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Book Review:
The struggle for land and justice in Kenya
by Ambreena Manji

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Ambreena Manji's *The struggle for land and justice in Kenya*, James Currey, 2020, aims to provide a socio-legal approach to understanding developments in the land domain in Kenya between 2010 and 2020. Specifically, the book studies land accumulation by dispossession and the struggles against exploitation through a justice framework. The book is divided into 8 chapters.

The struggle for land and justice in Kenya makes for a depressing read on the land question in Kenya. Manji clearly outlines the unjust nature of Kenya's property system and hopes to excite a discourse through a justice prism. She seeks to reignite debate on the land question in a way not contemplated by the Constitution and the land legislations (and perhaps, interestingly, possibly unlawful according to the National Cohesion and Integration Act)¹ and this would be its greatest contribution. It

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¹ As part of the legal reforms that followed the 2007/2008 post-election violence, Parliament enacted the National Cohesion and Integration Act (No 12 of 2008) whose purpose was to encourage national cohesion and integration. Section 13 of the Act introduced the offence of 'hate speech' which prohibits words or behaviour that is 'threatening, abusive or insulting' and is intended or is likely to stir up ethnic hatred. Given the ethnic angle to the unjust allocation of land in Kenya, this provision has been invoked in a number of instances in an attempt to stifle debates on land injustices. For instance, in the 2013 campaigns, the police warned candidates against rais-

implores us to unbind ourselves and open our eyes to the inequities of our society in ways that defy imagination.

In *The struggle for land and justice in Kenya*, the author takes the reader through a historical journey on the struggles on land relations. She begins the journey in pre-colonial Africa where societies viewed land as a trans-generational asset vested in communities and not capable of individual exclusive ownership. Access and use of land represented a person's culture, heritage and means of both individual and communal daily survival. With the advent of colonisation, a new and alien vision of land ownership was introduced that defined land as a commodity: a factor of production capable of individual and exclusive ownership. The original sin in this regard began with the introduction of the Foreign Jurisdiction Act of 1890 which engineered the translocation of the radical title from the commons to the Crown in what the author describes as the radical title's 'kinetic history'.² In an 1899 advisory opinion by Law Officers of the Crown, they interpreted the effect of the 1890 Act as 'bestow[ing] upon the "sovereign" the power of control and disposition over waste and unoccupied land in protectorates where there was no settled form of government.'³ This position was affirmed in *Wainaina v Murito*⁴ which clarified that 'all native rights in such reserved land... disappeared and the natives in occupation of such Crown Land became tenants at will of the Crown.'

Thus, by colonial occupation and fiat, the 'defective' informal and non-market-oriented property system of African societies was unilaterally replaced by the 'superior' formal and secure English property system managed by Britain. This anchored the settler economy in Ken-

ing the land question. (See Julia Sigei, 'Land question divides experts and politicians right down the middle', *Daily Nation*, 7 February 2013.) Similarly, some journalists have been targeted by authorities for covering politically sensitive topics like land (See Human Rights Watch, 'Not worth the risk: Threats to free expression ahead of Kenya's 2017 elections' 30 May 2017. <https://www.hrw.org/report/2017/05/30/not-worth-risk/threats-free-expression-ahead-kenyas-2017-elections> on 16 March 2021.

² Ambreena Manji, *The struggle for land and justice in Kenya*, James Currey, 2020, 5.

³ HWO Okoth-Ogendo, 'Property theory and land use analysis: an essay in the political economy of ideas' 1 *Journal of Eastern African Research and Development* (1975) 37-53.

⁴ (1922) 9 KLR 102.

ya where land was allocated/distributed based on race at the expense of indigenous communities who were condemned to live in native reserves and to support the settler economy through provision of cheap labour. At independence, racial privilege as a basis for land alienation was replaced with ethnic privilege, plunder and theft. The basic and unjust structure for land relations remained, fundamentally, the same. The political class failed to recognise the trauma caused by the colonial property system and as such made no deliberate efforts to offer any form of meaningful therapy to ameliorate the condition of the patient. As Chinua Achebe aptly put it:⁵

We had all been in the rain together until yesterday. Then a handful of us – the smart and the lucky and hardly ever the best – had scrambled for the one shelter our former rulers left, and had taken it over and barricaded themselves in. And from within they sought to persuade the rest through numerous loudspeakers, that the first phase of the struggle had been won and the next phase – the extension of the house – was even more important and called for new and original tactics; it required that all argument should cease and the whole people speak with one voice and that any dissent and argument outside the door of shelter would subvert and bring down the whole house.

Thus, the hitherto unjust, unfair and evil system of government under white rulers immediately became virtuous and useful for the successors of the colonial state. In this neo-colonial state, the political class has presided over (and in certain instances, used the law to sanction) a system where there is no big difference between what is legitimate and what is unlawful.

