Getting to the Heart of the Matter: Powers over Property

Devolved land governance – the key to tackling the land issue in Kenya?

Liz Alden Wily
Independent tenure adviser & Member Kenya Land Alliance
lizaldenwily@gmail.com

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INTRODUCTION

This informal paper is written as a contribution to the vibrant debate underway among Kenyan land and property specialists as they mull over the implications of the recent upheavals and the role land has played in this. For tenure purposes the upheaval referred to is the locally-driven evictions and mass displacement from especially Rift Valley Province which followed the contested election in December 2007. This saw broadly politically-aligned inter-ethnic resentments find expression in claims that outsiders had wrongfully and disproportionately acquired lands in the territories of other groups. The issue of 'ancestral lands and historical injustices' was brought firmly into the public arena.

Opinions vary as to how far the claims of disaffected communities were opportunism that will dissipate as more ethnically-equitable political power-sharing is attained, or constitute grievances that reaches into the very heart of property relations in Kenya. Proponents of both positions agree that economic inequities stemming from Kenya's capitalist transformation heighten land-related grievance but differ as to how far economic growth and job creation might diminish these grievances. They also differ in their regard for customary land holding arrangements and even their acceptance of this as delivering private property rights.

Meanwhile for the displaced, the 'security' they need in order to return to their places of last residence is less a matter of police protection than of warm and lasting welcome by local communities. Those communities in turn show signs of holding firm until the ancestral lands issue is addressed. These realities suggest that irrespective of emergent political power-sharing and potential economic growth, the land issue as it has now crystallised cannot be lightly set aside.

Nonetheless, a peaceful path to remedy does not lie in confronting head-on the issue of the ancestral lands and whether or not these should be acknowledged as existing and thence legally entrenched. Nor does it lie in ignoring the concerns around *the status of customary land rights* for which ancestral land has become shorthand.

Rather the solution lies in radical restructure of the way in which property relations *are governed*. The reason this can be effective is that it acknowledges that what is being contested today is not just about *property* (how it is conceived and legally protected) but about *power over property.* Helpfully, the solution lies not in

restructuring relations among ethnic groups but those between *people and state*. It is through reform in this relationship that a fairer and safer platform for inter-community land relations may be achieved. So too through this route, inroads into a real and bitter sense of historical justice may be made, and bearing in mind that, strictly speaking, some of the most pernicious of these have occurred in *recent history.*

This paper lays out three simple measures for setting the ball rolling. The pivot is hardly radical in itself: genuinely local democratization of land governance.

ANALYSIS

Correctly locating the nature of land dispute is important for remedy, and most of all, to disrobe the ethnic clothing in which such disputes tend to dress, taking on a life of their own.

The first aspect to get a grip on is that land/property issues always contain political and socio-economic grievance and are not easily unpacked as solely a matter of a land rights. There is plenty to suggest that class and political clout help drive resentments over matters of land and housing access in Kenya. Class relations have reached striking levels of social stratification in recent decades. A small rich elite largely controls the political and economic life of the nation. Its members are also prominent in the now starkly skewed pattern of rural landholding in non-arid areas. There is a comfortable if always striving and mainly urban-employed middle class. And then there is *the majority*, somewhere between 25-30 million poor and extreme poor who begin to despair that the process of liberation, growth and development over the last half century will ever benefit them. Meanwhile having followed what they were told was the road to success by going to school (at considerable cost to family livelihood), some millions young and now not-so-young find themselves unable to get or make jobs for themselves. Nor are they able to sufficiently support themselves and their families on declining per capita parcels of land in rural areas.

Into this melee of frustration rising inequity in landholding becomes a source of conflict and provokes the increasingly loaded question *"so whose land really is it?*" Left too long unanswered this can descend into a call to arms. The fact that many Kenyan citizens no longer trust the mechanisms through which land is officially allocated or acquired, including allegations of ethnic favouritism, adds fuel to the fire.

