"The Struggle for Land and Justice in Kenya"

by Ambreena Manji

Reviewed by Martin Adams, April 2021

The hardback with a fine illustration on the front and some 200 pages was published in 2020. It is an imprint of Boydell & Brewer Ltd. in the James Currey 'Eastern African Series' and brings together the writings of a distinguished Kenyan author and other scholars as well as official reports on land-related issues. Manji's book will no doubt feature prominently in the reading list of her students in Cardiff University Law School, of students in Eastern and Southern Africa and Kenya's Supreme Court, no less. Although instructive, I must confess that in places I found the text difficult to follow, without the Shorter Oxford Dictionary at hand; a glossary of land-related words and abbreviations could have been helpful.

Manji provides an account of land dispossession by the British in the late 19th and early 20th century when colonial agriculture developed in a capitalist manner subsidized by peasant labour. In the years 1902-1960, the colonial government acquired for itself the legal powers to set aside land for European settlers in the Highlands, disinheriting African farmers and banning them from growing cash crops that might compete with produce marketed by European farmers. Under colonial rule, the large-scale alienation and privatisation of land with high agricultural potential continued in the second half of the 20th century. Manji describes how, after Independence in December 1963, land grabbing continued in the hands of Kenya's political elite. Her book provides a '*critical schema*…'*for understanding the last decade of developments in the land domain*' and explains why there has been an increase in land grabbing, despite a new Constitution, a National Land Policy and new land laws in 2012.

The first chapter introduces the challenges posed by the dominance of the received law for the wealthy and the fast-disappearing customary land rights of the poor. Manji elaborates how, following Independence rural land was unlawfully and irregularly appropriated and transferred to a privileged few. In the meantime, European settler agriculture continued to be subsidized by cheap labour from the African reserves.

Manji explains how she aims to develop a '*socio-legal analysis of the struggle for land and justice in Kenya*'. She takes seriously Yash Pal Ghai and Partick McAuslan's[1] criticism of restrictive land laws and J. Ghai's reminder that in order '*to understand the dynamics and functions of constitutionalism, one has to uncover its social and*

[1] Ghai, Y.P. and McAuslan, P. (1970), *Public Law and Political Change in Kenya* (New York: Oxford University Press)

economic bases, and thus transcend the formal boundaries of the law[2]. Accordingly, she seeks to explain the politics of land law reform, showing the continuities over the years. While starting with law, Manji draws on history, political science and literature studies. In developing her analysis, she quotes a host of authors, prominent among them are three distinguished professors of land law, Hastings Okoth-Ogendo, Yash Pal Ghai and Patrick McAuslan.

Manji explains that in choosing the word 'struggle' in the title of her book, she recognises how ideas of justice and fairness have been constantly contested in different ways. She explores the making of land law and policy from above and secondly the endeavour of civil society from below to resist corruption by the authorities and their political beneficiaries. Much of what is known about the history of land grabbing in Kenya is to be found in two official reports: (a) Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (the 'Ndung'u report' named after its Chair) which was presented to President Kibaki in June 2004; (b) the report of the Truth, Justice and Reconciliation Commission (TJRC) of 2008.

Chapter 2, *Land Reform in Kenya: The History of an Idea* provides the record of land reform in Kenya that resulted in massive and growing inequalities and limited access to land resources. Manji aims to answer the question '*what has land reform meant at different times and to different people*' and place modern-day debates in the context of the country's long history of land reform. She judges this to be important because of the patchy knowledge associated with current debates about land reform; even the Supreme Court had expressed a wish better to understand the country's history when interpreting the Constitution in matters relating to land.

The end of 2002 marked the reawakening of concern over the need for land reform, coinciding as it did with the end of the era of President Moi and the submission of the report of the *Commission of Inquiry into the Land Law System of Kenya* (the 'Njonjo' Commission), and the inauguration of the Kibaki government. The '*Ndung'u* Commission' followed in July 2003, the report of which was submitted to President Kibaki in June 2004. The findings brought into focus long suppressed questions of land injustice which had been barely articulated in the years since Independence. The allocation of land to their respective tribal supporters by presidents Kenyatta and Moi had '*channeled the anger of the landless and land poor to ethnic others* (i.e. to competing tribes) *and away from the elite's own mischiefs*'.

