

'WE'VE BEEN TO HELL AND BACK...'<sup>1</sup>  
*Can a Botched Land Reform Programme Explain Kenya's  
Political Crisis?  
(1963–2008)*

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ABSTRACT

*A central argument pursued in this paper seeks to accord primacy to the unresolved land reform programme in Kenya in debunking the genesis of the country's intermittent political crises since independence. It is argued that one cannot come to terms with Kenya's failed democratic process without acknowledging the extent to which patrimonial politics were systematically developed and sustained, and the key to this was land. Land as a resource of political patronage, to reward, and punish, those who were part of, or were perceived as outsiders in an evolving political system that personified the ideals of its leaders gained a particular premium, easily manipulated across the three presidential epochs: Kenyatta (1963-1978), Moi (1978-2002) and Kibaki (2002-2007). The failure of land reform contributed immeasurably to the conflict that followed the December 2007 elections. The spatial character of the electoral violence (eg, Rift Valley and Coastal Province) suggests systemic faults that have marked decades of historic injustices brought about by a land reform policy largely informed not by a constitutional pronouncement but by the interests of the incumbent president. The paper concludes that an end to Kenya's political crises is not fully contingent on resolving the land issue, but rather on transcending the quest for land reform as a contributor to economic growth and political stability. This outcome is achievable through more creative means of economic diversification. The reality of Kenya's demographic and environmental pressures attests to the*

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1 Opposition leader Raila Odinga, 17 April 2008, when he was sworn into office as the country's prime minister, a key step in a power-sharing deal aimed at ending Kenya's political crisis. Analysis of aspects of his speech available at: [www.news24.com/News24v2/Components/Generic/News24v2\\_Print\\_PopUp\\_Article](http://www.news24.com/News24v2/Components/Generic/News24v2_Print_PopUp_Article)

*urgency of a shift in the meaning and symbolism attributed to land within the country's polity and its economic realm.*

## INTRODUCTION

Kenya opened a new chapter in its political history when two wrangling factions, the Party of National Unity (PNU) and the Orange Democratic Movement (ODM), signed a power-sharing agreement on 28 February 2008 (*The Daily Nation* 29 February; *The East African Standard* 29 February 29 2008). The agreement brought to an end months of civil unrest and political bickering following the declaration of Mwai Kibaki (the PNU's presidential candidate) as the winner of the 2007 presidential election, held on 31 December 2007. Raila Odinga (ODM's presidential candidate) refused to concede defeat, alleging that he had won and that Kibaki had been illegitimately declared the president by the Electoral Commission of Kenya (ECK).

The declaration of Kibaki's victory sparked a wave of atrocities across the country, particularly in Odinga's political strongholds. These events caught the eye of the international community, which stepped in to facilitate the restoration of order in a country that was once the icon of peace on the continent.

The African Union appointed a team of international experts to mediate the crisis. The team comprised former United Nations (UN) Secretary General Kofi Annan and members of the African Panel of Eminent Persons – Graça Machel and former Tanzanian President Benjamin Mkapa. At the onset the mediators requested both the ODM and the PNU to appoint a group of people who would represent them at the negotiating table.<sup>2</sup>

The mediation process brought to the fore the fact that Kenya's current political challenges and the violence that marked the post-2007-election period were symptoms of deep-seated democratic deficiencies that remained unresolved in post-independence Kenya and included the failure to bring about wide-ranging constitutional, institutional and legislative reforms that would deepen democratic growth and reverse the ills of underdevelopment bequeathed by colonialism.

At the epicentre of Kenya's intermittent political crises since independence is the character of the post-colonial state, which, as argued by Lonsdale (2008), has traditionally been the sole agency through which Africans could aspire to the commanding heights of the economy in defiance of racially entrenched interests – in land, commerce and finance. Access to state power was central and was

2 The PNU was represented by Cabinet ministers Martha Karua, Sam Ongeru, Moses Wetang'ula and Mutula Kilonzo, while the ODM delegation was made up of MPs Musalia Mudavadi, William Ruto, Sally Kosgei and James Orendo. See Namunane Bernard, 'Annan pleads for grand coalition government' available at [www.nationmedia.com](http://www.nationmedia.com).

mediated through elections, which served as a mechanism for the redistribution of wealth accumulated from above (Tamarkin 1978, p 318).