In these ways, the land issue is at one and the same time a resource, political and economic issue. Experiences in other agrarian states which have had to face similar conundrums suggest that reform in the property systems that carry these ills is not just a useful, but an essential way forward. At the time of writing redress of inequitable or ill-managed land relations is underway in no less than 35 African states, 19 of which have arisen out of civil insurgencies or outright civil war. Failure to do so is increasingly understood as one of the reasons why around half the countries which eventually go to war with themselves return to war within five years of signing peace accords.

As amply laid out in the draft National Land Policy 2007, a multitude of problems face property relations in Kenya today. Analytically these manifest themselves in conditions of *maladministration, malfeasance* and *injustice*. The current displacement

of people, rationalised as territoriality, is firmly nested in the way in which property relations have been and are today governed.

Main flaws are (i) a system of land administration that was and remains unsuited to a modern agrarian state in transformation; (ii) a failure to take account of (let alone advantage of) the powerful notion of 'our land' which underwrites land relations in modern agrarian society; and (iii) a failure to provide the housing support needed in the face of rapid urbanization and growth.

Failing the urban poor and forgetting the right to rights

Running through these governance flaws have been two pivotal misconceptions. *First,* that Kenya's modernization would follow the same path as 19th century industrialization in the west. This has been unrealized, and with hindsight is not surprising, given that western industrialization occurred on the back of extractive resource economies provided by the creation of colonial states like Kenya. This combined with equally unfounded hope that Kenya could escape the obligation to provide the welfare and especially mass urban housing support that necessarily accompanied, and still accompanies, capitalist transformation. The miracle island economies of Singapore, Hong Kong and Taiwan are most recent demonstration, their socio-political stability significantly rooted in mass provision of public housing (e.g. 85% of Singaporeans live today in houses built by the state). Public housing provision is not for charity or even just a means to social peace. As fully paid up members of society the urban poor have rights; the nature of social rights may alter over time but never '*the right to rights*' themselves. In practice public-private delivery has proved most workable.

Failing to recognize customary land interests as private property

Second, the characteristic nature of indigenous ('customary' in Africa) tenure regimes has not been well understood as a *property* system in its own right. There are several elements to this. First, just because these interests are not registered and delivered in land title does not mean that they do not exist (or may be treated as if they do not exist). Second, the rights those systems provide are in every respect *private property rights* in the sense that they belong to an identifiable owner. Third, unlike imported European tenure norms, the ownership of such rights by an individual is just one option provided by indigenous regimes. On the whole, family tenure and collective tenure are more common and embedded. Fourth, experience in the 100 or more agrarian economies where indigenous regimes pertain tells us that the latter forms of ownership retain striking purpose and potency in modern circumstances. This is logical; as often as not they remain sensible ways to access, use, and thus own rural land. It could be safely argued that had for example statutory forms of family and community ownership been properly provide for this last half century, a great many intra-family disputes would have been avoided. So too the integrity of forest resources which have fallen by default to wayward state ownership might have been better sustained had collective tenure been provided for.

At the heart of this lies the singular shared attribute of indigenous tenure regimes around the world today (and adhered to by no less than two billion people) as *community based* property systems. What this means is that for as long as socio-

spatial and socio-political community exists and comprises of a socio-spatial network of families and neighbours, the legitimacy of these community-derived norms remains. How far community based norms are rooted in the practices of past generations (i.e. *traditions*) is hardly relevant; those operating today stem from and are sustained by the *living* community of today.

Where naturally collective assets like swamplands, pastureland and forest/woodlands, and public service areas remain, community-based norms are obviously strengthened. Less predictably, they are also strengthened where community-derived authority is legally or practically threatened or the rights they deliver interfered with. Pressures of land scarcity add to this.

Governance paradigms which intentionally or otherwise ignore, dismiss or weaken the socio-spatial context within which land is owned (registered or otherwise) increasingly find they do so at cost. Where response has been slow to non-existent, discontent readily ascends into larger ethnically-defined territorial claims and solidarity. This complicates and confuses the structural issues at stake.

As seen in Kenya it may also become a conflict issue in its own right or carry other sources of dispute. Although land grievance is not often the tipping point to civil war (political events mostly are) it remains a fact that not a single post-conflict administration has over the last quarter century been able to sustain peace *without adjusting the way in which land interests are legally acknowledged and protected – and governed.* Time and again in agrarian economies this crystallises around the contested interface of customary and introduced property norms, or what in Kenya has become the question of ancestral lands.