From the author's point of view, paradoxically, ten years since the transformative 2010 Constitution was promulgated with its high-sounding promises, no fundamental change in the structure of land relations has occurred. Indeed, the book raises doubts about the efficacy of the prescription contained in the Constitution – the introduction of independent and strong land governance institutions – to resolve the land question at the expense of other remedies like redistribution of land or retribution for past and present wrongful acts.⁶ There has been a pre-

⁵ Chinua Achebe, *A man of the people*, Penguin Classics, 2001, 33.

⁶ Manji, *The struggle for land and justice in Kenya*, 12.

occupation with the desire to get the institutions right without concomitant reforms in the control and ownership of land. In the author's opinion, the 2010 Constitution, viewed through the lenses of just and fair land relations, was low on ambition. With its focus on reforming land governance *institutions*, it sought to sanction and anchor a market for sanitising illegal and illegitimate past and present conduct in land relations.

According to Manji, scholarship and public policy discourses on land have been dominated by a private law model of land law. In this sense, the law has a limited role, that is, to 'facilitate the market and to guarantee the rights of the individual to own and control land.'⁷ The author argues for an expansion of the scope of the discourse to include public law aspects of land relations which consider and protect interests that may not necessarily be market/commerce-oriented.⁸ Specifically, she advocates applying administrative law principles in managing public and community land.⁹

True to her suggestion of unsettling the outdated ideas dominating Kenya's property regime, the author analyses land reform issues from a broad perspective. Manji adopts a multidisciplinary approach which incorporates law, history, political science, literary studies and economics. Further, she links the land question in Kenya to policy and legal developments at the regional and international levels and shows how these impacted local discourses in Kenya on land. This approach provides the readers with a rare comprehensive toolkit for unmasking and understanding the complex and multifarious question of land, which festers in Kenya and other African countries many decades after the end of colonial rule.

In an attempt to highlight and refocus the spotlight on the role of the state in the (mis)management of land relations, *The struggle for land and justice in Kenya*, looks at the land question through a justice lens that

⁷ Manji, *The struggle for land and justice in Kenya*, 17.

⁸ Manji, *The struggle for land and justice in Kenya*, 17.

⁹ Manji, *The struggle for land and justice in Kenya*, 17.

asserts the public law attributes of land affairs. In so doing, the author has sought to document the evolution of attempts to frame land issues in Kenya using a justice and fairness framework. This framework brings into question the very foundation of property institutions, rules, norms and, indeed, the political economy in Kenya. It nudges us towards the reality of our society. This reality, we seem to have chosen to turn a blind eye to as was illustrated by a colleague's wry comment on the title of Manji's book that '...in Kenya, we do not struggle for land, we simply need to work hard, make enough money and then use the money to acquire as much land as we want.'

Although the book is a valuable contribution to the scholarship on land relations in Kenya, a few weak points can be identified. First, the author is right in criticising the narrow approach of reforming land laws and land governance institutions post 2010 as providing legal answers to 'political and social problems relating to land'. However, the author shies away from clearly highlighting how we should get out of this undesirable situation. Thus, while the book is forthright in its diagnosis of the problem, the reader has to contend only with hints for prescription.

Second, in arguing for the adoption of a composite private and public law model, the author seems to argue more strongly for the application of this model only in relation to public land and community land. In reality, principles of administrative law like fair hearing, legality and rule of law would also find utility in relation to the management and administration of private land. For instance, in dealing with an application to register or remove a caution or a restriction, the registrar is required to issue notices to the affected parties and to grant them an opportunity to be heard.¹⁰

Third, in chapter 3, while the book provides a comprehensive analysis of various official reports documenting land problems in Kenya,¹¹

¹⁰ Land Registration Act (No 3 of 2012), Section 71, 72, 73 and 76.

¹¹ The chapter discusses the reports of the following official bodies: the Presidential Commission of Inquiry into Land Law System of Kenya (Njonjo Commission, established in 1999); the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land (Ndung'u Commission, established in 2003); the Commission of Inquiry

it is odd that it does not include the report of the Judicial Commission of Inquiry into Tribal Clashes¹² (Akiwumi Commission), established in 1998. The Commission was created with the mandate to investigate the tribal clashes that occurred in various parts of Kenya since 1991 and to specifically report on the origin and underlying causes of the clashes; the nature of intervention by law enforcement; and the status of preparedness on the part of law enforcement agencies to respond to and prevent tribal clashes. While this commission's mandate did not specifically relate to land, some of its findings identified dissatisfaction with land ownership and use as one of the factors that sparked the violence. The findings of this commission showed, quite early in time, how politicians used the land question to plant discord among neighbours and its contribution in providing fodder for the land reform debate would have deserved recognition alongside the other reports mentioned in chapter 3 of the book. The findings of the report showed the connection between land injustices, politics and human rights abuses. Additionally, the report provided the context for understanding the emergence of the land question in the post-election violence that was investigated by the Waki Commission in 2008.

into Post-Election Violence (Waki Commission, established in 2008); the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (Mutua Task Force, established in 2003); and the Truth, Justice and Reconciliation Commission, established in 2008.

¹² Republic of Kenya, Report of the Judicial Commission of Inquiry into Tribal Clashes, 1999.



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