The patron-client relationships that developed and characterised Kenya's patrimonial politics constituted an exchange of material benefits for political influence and loyalty (Tamarkin 1978, p 318), which ensured that state power was concentrated in an executive presidency, directly elected but able to manipulate public institutions and dispense political patronage on the basis of ethnic mobilisation. Hence the competition for a share in this power is mediated through internal ethnic accountability and tribal politics/rivalry.

This situation was typified by the leadership of Kenya's first president, Jomo Kenyatta, in 1964, when patronage politics was played out within the realm of land reform. Kenyatta and the Kikuyu elite soothed the frustrated honour of the Kikuyu poor through settlement schemes in the former 'white highlands' (Rift Valley), in which the less favoured Kalenjin and Maasai groups had indigenous claims to land (Lonsdale 2008, p 3).

The attempt under Kenyatta to Africanise both the public and private sectors manifested as 'kikuyuisation', a practice which alienated other ethnic and racial groups (Southall, 1999, p 94). This continuity in a governance system that was highly ethnicised and exclusionary was perfected in 1978 by Kenyatta's successor, Daniel arap Moi, whose presidency, though marked by a declining economic base and opportunities for personal enrichment, galvanised political authoritarianism that was exclusionary and aimed at developing an ethnic elite from his Kalenjin tribe at the expense of those who were now tribal rivals in land, urban property, or petty trade.

This institutional configuration ensured that electoral politics became a high-stakes game. The centre of power, the Office of the President, with its allocative and coercive powers, created a space in which the contest for political power was a hard-fought battle that took on an ethnic dimension which centred on ethnic rivalry and competition that sought to lay claim to state largesse, which increasingly came to be seen as the ultimate guarantor of wealth accumulation (Klopp 2001, p 476).

This mode of political practice marked Kenya's 45 years of post-independence (1963-2008). Commenting on the 1997 multiparty elections Ajulu (1998, pp 279-282) notes succinctly that one of the core features of Kenya's political system was its ability to invoke ethnicity in political mobilisation as a conduit for control of the state and to effect a governance system that was exclusionary and authoritarian. This calls into question the stability of Kenya's long-term political future, as Ajulu (1998, p 283) further warned: 'The Kenyan situation has not exploded yet, but developments certainly push in that direction, unless of course a workable power-sharing formula can be found.'

Hence, with every successive election popular resentment has grown among Kenyan citizens, to the extent that the clamour for constitutional change became a defining political feature in the post-1990s epoch (Lonsdale 2008, p 3). Moi's departure from the presidency in 2002 after 24 years in power did not, however, bring about the much-anticipated democratic reforms. Under the presidency of Mwai Kibaki the new ruling coalition promised to focus its efforts on generating economic growth, combating corruption, and rewriting the country's Constitution. Despite a marked improvement in economic growth, constitutional reforms were not effected. Like the preceding regimes Kibaki's first term was beset by controversy.

The period between 2003 and 2007 was marked by extensive political animosity between pro-government and other political parties, which, to all intents and purposes, culminated in the election violence seen in December 2007 (Sjögren & Karlsson 2008). This electoral crisis was an elaboration of a failed democratic transition which can largely be analysed through the prism of a botched land reform programme, whose latent function was to meet political objectives, as opposed to dealing with a history of unjust redistribution. The outcome of such a programme, I argue, was essentially to redistribute political patronage, which inevitably led to retribution by a supposedly 'privileged' tribe (the Kikuyu), whose historic claims to land (for example, in the Rift Valley) were not vested in their current occupation, but with the Kamatusa tribes (Kalenjins, Maasai, Turkana and Samburu).