PROPOSAL

The specific task this paper addresses is to find a practical path towards tackling what seem incompatible objectives of (i) sustaining the security of legal and transparently acquired formal land rights as exist in rural freehold and leasehold entitlements and (ii) successfully beginning to remove the effects of historical injustice.

This accepts that recent displacement was indeed built upon festering land grievances that must be confronted. The position is also taken that these grievances stem from the most important structural fault in property relations in modern Kenya, and which in turn contributes to the plethora of other land governance ills including wrongful capture of property to flourish in especially public lands including trust lands.

A systemic issue of property and power over property

This fault-line lies today in the failure to acknowledge and legally uphold customary rights in land as *property* until such time as these interests are converted into the only tenure forms clearly provided for in national law, statutory freeholds and leaseholds. This combines with a more dangerous failure to endow community jurisdiction with legal land administration authority over all properties, registered or otherwise, within respective village or clan based community domains.

Instead the modern central Kenyan State has drawn this authority into its own remote and unaccountable hands, and vested the ownership of unregistered properties in remote, partially-elected and demonstrably unaccountable agents of state, County Councils. This both disempowers and dispossesses millions of rural Kenyans; their properties attain status as *de facto* public lands (and noticeably referred to as such by autonomous investigating Commissions).

In practice the land which customary owners hold in undivided shares such as pastures and forest/woodlands or other unfarmed estates have been rendered most vulnerable. Capture of these by government or councils (or their officials) and wilful reallocation to those of their choice are legion. Community right to regulate their own land relations including to whom and how properties are transacted and disposed at inheritance is also truncated. Stressed economic conditions and land scarcity deepen the fault-lines.

As observed above, the rise in estates held by outsiders combine class and ethnic resentments in land grievance. Outsiders are an easier target to challenge than the rich and powerful from within one's own ethnic community. With no sign of remedy for the grievance itself, ethnic solidarity is enhanced and grievance matures into demand for recognition of tribally-defined territorial dominion. But, I would argue, at base what is being demanded is *restitution* of community right to control local land relations and the right to recall property rights within those territorial domains that have been illegally or irregularly obtained or transacted.

WHAT TO DO?

Three basic measures may pave the way to repair the structural fault that allows such issues to escalate.

Act on identified illegal/irregular allocation of public land

The *first* is establishment of the Land Titles Tribunal recommended by the *Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (June 2004). This is designed to systematically receive, investigate and rule on claims relating to specific properties now held under registered title. No more is said here on this important intervention, amply provided for in the Commission's report.

Devolve, not de-concentrate, land administration and to the most local level possible

The *second* is to effect structural adjustment in the institutional arrangements governing property and in particular to deliver *wholesale devolution* in the rural sector. The instrument for this is the establishment of elected *Community Land Boards* at Location or Sub-Location level as appropriate (or even village level) and as locally determined.[1] *Inter alia*, without such fully-empowered community level

[1] Community Land Boards are already provided for in the draft National Land Policy, 2007 but in less than crystal-clear terms; these make it difficult to determine if what is intended is that these Boards hold and manage only collective estates such as forests currently held and managed by County Councils or become the root owner-managers of *all* parcels within the socio-spatial community area. Either way, as posed in the Policy, Community Land Boards are dubiously made subject to District Land Boards. This suggests little change in locus and authority over land matters as currently held by County Councils.

institutions in place, the restitution of properties reclaimed by communities will see these returned instead to the very central and local government agencies (County Councils) which were instrumental in their loss.

