additionally, the Community Land Act and other legislation on the area need to recognise use of existing community frameworks instead of seeking to create new ones which skew the politics of space creation and power in favour of the state and the elites. In adopting community frameworks, concerns on equality and fairness can be addressed, as already set out under the provisions of the Constitution, including article 27 on equality. These measures will enhance the impact of the place-based notions of land among the local communities.

Bibliography

Akech, Migai (2010), Institutional Reforms in the New Constitution of Kenya. International Centre for Transitional Justice

Atieno-Odhiambo, Elisha (1991), The Production of History in Kenya. The Mau Mau Debate, in: Canadian Journal of African Studies 25,2, 300–307, https://doi.org/10.2307/485221 (accessed 17 October 2024)

Bates, Robert (1989), Beyond the Miracle of the Market: The Political Economy of Agrarian Development in Kenya, New York

Bentsi-Enchill, Kwamena (1965), Do African Systems of Land Tenure Require A Special Terminology? in: Journal of African Law 9,2, 114–139, https://doi.org/10.1017/S002185530000111X (accessed 17 October 2024)

Berry, Sara (1993), No Condition is Permanent. The Social Dynamics of Agrarian Change in Sub-Saharan Africa, Madison (WI)

Bhandar, Brenna (2018), Colonial Lives of Property. Law, Land, and Racial Regimes of Ownership, Durham (NC), https://doi.org/10.1215/9780822371571 (accessed 17 October 2024)

Blomley, Nicholas (2003), Unsettling the City. Urban Land the Politics of Property, New York, https://doi.org/10.4324/9780203499801 (accessed 17 October 2024)

Blundell, Michael (1964), So Rough a Wind. The Kenya Memoirs of Sir Michael Blundell. With a Foreword by the Earl of Kilmuir, London

Boone, Catherine (2014), Property and Political Order in Africa. Land Rights and the Structure of Politics, New York, https://doi.org/10.1017/CBO9781139629256 (accessed 17 October 2024)

Boone, Catherine, Fibian Lukalo, Sandra Joireman (2021), Promised Land. Settlement Schemes in Kenya, 1962 to 2016, in: Political Geography 89, 102393, 1–13, https://doi.org/10.1016/j.polgeo.2021.102393 (accessed 17 October 2024)
Branch, Daniel (2010), The Search for the Remains of Dedan Kimathi: The Politics of Death and Memorialization in Post-Colonial Kenya, in: Past and Present 206,5, 301–320, https://doi.org/10.1093/pastj/gtq022 (accessed 17 October 2024)
Clough, Marshall (1998), Mau Mau Memoirs. History, Memory and Politics, Boulder (CO), https://doi.org/10.1515/9781626376267 (accessed 17 October 2024)
Colony and Protectorate of Kenya (1954), A Plan to Intensify the Development of African Agriculture in Kenya (compiled by Roger Swynnerton)
Coulthard, Glen (2014), Red Skin, White Masks. Rejecting the Colonial Politics of Recognition, Minneapolis (MN), https://doi.org/10.5749/minnesota/9780816679645.001.0001 (accessed 17 October 2024)
Dang, Tiffany (2021), Decolonizing Landscape, in: Landscape Research 46,7, 1004–1016, https://doi.org/10.1080/01426397.2021.1935820 (accessed 17 October 2024)
De Soto, Hernando (2000), The Mystery of Capital. Why Capitalism Triumphs in the West and Fails Everywhere Else, New York
Funder, Mikkel, Martin Marani (2015), Local Bureaucrats as Bricoleurs. The Everyday Implementation Practices of County Environment Officers in Rural Kenya, in: International Journal of the Commons 9,1, 87–106
Ghai, Jill Cottrell (2023), Land, the Constitution and New Vision, in: The Star, 07 May 2023, https://www.the-star.co.ke/siasa/2023-05-07-ghai-land-the-constitution-and-new-vision/ (accessed on 13 June 2023)
Government of the United Kingdom (1955), Report of the East African Royal Commission 1953–1955
Harbeson, John (1971), Land Reforms and Politics in Kenya, 1954–1970, in: The Journal of Modern African Studies 9,2, 231–251, https://doi.org/10.1017/S0022278X00024915 (accessed 17 October 2024)
Hardin, Garrett (1968), The Tragedy of the Commons, in: Science, New Series, 162, 3859, 1243–1248, https://doi.org/10.1126/science.162.3859.1243 (accessed 17 October 2024)
Haugerud, Angelique (1989), Land Tenure and Agrarian Change in Kenya, in: Africa: Journal of the International African Institute 59,1, 61–90, https://doi.org/10.2307/1160764 (accessed 17 October 2024)
International Bank for Reconstruction and Development (1960), Kenya. Report for the Development of African Agriculture and Roads, Washington DC
Kamau, John (2016), When Ministers, Civil Servants Got 100 Acres and Farm House for Free, in: The Daily Nation, 20 February 2016, https://nation.africa/kenya/blogs-opinion/opinion/when-ministers-civil-servants-got-100-acres-and-farm-house-for-free-1172244 (accessed 13 June 2023)
Kamuaro, Ole (1998), State and Community Conflicts in Natural Resource Management Kenya, in: Veit, Peter (ed.), Africa's Valuable Assets. A Reader in Natural Resource Management, Washington DC, 301–323