These ethnic cleavages, which politicians intent on maintaining power sustain by intermittent ethnic mobilisation, form the basis of Kenya's sporadic election crises since the advent of multiparty politics in 1992. Against this background this paper examines Kenya's post-election crisis with a view to highlighting the underlying factors that might have instigated it, significantly, the land question, which has come to represent the exigencies of building a new political and democratic order that accommodates varying and often irreconcilable interests.

Within the Kenyan political discourse these interests took on an ethnic dimension that was interdependent with the political system. Recognition of this factor has often been underplayed in the analysis of Kenya's political system, in particular in relation to struggles for ownership and access to land as a basis for claims by elites to political power. Roger Southall (2005, p 142), in his analysis of the Ndung'u Report, avers that: '[...] whilst I recognised land-grabbing (especially by local councillors) as a phenomenon, I failed to appreciate how enormously extensive the illegal appropriation of public land was to the formation and consolidation of Kenya's political elite.'

The primacy of land allocation as a basis for building political alliances and loyalty cannot be overstated within Kenyan political discourse, and this will

become evident in a review of the historical antecedents of the December 2007 elections.

This analysis will attempt to elucidate the centrality of land reform, and how this programme was politically managed and manipulated to consolidate political power. The presidential periods of Kenyatta (1963-1978), Moi (1978-2002) and Kibaki (2002-2007) will be reviewed briefly. A key characteristic of all these periods is the degree to which ethnic mobilisation for control of the independent state intensified the growth of authoritarianism (or what others have termed kleptocracy), whittled down the expansion of the democratic space as the clamour for political power was intricately fused with the use of the state as a site of accumulation, and the suppression of political dissent (Ajulu 1998, pp 279-282).

Kenya's embryonic post-independence phase was the foundation on which future political developments were built. The primacy of land in contributing to the quality of life, sustenance and coping strategies among Kenyans is evident when considered against the socio-economic and demographic facts that obtain in the country. This becomes more apparent when one considers the scarcity of arable land in Kenya, its burgeoning population, and the insistence of Kenya's political principals on using land ownership, access, and control as a basis for mobilising the country's resilient political patronage system.

### Socio-Economic and Demographic Features of Kenya

#### Extent

Total: 582 646 sq km (45-million hectares) of which 97,8% is land and 2,2% water surface. 20% is medium-to high-potential agricultural land, the rest is either arid or semi-arid.

#### Population

In 1963 – 10 million; in 2007 – 38 million.

75% of the population lives within the medium- to high-potential areas, the rest in the vast arid and semi-arid lands (ASALs).

Population density in the ASALs is two persons/sq km.

In parts of the Central, Western and Rift Valley provinces it is 2 000 persons/sq km, 60% of them below the age of 18 and more than 51% female.

#### Land and Economy

78% of the population lives in rural areas and 22% in urban areas.

Agriculture and pastoralism provide a living for 75% of the population, support 70% of employment and are responsible for 80% of export earnings.

50% of Kenya's livestock is found in the arid and semi-arid lands

As seen in the box above the inability to diversify the economy creates further pressure for access to land and ownership as the single most important resource for the majority of Kenyans.

#### KENYATTA'S PRESIDENCY AND THE LAND QUESTION, 1963-1978

As in other countries in Africa the emergence of settler colonialism in Kenya in the late 1800s created dispossession and landlessness, particularly in the Kenyan highlands. This generated intense resistance, which culminated in the first African nationalist movement in 1944, the Kenya African Union (KAU), whose primary concern was land and social inequality. Resentment of white domination and discriminatory land policies led to the Mau Mau<sup>3</sup> guerrilla campaign from about 1952 (Bogonko 1980, p 70). Kenya was placed under a state of emergency from October 1952 to 1959.

KAU was banned in 1953 and Kenyatta and other leaders were imprisoned (Sorrenson 1967, p 64). In 1960 KAU was renamed the Kenya African National Union (Kanu) and was led by J S Gichuru, Oginga Odinga, Tom Mboya and, later, Jomo Kenyatta, on his release from prison in 1961 (Miller 1984). A combination of the Mau Mau campaign and the increasing inability of the colonial power to govern forced the latter to commence negotiations with African leaders with a view to ceding power. This led to the formulation of a negotiated framework of constitutional arrangements for Kenya's independence (Harbeson 1974, pp 231-51).