It must be observed that Community Land Boards are already provided for in the draft National Land Policy, 2007. Their provision is however unclear in both proposed level at which these should be located and in their powers. On the former, it is not clear whether Boards would be at more grassroots levels than district, follow existing administrative boundaries or even be able to be formed at wider tribal levels. Nor is it explicit in the Policy whether these Boards would hold and manage only collective estates such as forests currently held and managed by County Councils or become the root owner-managers of *all* parcels within the socio-spatial community area. Either way, as posed in the Policy, Community Land Boards are dubiously made subject to District Land Boards. This suggests little change in locus and authority over land matters as currently held by County Councils. The view taken here is that there is little to recommend the district level as the primary holder or administrator of lands given that it is (i) too far from community life to be effective; (ii) too easily co-opted as agents of the centre rather than responsible to the populations they are supposed to serve; and (iii) too easily co-opted into ethnicised territorial identity. The practicalities of good governance are even more important. Many Francophone and Anglophone states in Africa have found it steadily necessary to move governance institutions of all kinds closer and closer to the grassroots to have meaning and effect. Throughout the continent, the village or the village cluster (most comparable to Sub-Location in Kenya) is increasingly identified as the level of operations which is most directly accountable to citizens, the most self-reliant and cheapest to operate and sustain. The duty of higher level agencies including district councils is to support this primary level of modern governance.

Vest radical title in real communities not district/tribal territorial domains

The *third* step is integral to the above; this requires the vesting of radical title of the land within each community's land area in the name of that community. Experience also suggests that this must be achievable *without* necessitating creation of special corporate legal personality, or within this the precise listing of named individuals which make up the community. Such approaches (best seen in Kenya in the Group Ranches formation) tend in the first instance to never be updated as community composition changes over time. Aside from the latter removing a bureaucratic hurdle to achievement, vesting radical title in a self-defining and named community allows it to be defined as a continuing entity over generations and time and to reinforce the nature of exactly what is being titled – *symbolic ownership of the soil* - and from which fixed estate property rights including leaseholds (and even freeholds in the true English law sense) derive. That is, the title being referred to here is not a real property entitlement in the sense of being tradable but in effect a territorial

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designation. It is from this root title that the power of the community to regulate transaction in property rights to that land derives.

TO WHAT EFFECT?

By recognising ultimate local possession of the soil a core element of ancestral land claim may be met, and without immediately disturbing (other than fraudulently-obtained) formalized entitlements. Entrenching this along with jurisdiction at the most local level respects where this is historically most meaningful and practically exercised, and most easily accountable to landholders. It also advantageously undercuts the tendency for customary land claims to grow into the ethnically-defined territorialism.

Formalising the parameters within which freedom of settlement logically operates

In the immediate term, the paradigm holds out promise of land governance changes that make it much more acceptable to communities that those they displaced may now return. This is also important for the longer term, laying out the parameters within which the constitutional right of any citizen to settle anywhere in the country may be mediated in fair ways.

The strategy also provides a framework within which the autonomous Land Titles Tribunal (ideally decentralized to district level) may receive claims from communities, not just individual or family landholders, and to which jurisdiction as appropriate those properties may be returned for purposes of monitored resale, retrieval and registration as community owned estates (e.g. forested areas), or cash reparation to communities made.

The suggested strategy does not pretend to tackle directly equity in terms of access to land. However by addressing the issue of ancestral lands in this manner a less ethnicised framework is laid down through which very real concerns of mainly generational and class landlessness may be considered, and critically, led by rural communities themselves. An immediate opening for this would lie for example in the right of Community Land Boards to limit land hoarding and speculation and to introduce ceilings for certain classes of land.

HOW WOULD THE BOARDS OPERATE?

Community Land Boards would be established incrementally as each community voluntarily reaches agreement with its neighbours as to the respective territorial limits of its jurisdiction. The area so embraces would be the *Community Land Area* (CLA) and described and registered as such in a National Register of Community Land Areas.

From the outset it would have to be clear that these bodies will not be government instituted or funded, but exist as community based and supported entities.

Facilitation, training and related recurrent support would however be an obligatory function of government.[2]

It is over the CLA that the elected Community Land Board would hold full land administration jurisdiction including being able to establish conditions of entitlement and able to formalize entitlements through community-based adjudication and decision on request. Given the damaging limitations often experienced in the registration of a parcel in the name of one (usually male) head of household, supporting law would take the opportunity to provide for f*amily* and *group* entitlements.