Kanu, Macaulay (2010), The Indispensability of the Basic Social Values in African Tradition. A Philosophical Appraisal, in: OGIRISI: A New Journal of African Studies 7, 149–161, https://doi.org/10.4314/og.v7i1.57930 (accessed 17 October 2024)
Kariuki, Francis, Smith Ouma, Raphael Ng'etich (2016), Property Law, Nairobi
Klopp, Jacqueline (2000), Pilfering the Public. The Problem of Land Grabbing in Contemporary Kenya, in: Africa Today 47,1, 7–26, https://doi.org/10.1353/at.2000.0015 (accessed on 17 October 2024)
Knauss, Peter (1971), From Devil to Father Figure. The Transformation of Jomo Kenyatta by Kenya Whites, in: The Journal of Modern African Studies 9,1, 131–137
Laclau, Ernesto (2000), Identity and Hegemony. The Role of Universality in the Constitution of Political Logics, in: Butler, Judith et al. (eds.), Contingency, Hegemony, Universality. Contemporary Dialogues on the Left, London, 44–89
Leo, Christopher (1981), Who Benefited from the Million-Acre Scheme? Toward a Class Analysis of Kenya's Transition to Independence, in: Canadian Journal of African Studies 15,2, 201–222
Leo, Christopher (1984), Land and Class in Kenya, Toronto
Lugard, Frederick (1922), The Dual Mandate in British Tropical Africa, Edinburgh
Mafumbate, Racheal (2019), The Undiluted African Community: Values, the Family, Orphanage and Wellness in Traditional Africa, in: Information and Knowledge Management 9, no. 8, 7–13
Mamdani, Mahmood (1999), Historicizing Power and Responses to Power. Indirect Rule and Its Reform, in: Social Research 66,3, 859–886
Manji, Ambreena (2020), The Struggle for Land and Justice in Kenya, London, https://doi.org/10.1017/9781787449268 (accessed 17 October 2024)
McAuslan, Patrick (2015), Property and Empire. From Colonialism to Globalization and Back, in: Social & Legal Studies 24,3, 339–357, https://doi.org/10.1177/0964663915593010 (accessed 17 October 2024)
Morris, Henry, James Read (1972), Indirect Rule and the Search for Justice. Essays in East African Legal History, Oxford
Mutunga, Willy (2020), People Power in the 2010 Constitution: A Reality or an Illusion?, in: The Elephant, 6 March 2020, https://www.theelephant.info/op-eds/2020/03/06/people-power-in-the-2010-constitution-a-reality-or-an-illusion/ (accessed 12 June 2023)
Mwangi, Evan (2010), The Incomplete Rebellion. Mau Mau Movement in Twenty-First-Century Kenyan Popular Culture, in: Africa Today 57,2, 86–113
Ngugi, Joel (2001), The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa, in: Wisconsin International Law Journal 20,2, 297–352
Nolte, Kerstin, Lieske Voget-Kleschin (2014), Consultation in Large-Scale Land Acquisitions. An Evaluation of Three Cases in Mali, in: World Development 64, 654–668