Manji argues that Kenya's National Land Policy was formulated following sustained pressure by civil society groups. Work on the policy commenced in February 2004. In April 2007 the draft was adopted in a National Symposium. The Government eventually approved the Draft National Land Policy and directed the Minister for

[2] Ghai, J. (2017), 'Constitutionalism: African Perspectives, Kameri Mbote, P. and Odote, C., *The Gallant Academic: Essays in Honour of H.W.O. Okoth Ogendo* (Nairobi: University of Nairobi Press)

Lands to proceed with the preparation of the Sessional Paper for presentation the NLP to Parliament, which was eventually published in 2009. This was followed by the publication of the Land and Environment Chapter in the New Constitution, inaugurated in 2010.

Chapter 3, *Making Mischief: Land in Modern Kenya*: Manji describes how the various official reports tell of the land problems experienced after Independence in 1963 and until land reform returned to the political agenda in 2000. She draws on the scattered information that had been built up by activists over many years when describing 'mischiefs' associated with land acquisition. In particular, she explores the struggles over legal protection for 'community' or 'communal' land. She argues that there had been progress in recognising the endurance and effectiveness of this form of tenure, which had been endangered and would probably be the battleground in Kenya's land politics over the coming decade. Vacant public land that had been set aside for future schools, hospitals, road and rail reservations, forest reserves etc., had been illegally doled out by Government to individuals, families and organisations as rewards for their political support. Often, this land was rapidly and illegally sold on by the grantees for high prices to parastatal parties.

Manji devotes several pages to the first significant land enquiry in the post-independence era, namely the Njonjo Report (*Commission of Inquiry into the Land Law System of Kenya)* which was published in November 2002. She explains how the appointment of the Commission in 1999 was a symbolic response by President Moi to civil society that was concerned about land grabbing. The Commission was tasked to consider the policy and legal framework for land and how these might be reformed. It was given a mandate to explore policy and legal options. Its recommendations were not put into effect but, nonetheless, Manji rightly explains at length how it marked the beginning of post-independence land debates and very clearly brought land issues into the arena of constitutional, public and administrative law.

I should like to add that one could have been pleasantly surprised by the Commission's findings, bearing in mind it was chaired by a friend of President Moi and was expected by civil society to deliver an uninspired and ineffective response to their concerns. The Commission in 2001 had submitted an interim report that was clearly in need of more information and recommendations on key issues. Professor Okoth-Ogendo, despite pressure of work as Vice Chair of the Constitution of Kenya Review Commission (CKRC), agreed to help and in the process completely redrafted the key chapters and its recommendations. Chapter 4, 'A Land Policy Framework for Kenya', was entirely his initiative and the source of the land policy principles set out in the Commission's report.

The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (the Ndung'u Commission) was appointed in July 2003 and presented its report to

President Mwai Kibaki in June 2004.[3] Manji explains how the report set out in forensic detail the illegal awards of Public Land made over the years to the families of Presidents Kenyatta, and Moi, to numerous former ministers, MPs, civil servants as well as individuals in the military and the judiciary - even to religious bodies. Despite the enormous number of cases listed in the annexes, the Commission stressed that its report was still incomplete due to the widespread lack of support to its investigations. Nonetheless, even a cursory analysis of the associated corruption and patronage revealed that land grabbing was thoroughly embedded in Kenya's politics. Manji analyses the findings of the report in detail and notes that it was taken up by leading human-rights groups.

Manji points out, quoting the South African academic Roger Southall,[4] that despite widespread public awareness of the Ngung'u report, discussions of its findings were far from comprehensive. Most reporting tended to focus on the 'what' and 'whom' of land allocation. She emphasizes that one of the most significant issues raised by the Commission was the extent to which illegal or irregular transactions in public land had been made possible through corruption in the responsible Ministry of Land. In her conclusion on the report she underlines Southall's comment that '*it did not tell us much about what happened to the land effectively redistributed by grabbing*.' He concluded that the annexures seemed to suggest that the majority of allocations had been utilized for residential, commercial, industrial or for building purposes.

The section of her chapter that she named '*Non-Land Reports'* did not solely concern land matters, but nonetheless revealed that inter-tribal land disputes were a major issue. An example was the report of the *Commission of Enquiry into Post-Election Violence* (2008), which found that the source of ethnic-based violence was associated with disputes over land allocation. The Commission expressed grave concerns about what it saw as government policies that encouraged ethnic homogeneity in land allocation. The *Truth, Justice & Reconciliation Commission*'s report of 2008 recognized that the role played by successive regimes in inflaming land disputes was to gain local electoral support. Communities that had lived peaceably together for decades were suddenly turned against each other.