It would also need to be possible for the community itself to be titled as private owner of naturally collective assets like pasture and forest lands within the CLA. The conditions for collective decision as to its future transposition and its practical management and access lain would be prerequisite elements of such registration. These collective properties would be held by all members of the community in undivided shares in joint ownership.

Existing leaseholds and freeholds within the Community Land Area would not be interfered with but transactions and other aspects thereafter administered (and registered) by the Community Land Board. Consideration in new law affecting devolved land administration would needfully consider if and how these estates would be converted on commencement of the law into Community Leaseholds and Freeholds and the extent of changes to their incidents that would result. Changes would best be limited to the right to establish conditions which demonstrably inhibit land hoarding or speculation. Obviously any annual rent accruing would henceforth accrue to Community Land Boards, not County Councils or central government.

One set of freehold entitlements need special attention. These are already existing group entitlements registered under The Land (Group Representatives) Act Cap 287 – i.e. 'group ranches'. These are already collective entitlements, although perhaps not as inclusively or simply constructed as desirable. They may also be considered community land areas and their elected management committees as for all intents and purposes Community Land Boards. Group Ranch holders should have the option on the commencement of the law to retain their holding as is or to convert this at no cost into a community collective entitlement as would be provided under new law

Formalization of existing but *unregistered* land interests such as affecting these houses, shops and farms and collectively owned pastures and forests would not be compulsory. Introduced new law would need to guarantee the security of tenure of these properties as acknowledged as existing by the community through its Board. Registration of *transactions* would however be usefully made compulsory once the Community Land Register is established, at which time adjudication, boundary

[2] The need to avoid government funding of such bodies is largely a consequence of cost (locations number around 1,000 and sub-locations around 10,000). Failure to cost this into land reform programmes (e.g. Uganda) has seen reversion to district-focused strategy removing the benefits of devolution in this area. Additionally, a more community-engineered process ensures the level of self-reliance and localised empowerment needed to drive and sustain action and performance. It also enables those communities most ready to act to lead the way, setting precedents to which less organized communities may aspire.

description and plot numbering, and registration of the transacted property would take place. This would provide incremental compilation of the Register. This would be held and maintained by the Board with backup copies of additions and changes submitted to a National Register of Community Land Area Properties, de-concentrated in branches to the district level. At the very most such district level bodies, and purposely not referred to as Boards, would have functions strictly limited to back-up record-keeping, monitoring and receiving complaints from aggrieved landholders.

These and related matters would be laid out in a national Community Land law. Each Board would be directly accountable to the community (Community Assembly). The community itself would constitute all members of the community with permanent or demonstrated *primary* residence within the Community Land Area. Procedures laid out in the law would be bound to be called upon to determine membership on the grounds of *bona fide* ownership or residency when contested. The right of every Kenyan to continue to hold, apply for, or purchase land within any Community Land Area would be explicit, along with sanctions for interference in this right. Boards would hold the right of refusal, but not on the basis of ethnicity. Obviously interests found to be illegally or fraudulently acquired would not be upheld. It could be expected that most Community Land Boards would obligate commercial enterprise located within it Community Land Area and involving significant tracts of land to be developed in partnership with community members.

Newcomers would be obliged to adhere to such conditions as applied to existing community members as laid down by the Board as agreed by the Community Assembly. National law would lay out the limitation on the scope of these. Placement of a ceiling on total holding size for different classes of land and measures to limit arable land lying idle or purchases being made for the purpose of speculation would fall within local CLB remit.

APPLICATION

The intention would be that the entire rural landscape of Kenya would over time become a mosaic of discrete Community Land Areas. This includes Coast Region whose unique tenure history has delivered particularly complex grievances, but which may similarly begin to be remedied through these proposals. The only exception to the above would be inclusion of National Parks and Forest Reserves. The tenure of these will in due course need to be addressed, and in ways consistent with the principles herein suggested.[3]