Nyamu-Musembi, Celestine (2006), Breathing Life into Dead Theories about Property Rights: de Soto and Land Relations in Rural Africa, in: Institute of Development Studies Working Paper 272, 1–27
Odhiambo, Michael (2013), The ASAL Policy of Kenya: Releasing the Full Potential of Arid and Semi-Arid Lands – An Analytical Review, in: Nomadic Peoples 17,1, 158–165
Okoth-Ogendo, Hastings (1989), Some Issues of Theory in The Study of Tenure Relations in African Agriculture, in: Africa: Journal of the International African Institute 59,1, 6–17
Okoth-Ogendo, Hastings (1991), Tenants of the Crown. Evolution of Agrarian Law and Institutions in Kenya, Nairobi
Okoth-Ogendo, Hastings (2000), The Tragic African Commons. A Century of Expropriation, Suppression and Subversion, in: Land Reform and Agrarian Change in Southern Africa: An Occasional Paper Series 24, 1–17
Ole Simel, Joseph (2003), The Anglo-Maasai-Agreements / Treaties. A Case of Historical Injustice and the Dispossession of the Maasai Natural Resources (Land), and the Legal Perspectives. Expert Seminar on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples, Office of the United Nations High Commissioner for Human Rights, Geneva
Proulx, Guillaume, Nicholas Crane (2020), 'To See Things in an Objective Light': The Dakota Access Pipeline and the Ongoing Construction of Settler Colonial Landscapes, in: Journal of Cultural Geography 37,1, 46–66
Republic of Kenya (1965), Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya
Republic of Kenya (2004), Report of the Commission of Inquiry into the Illegal / Irregular Allocation of Public Land
Republic of Kenya (2012), Sessional Paper No. 8 of 2012 on National Policy for the Sustainable Development of Northern Kenya and other Arid Lands. Releasing Our Full Potential
Republic of Kenya (2013), Report of the Truth, Justice and Reconciliation Commission of Kenya, vol IIB – 3 May 2013 version
Resource Conflict Institute, Kenya Land Alliance, Haki Jamii, Enderois Welfare Council, and Sustainable Community Environmental Programme (2017), Results from Practice Indicators. Measuring the Will of the State to Recognize and Protect Community Lands
Robinson, Ronald, John Gallagher, Alice Denny (1961), Africa and the Victorians. The Official Mind of Imperialism, London, https://doi.org/10.5040/9780755624140 (accessed 17 October 2024)
Ruto, Rose (2005), The Treaties That Rendered the Maasai Landless. LLM Thesis, University of Nairobi, http://erepository.uonbi.ac.ke/handle/11295/11669 (accessed 4 July 2023)
Said, Edward (1993), Culture and Imperialism, New York

Schein, Richard (1997), The Place of Landscape. A Conceptual Framework for Interpreting an American Scene, in: Annals of the Association of American Geographers 87,4, 660–680
Seidman, Robert (1970), Administrative Law and Legitimacy in Anglophonic Africa. A Problem in the Reception of Foreign Law, in: Law & Society Review 5,2, 161–204, https://doi.org/10.2307/3053033 (accessed 17 October 2024)
Soja, Edward (2009), The City and Spatial Justice, in: justice spatiale | spatial justice, n° 01 September 2009, https://www.jssj.org/wp-content/uploads/2012/12/JSSJ1-1en4.pdf (accessed 1 June 2023)
Soja, Edward (2010), Seeking Spatial Justice, Minneapolis (MN), https://doi.org/10.5749/minnesota/9780816666676.001.0001 (accessed 17 October 2024)
Sorrenson, Maurice (1968), Origins of European Settlement in Kenya, Nairobi
The East African (2009), Land barons in high-level lobbying over Kenya's 999-year leases, 07 February 2009, https://www.theeastafrican.co.ke/tea/news/east-africa/land-barons-in-high-level-lobbying-over-kenya-s-999-year-leases-1293804 (accessed 6 June 2023)
Thomason, Michael (1975), Little Tin Gods: The District Officer in British East Africa, in: Albion 7,2, 145–160, https://doi.org/10.2307/4048227 (accessed 17 October 2024)
Van Arkadie, Brian (2016), Reflections on Land Policy and the Independence Settlement in Kenya, in: Review of African Political Economy 43,1, 60–68, https://doi.org/10.1080/03056244.2016.1217837 (accessed 17 October 2024)
Wily, Liz (2018a), Risks to the Sanctity of Community Lands in Kenya. A Critical Assessment of New Legislation with Reference to Forestlands, in: Land Use Policy 75, 661–672
Wily, Liz (2018b), The Community Land Act in Kenya Opportunities and Challenges for Communities, in: Land 7,1, 1–25
Wolfe, Patrick (2006), Settler Colonialism and the Elimination of the Native, in: Journal of Genocide Research 8,4, 387–409, https://doi.org/10.1080/14623520601056240 (accessed 17 October 2024)
World Bank (1989), Sub-Saharan Africa. From Crisis to Sustainable Growth, Washington DC