Chapter 4, *Land and Constitutional Change*: This chapter is concerned with the political and constitutional context from which the country's land laws emanated. The text is preceded by two quotes:

> *In an ideal situation, a constitution should set out the broad principles for the governance of land and establish an efficient and equitable framework for land ownership, administration and management. Land policy reforms are not likely to be successful in the absence of a sound constitutional framework. Accordingly, land reforms should be accompanied by constitutional reforms if they are to be*

[3] Not as Manji writes in December 2004, which was the date when it was made available to the public
[4] Southall, R. (2005) 'The Ndung'u Report: Land and Graft in Kenya' *Review of African Political Economy, 32 (103)* pp 142-151.

effective. (The National Land Policy, Republic of Kenya 2009)

Kenya's current constitutional moment has included both the first popularly ratified constitution and its first post-independence comprehensive land reform policy. The roughly temporary parallel processes that brought these two signal achievements have inserted the interests of ordinary Kenyans into this constitutional moment in a way that elections and constitutional ratification alone would not have, reflecting more than two decades of civil society pressure. (Harbeson 2012: 15)

These quotes set the scene for the chapter that examines the essential importance of linking changes in national land policy to constitutional reform. Manji explains how these are deeply interconnected and '*how the constitutional debate and the land debate became intertwined and ran alongside one other*' and share the same *dramatis personae*. The four years 2003-2006 were crucial. The two Kenyans who skillfully managed and maintained oversight of this politically sensitive era were Professor Yash Pal Ghai and Professor H. W. O. Okoth-Ogendo, Director and Deputy Director respectively of the CKRC.

In Chapter 4, under the heading of Land and Constitutional Change, Manji describes how the disputed December elections of 2007, the widespread, violence and the steps taken to calm the conflict caused delays in publication of the NLP. She writes that when the NLP was finally published in 2009, it had been long in the drafting.

> *This process had begun many years before, but now, as the momentum for change in the land sector built up, civil society focused its considerable energy on completing the drafting of the NLP.* (page 91)

In fact, the draft NLP remained fundamentally unchanged after April 2007. Further, there is no evidence that other members of the working groups were less energetic than civil society members in developing the NLP.[5] It was a combined effort. In the Conclusion to Chapter 4 she writes:

> *In this chapter, I have shown that land-related* ***civil society was one of a range of sectorial interests*** *that made up a wider opposition movement struggling for constitutional change after 1990…Those committed to see a comprehensive and achievable programme of land reform had to calibrate their claims in the wider context of the constitutional review process. The priority of the movement was to end power personalized in the President…Kenyan land history had shown what could happen when despotic power was exercised by an unaccountable executive, when power was overly centralised and when resources were treated with impunity.* (page 97)

'One of a range of sectorial interests'; one cannot quarrel with that.

Chapter 5, *The New Institutional Framework for Land Governance:* Manji opens this chapter with a quote from Sessional Paper No. 3 the NLP (2009)

> *The existing institutional framework for land administration and management is highly centralized, complex, and exceedingly bureaucratic. As a result, it is prone*

[5] Further down page 91, there is a reference to the Ndung'u report being published in 2009. It was of course made available from the Government Printer in June 2004. At the top of page 92, there is a reference to '(Southall 2009)'. If this the paper referred to in the Bibliography on page 190, it should read '(Southall 2005)'. If it refers to another paper by Southall, it is missing in the biography.

to corruption and has not been able to provide efficient services. In addition, it does not adequately involve the public in decision-making with respect to land administration and management and is thus unaccountable.

She describes the three main constitutional and legislative provisions of land governance that were attempted in the period after ratification of the 2010 Constitution. These were:

- to anchor the land law in clear public law values, stressing the role of good administration, first creating and then increasing the status of the institutions that might control the Executive's interference in the land domain;
- to decentralize land administration and management; and finally
- to embed land law in wider efforts to devolve power.

As the above quotation from the NLP indicate, the relative prominence given in the constitution to the powers of the state and the land rights of citizens can be politically sensitive and complex and are therefore challenging to those seeking land reform. To quote Manji, in the introduction to Chapter 5:

> *…getting the institutional arrangements for land governance right was a major preoccupation of the constitutional review process.* (page 99).

***Land law as administrative law*:** In this section, Manji returns to the 1970 work of Ghai and McAuslan who noted that prior to independence the colonial authorities imposed detailed administrative rules and by-laws on African farmers in the Reserves, which were to be adhered to on pain of eviction, while European settlers were given virtual free rein. Ghai and McAuslan argued that although Kenya's first independence constitution in 1963 was meant to enhance liberal values and assure citizens' rights, these were soon snuffed out. Controlled by Ministers, they were used to accumulate power and to build patronage in the land domain, for example by rewarding supporters with land.