[3] In the immediate future these would remain vested in the state as provided by the Forest Act, 2005. In time, those communities which demonstrate successful community-based land management would be able to apply for restitution of adjacent parts of these nationally reserved areas into their own community tenure. This change in ownership would not affect the status of these areas as protected areas; the new owners would be legally bound to uphold whatever conservation conditions pertain. In most cases change in ownership from state to communities would be accompanied by or preceded by a change in management regime, the community taking on this right and responsibility, again strictly within the terms of the appropriate conservation legislation. Alternatively, depending upon the case and the interest and capacity of the community to provide conservation and production management, the Forest Service (for example) would be contracted by the community to manage its asset, with an appropriate and agreed proportion of revenue withheld by the Service but accounted for to the community. In cases where the forest is entirely without revenue generating potential, state

Although not pursued here, there is also no reason why the principle cannot be applied to urban areas and launched first in slum/squatter areas, in the form of Neighbourhood Land Councils. This would provide a community-based framework through which locally controlled and managed occupancy may be legally institutionalised, and regularization of occupancy pursued. Innovative mechanism being tested in a rising number of the world's slum cities would need to be applied. These include incremental titling such as quick provision of residential licences, upgradeable to longer-term licences and ultimately full entitlement as owners improve their properties. It also includes group titling of multiple parcels too small, fluid, too layered in ownership or too expensive to register individually. Community based area planning similarly becomes more possible and rooted in real local powers to do so.

The overall advantages of a devolutionary approach are multiple. First, it responds constructively and in a non-inflammatory manner to rising demand for respect for customary land rights, and without interfering with the equally basic right of Kenyans to settle and own land in any part of the country. The difference is as noted above that they do so in cognizance that the radical title of the soil is owned by the community (of which they become part) and additionally do so (within reason) on the terms of that owning polity. This could take heat out of the issue and without creating chaos as relating to existing rights. In practice a degree of ethnic consolidation by area would be expected, especially in early years. Over time as relations settle and the sense of inter-ethnic threat recedes, this can be expected to fall away.

At the same time the inefficiencies and scope for corruption and malfeasance long facilitated by a remote, centralized and unaccountable administrative system (to landholders) may also have a chance to diminish. Community Boards will not by any means be exempt from corruption but this should be better kept in check by the immediacy of access and accountability of Boards to the landholders they represent and serve. Moreover the failures of one Community Land Board need not impact upon those of neighbouring communities.

Two interrelated foundations of what is proposed must be spelt out. It may have been observed that one result of these proposals will be a steady diminishment in the hectarage of *public lands*. Most immediately, the very notion of 'trust lands' is undercut and replaced by community owned and governed land areas. At the same time land *governance* changes. This has two faces: first, the critical transition is made within the 'customary' community from so-called notions of customary land tenure into modern, community based rural land governance. Second, this enables the *role of the state* itself to be properly restructured as less landowner (or de facto land owner) than ultimate land regulator, monitor and watchdog over good practice.

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subsidization would be necessary. Most of such cases would see the community manage the asset itself, securing non-incoming generating benefits directly to itself (e.g. in the form of rights to graze the area at certain times of year, collect dead wood etc.). There are an abundance of examples from Mexico to South Africa from which to draw working models of all kinds of community owned and/or managed regimes. (It might be noted here that even in neighbouring Tanzania no less than 1.6 million ha of Government Forests are already managed by communities as well as some 2.06 million ha of forest now located in community-owned forest reserves (Village Land Forest Reserves).

A final general advantage of the system may be observed. Instead of striving in vain to abolish or replace customary norms, these become the platform of modern democratic land governance. Accordingly the integration of the so-called customary and statutory systems is achieved.

It does this in two ways: first, in building governance upon the customarily community-based governance system that exists, thus also achieving much-needed democratization. This also immediately makes formalization of rights a much more realistic and sustainable possibility. This has been problematic in Kenya especially after first registration with possibly a minority of transactions since being registered. A significant proportion of first registration has not itself seen completion, a large number of people yet to collect deeds available since the 1960s and 1970s. Second, by absorbing useful elements of customary norms, the modern system increases the options through which such registration may be delivered. This includes not just provision for registration of family title and collective titles as private group owned properties but enables derivative rights (e.g. seasonal access rights) to also be secured as part of these entitlements if and when appropriate.

Although a century late, integration of customary law and received law is thus obtained into a single statutory regime. As several African and European scholars of property jurisprudence have in different ways opined, received law needs to be adapted and adjusted to indigenous law (i.e. community based law), not vice versa. This is the secret of successful integration.

CAN IT WORK?

Is such a vision of democratised rural land relations utopian? This paper argues not, and in the full paper draws upon the principles and operations of comparable developments in other parts of the continent to explicate the potential (and including neighbouring Tanzania and Uganda). What is sure is that the process may only be incremental. Ideally it will also be built upon early trial through learning by doing. A host of lessons would guide the detail of final legislation, including the measures that have to be taken to ensure that existing title files are promptly dispatched to local Community Land Boards as each is formed.

Experiences in Africa, Asia and Latin America in comparable agrarian situations alert us to the need to attend to the sustained sense and claim of customary land rights. This calls for the surrender of the idea that with modernization, introduced individualization and titling and socio-economic transformation, that these claims will disappear. If proof of futility is needed, a gentle eye need only be cast upon developments in recent decades in the modern economies of Norway, New Zealand, Australia and Canada. These states among others have all found it necessary to provide constructively for the recognition, exercise and registration of indigenous/customary interests as *private property rights,* and in the forms they occur. Locally, on the African continent, no less than 12 states have found it necessary and logical to respect not just the sanctity of title but the *sanctity of unregistered customary land rights* as they exist today. In practical terms they have also found it necessary, beginning in Botswana in 1968, to make clear provision for those interests to be registered ‘as is’ in their various family, collective as well as individual forms.

The fact that the issue is not confined to the African continent is less surprising than may first appear. For its origins are clear in almost uniform diminishment of indigenous/customary property rights to those of *permissive occupancy and use.* These in turn have only been recoverable as 'property' through a further transformation into often awkward and unsuited imported forms of ownership. This, as is now well-known, arose with colonial state-making, which, inter alia, by denying that Latin American, Asian and then African populations actually owned the land removed the need to pay for the land acquired and made available immense resources free for occupation or extraction.

However, if today historical grievance may be identified, it could be argued that the greatest fault lies with post-liberation governments, whose elites saw no reason to alter the paradigm to meaningful degree. In especially Africa, the 1950s thesis of agrarian modernization supported continuity and it must be said, encouraged by well-meaning national and international agencies including The World Bank. This was through the thesis that modernization could only occur by placing farms in the hands of the more progressive of local farmers, their tenancy secured in individualized freehold. Land intended as only temporarily resting in the hands of the poorer majority would in the meantime be held in trust for them. Everywhere such lands, usually the majority area of each agrarian country, became for all intents and purposes public land. Integral to this was the cancellation of the right of communities to regulate and administer their own land relations including registration of transactions in ways that courts would uphold. It is this mass *dispossession and disempowerment* in property which modern democratization of land governance and rights now pursues in widespread tenure and land administration reforms. The origins of the abuse also explain why the matter is often referred to as 'the last colonial question'.

As observed earlier, lessons are also being learned as to the costs of sustained frustration around the customary/statutory interface which renders so much community owned land vulnerable and bitterness to grow. The recent events in Kenya are a wake-up call as the equally severe 'land clashes' of 1992 and 2002 should have been before them. The question facing Kenyans and their politicians is not whether to act but *how to act*. Commonsense suggests that a practical rather than declamatory approach is needed.

HOW THEN TO PROCEED?

To large degree what has been outlined above is reflected in the draft National Land Policy. Its approval is one route to pursue. However this holds promise of delay and potential to polarize positions. This is for several reasons.

First, as it is currently drafted the Policy lacks a clear vision as to how its important principles *should be delivered in practice*. This in turn makes it almost impossible to cost the implications, a pending requirement of Cabinet approval. No early result can be expected.

For the same reason, policy pledges to take into account principles of restitution, resettlement, redistribution and the right to land as instruments of reform has raised

alarm in some quarters. Without concrete proposals as to how these would be implemented, the worst is being assumed. Signs of anxiety and resistance to the approval of the policy are already apparent. This includes a degree of wilful misinterpretation as to what the Policy says and means.[4] This will gather pace. The Policy would then fail to be approved at all and valuable principles and opportunities for placing property relations in Kenya on a fairer and less contested footing lost in the process. This is an element of policy which needs significantly more than generalised principle; too much depends upon the nitty-gritty policy and strategy for almost every other aspect of land relations, from the pattern of landholding being promoted, to security of rights (whose security?) to where and who may and may not be evicted, to if and how and for who resettlement is made possible.