Manji describes how McAuslan's work as a legal consultant was that of a lawyer who recognized that the study of land law was in fact the study of public law and, further, that land law constituted administrative law. In his work in Tanzania, McAuslan argued that the powers of administering land law should be spelled out in as much detail as possible, in order to constrain any importune actions of government officials. He advised that regulating the actions of officials was more feasible where a clear and detailed statute set out to limit their powers. In the event that the courts had to reach a decision, they would be less likely to be accused of exceeding their powers and interfering in government policy. Accordingly, in the case of Kenya, the National Land Policy and Chapter 5 of the 2012 Constitution, when translated into law, required suitably clear and appropriate drafting. For too long, in the post-independence era, successive governments had failed to administer land transactions in the public interest. In this regard, the requirements were clearly set out in the Njonjo Commission's Report (Chapter 4). What was envisaged '*was a more explicit and more robust administrative law framework to govern land*' (Manji, page 103).

Devolution: Under this heading Manji describes how Kenyans had a long history of demanding a decentralised constitution with dispersed powers over land politics and land ownership. The demand for devolution gained strength after the multiparty elections of 1992. Ten years later, the issue occupied the CKRC, which found that there was a widespread wish for people to take charge of their own lives, assert community rights and self-government. At the same time, those who favoured an authoritarian presidency and a centralised state supported ownership of private property and the right to live anywhere in the country. Either way, issues relating to land reform and constitutional change were intricately connected.

New land laws: The enactment of land policy principles into specific law took place after the new Constitution was proclaimed in August 2010. Parliament was required to enact the new land legislation within 18 months, or dissolve Parliament. The consequence was that new bills were hurriedly and poorly drafted, without adequate consultation with the public. Manji describes the efforts made by a group of experts on land matters, including Yash Pal Ghai and herself, to cooperate on the process of drafting the new laws, but they were given inadequate time to comment on the published bills before they were enacted. Manji concludes that the resulting incoherence of the new land laws had perpetuated Kenya's long-running land problems.

New land institutions: The purpose of the land laws passed in 2012 was to reduce the powers of the Ministry of Lands and increase the efficiency of land administration in the provinces. For example, the Ministry was no longer the only body with the authority to hold land records, to allocate and manage public land or to revoke land titles that had been unlawfully acquired. The Ministry's powers were to be reduced by establishing a National Land Commission and County Land Management Boards. At the same time, a Land and Environment Court was to be established.

Recentralisation: In 2016 there was a major revision of land legislation of 2012, which originated in the NLP and the 2010 Constitution. The Land Law (Amendment) Act 2016 removed key functions from the National Land Commission, vesting them in the Cabinet Secretary for land, and abolishing the County Land Management Boards. Manji writes that: *'Today, Kenya's institutional structure for the administration and management of land remains complex and bureaucratic" …"prone to corruption and unable to provide efficient services*."

For Manji, the Kenyan example raised a number of important issues.

> *Poor legal capacity to draft robust and clear laws marked the start of the process in 2011-12. This was followed by a hiatus of four years 2012 to 2016 in which the country's new land institutions were barely able to function due to uncertainty over their roles and responsibilities. By 2016, the government had prepared for introduction to Parliament a set of land law amendments that to all intents and purposes ended the devolution experiment in land.* (page 117)

In concluding the chapter, Manji emphasizes that when the time came to promulgate new land laws as required by the Constitution, the government chose as far as possible to ignore the advice of the well-informed public. '*Indeed, students of law-making may in the future be referred to that time as a rich case study in how not to make law'* (page 117).

Chapter 6, *Land Governance before the Supreme Court:* In 2012, a series of laws were enacted, one of which established the National Land Commission, which was envisaged by the 2010 Constitution as an independent body separate from the Ministry of Lands.

In spite of this, the Government was reluctant to accept the Commission's status as an independent body and sought to retain full control over all land administration functions. By 2014, the disagreement about the independence of the National Land Commission brought many land transactions to a standstill. Starved of funds, the frustrated staff of the National Land Commission continued to be housed in Ardhi House, the home of the Land Ministry. The Supreme Court was asked to provide an opinion on what should be the relationship between the two bodies, in the light of the 2010 Constitution and relevant laws.

Manji devotes the chapter to a scholarly analysis of the politics surrounding the National Land Commission and the advice of the Supreme Court on what it judged should be the relationship between the National Land Commission and the Ministry. She explains in detail how the Supreme Court failed to address crucial issues relating to the need for the National Land Commission to remain independent.