Other concerns need to be considered in determining whether the orderly process of first agreeing a Policy, proceeding to new law and then delivery programmes is strategically correct. The experiences of sister agrarian states in Sub Saharan Africa on precisely this point have been disappointing. First, policy approval is slow at the best of times. Kenya's record in seeing through the recommendations of commissions (and not just the land commissions but those in the education, judiciary and local government sectors) has been especially poor. Current optimism that new government will alter this trend may prove misplaced.

Further, the very nature of giant steps which the Policy proposes to take will at once return the issues to constitutional review. Kenyan experience on this has been even more salutary than usual. While constitutional change embracing the frameworks of governance may surely be expected by March 2009 this may not extend to the proposed land chapter or further changes to reflect the proposals of the 2007 Land Policy.

Even if new policy is readily approved, there are reasons to doubt that the formulaic following drafting and approval of new land law, in due course followed by development of implementation programmes is a practical way to proceed. Years, not months are characteristically lost. Worse, because the most important is left to last – workability in the field with real populations facing real constraints – attempts to apply the new norms all too often lapse into unimplementability and inaction. A return to the drawing board ensues, sometimes a decade after the original policy debate. On this continent alone, Ghana, South Africa, Lesotho, Namibia, Zambia and Malawi are cases in point. An outstanding lesson learned is simply that a more incremental attack on the ills affecting land relations is in order. In this, concrete learning by doing is pivotal to make the breakthroughs needed.

At the very least, complex principles – and of which Kenya's draft Policy abounds - deserve more elaboration prior to approval. This includes even the founding issue of institutional locus and power which this paper has suggested is the logical pathway to reform. For example, doubt has been expressed here (albeit in footnote) as to the wisdom of policy intention to create District Land Boards as the key agents of

[4] For example, the draft does *not* lay down that everyone shall be given land as has been attributed to it but rather that the equal right of access to land will be assured (s. 1.5.1). Nor does the policy say that all land conceived as wrongfully taken will be restored to original customary owners as of in 1895, rather that the principles of restitution will be taken into account in considering historical injustices (s.3.6.1, s.6).

localised land administration. Given the dubious history of supposedly autonomous commissions in Kenya (let alone parastatals which became a main conduit for malfeasance and mis-policy over land), the level of change that may really be obtained through removing ministerial authority into a National Land Commission must also be queried. Further thought on a number of other provisions in the policy seems due, before it is writ in stone. While it may be argued that the place for such debates is parliament when the Policy reaches it in the form of a sessional paper, more thoughtful working through on the implications and practical options of delivery are needed to properly inform that debate. Corrections will in the process be made. These may not be mere refinements but substantial, and have a domino effect upon a clutch of other elements of policy.

Getting cracking in the field The suggested alternative therefore is not to invest entirely in the Policy approval process at this point but to revisit at least the most contentious issues. This should not be confined to policy rooms but in the form of active field discussions with trial communities as to the workability of such avenues as laid out in this paper. As well as including a sample of characteristic communities in all agro-economic zones and provinces, examples of the most troubled areas should be included, as most testing of the options. This represents not just participatory consultation as to principles (already widely undertaken in the policy process) but participatory *action planning.*

This will in turn allow the more complex elements of the Policy to be presented for incremental approval and support – and action. Development (or dismissal) through this process will do much to illuminate a workable and acceptable first path forward. Thousands of displaced await just such word from on high that commitments to act in such vein have been made, to make their return to last places of residence possible. So too thousands of communities right around the country await clarification as to how the crystallising claim around ‘our land’ is going to be handled. Prompt consideration by the new government of such priority matters will do much to assuage the suspicions of many Kenyans that business as usual in such matters is not the intention, the comfort of the elites unaffected by majority concerns, notwithstanding.