According to the Supreme Court's judgment, the Land Commission was '*required to function in a collaborative and consultative and constitutional and legal setting'* with the Ministry in *'preparatory steps towards registering a title*'. The Court concluded that the task of registering land titles should lay solely with the national Government, which placed the Land Commission and the County Land Management Boards in a subordinate role to the Ministry of Lands, with no power to register titles.

In her concluding observations to Chapter 6, Manji again reminds the reader that land law reform in 2009 onwards was a reassertion of the role of public and administrative law in land transactions. As McAuslan had argued, where title to land was vested in the President, land law ceased to be a matter of private law but became part of public law, in fact administrative law. However, the process of developing these new laws had been inadequate and had failed to elaborate the role of the new Land Commission, the establishment of which was intended to remove the centralised control of a corrupt and dysfunctional Ministry of Lands.

Chapter 7, *Rethinking Historical Land Injustices*: Starting with Kenya, Manji presents a critique of historical land injustices wrought on the Maasai by European settlers prior to Independence in 1963. In pre-colonial times, the Maasai pastured their animals on both sides of the Rift Valley escarpment. These injustices were

compounded by an independent state, which failed to resolve the dispossession of the Maasai as the government's elite had an active interest in perpetuating it.

Manji extends her analysis to analogous injustices wrought on indigenous peoples elsewhere in Kenya. She describes how the Endorois people in Kenya were cruelly evicted from their traditional lands near Lake Bogoria in 1970 to make way for a game park for foreign visitors. The historical land justices suffered by the hunter-gatherer communities such as the Ogiek and the Sengwer are also unaddressed. She suggests *'that past and present cannot be neatly sealed off from each other, and that historical land wrongs bleed into and shape the present-day economy'* (page 139).

Chapter 8, *Taking Justice Seriously:*[6]

In her final chapter Manji aims:

> '*to draw together the many questions'* she had '*raised and make some tentative suggestions about Kenya's prospects for a better – by which I mean fairer – future in relation to land.'* She suggests, *'how the Kenya example provides us with important insights into African land questions and struggles for justice in the land domain.'*

She reminds the reader that the legal profession in Kenya had failed to uphold the rule of law and had been implicated in land grabbing by using their knowledge, skills and networks for the illegal and irregular allocation of public land to powerful individuals. Lawyers had deliberately made land transactions difficult to understand and had promoted the principal of individual, private ownership, disregarding community tenure. '*Legal knowledge had been mobilized in service of the most powerful.'* The elite had succeeded in containing and controlling the process of drafting legislation, successfully turning potentially big questions of equity and fairness into technical matters of governance and legal solutions.

> *'The joining of land reform with constitutional reform…far from enabling far-reaching discussions of the meaning and content of land reform, instead functioned to block debate'* and engagement with Kenya's history of land wrongs.

Manji turns to examine the prospects for the fairer administration of the nation's land and suggest an agenda for future research and teaching which looks beyond the formal analyses of law to understand the wider political, economic and historical context in which land reform continues to be debated.

Despite the negative portrayal of customary land rights in the colonial period and the post-colonial recommendations for land tenure formalisation, by the mid-1990s the World Bank was able to accept that informally held property rights could be appropriate within a particular setting. Manji reported that according to Alden Wily

[6] This brief chapter of some 8 pages is not easy to follow due to some elaborate wording: e.g. '*That future requires us to challenge the regular instrumentalisation of land as a tool of negative political mobilization.'*

(2017)[7] suitable forms of community land tenure existed or were under discussion in twelve African countries. With regard to future research, Manji recommends:

> *What might be the contours of future research agenda on land that is informed by theoretical insights drawn from a range of disciplines? That research agenda needs scholarship on land issues to move beyond the empirical and explanatory. I would suggest that it needs to be founded in a nuanced understanding of the history of ideas. Who determines how we talk about land? How have hegemonic ideas about citizens' relationships to land taken hold and how has this caused us to lose sight of other alternatives?* (page 167)
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> *Given law's complicity with political oppression, violence and racism it is curious the extent to which Kenya has come to rely upon law as the solution to land problems."…"I have called that approach into question"…"Throughout this book I have argued that an adequate grasp of land wrongs can only be achieved through an interdisciplinary approach to land issues. A legal approach alone will not suffice.* (page 168)
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> *A starting point for critical land law scholarship, research and teaching is to recognise the moral harms done by an enduring system of land wrongs. As this book has shown, policy makers cannot ignore these structural realities* (page 169)

[7] Alden Wily, L. (2017) 'Customary Tenure: Remaking Property for the 21st Century', *Comparative Property Law Global Perspectives,* eds Graziadei, M. and Smith, L. (Cheltenham UK: Edward Elgar Publishing) pp. 458-77.