At the dawn of Kenya's independence on 12 December 1963 the country's politics was dominated by two parties, Kanu and the Kenya African Democratic Union (Kadu) (Sjögren & Karlsson 2008). These parties were merely 'ethnic federations' dependent on the personalities of specific leaders and the loyalty of their members. Kanu, for example, which made the greatest claim to representing a Kenyan nation, had a largely Kikuyu and Luo leadership (Klopp 2001, p 476).

Kanu, essentially an alliance between politicians from the Central and Nyanza provinces, was a proponent of a centralised system of government. The party defined community as the nation to which all belonged and maintained that all had the right to land anywhere, subject to national laws and market exchange. The differences between Kanu and Kadu, which represented tribes such as the Kalenjin, were deep and were most irreconcilable in relation to the way land previously held by white settlers and the colonial government was

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3 The Mau Mau was a land-freedom army whose origin is clouded in mystery. The guerrilla group was mainly composed of Kikuyu, who rose against the European colonial authority and against Kikuyu 'loyalists' and European settlers. However, their chief target was land problems that dated back 30 years. For more analysis, see Bogonko 1980, p 70.

to be re-distributed (Ndegwa 1997, pp 599-616). Kadu was a conglomeration of a number of ethnic parties, some of which had made common cause with the white settlers as 'minority' groups. The fertile Rift Valley land appropriated by the settlers was a key issue of debate in the party.

Kadu was united by a desire to keep the primarily Kikuyu migrant labourers and 'squatters', the backbone of the Mau Mau revolt, from making claims to Rift Valley land (Klopp 2001, p 477). As a minority party, however, Kadu, which had been founded in 1960 to defend the interests of the smaller ethnic groups, dissolved itself voluntarily in 1964 and joined Kanu. Kenyatta skilfully used persuasion, particularly access to state resources, to bring Kadu MPs, including their leader, Daniel arap Moi, into Kanu. In exchange for a share in power Kadu dropped its opposition to settlement schemes in the Rift Valley which were meant, in part, to deal with landlessness and the political unrest associated with it (Klopp 2001, p 477).

The smaller ethnic groups in the Rift Valley and Coast provinces were concerned with the prospect of domination by the country's two largest ethnic groups, the Kikuyu people of Central Province and the Luo from Nyanza, who, between them, comprised nearly 40 per cent of the total population (Harbeson 1974). Because of its numerical strength Kanu had much to gain from centralised control over economic and political resources, a mode of political despotism exemplified in the response of Kenyatta's government to criticisms within his own party, chief among them over the question of land reform, which marked the embryonic phase of Kenya's political development in the early 1960s.

The political conflict within the party was partly based on the divergent approaches of politicians to the land question. This argument divided both moderate politicians (eg, Jomo Kenyatta and Tom Mboya) and radicals (eg, Bildad Kaggia, Oginga Odinga and J M Kariuki). Land policy became a significant bone of contention and no one tried more conscientiously than the militant nationalist Bildad Kaggia to put the government on the road to a policy that would be good for the expansion of the Kenyan economy, the interests of the landless and the confidence of the poor people who had elected the government. Kaggia, and other organisers of Kiama Kia Muingi (KKM), a movement mainly made up of landless peasants, insisted that Kenyans should not to be forced to buy back land that was rightly theirs (Cheche 1982).

Kaggia's stand on land led him into public confrontation with President Kenyatta, who, on successive occasions, made clear his view that the policy Kaggia advocated was inconsistent with the principles upheld by Kanu in relation to the freedom of the individual and the protection of individual rights. Nationalisation of property was not, therefore, possible. This key argument dominated land debates in the 1960s (Gertzel 1970, p 46) and met with sharp criticism from other

militant nationalists, particularly Oginga Odinga. In May 1961 on the outskirts of Nairobi Odinga, a militant nationalist, addressed a crowd of nearly 20 000, which collectively vowed never to buy land in the highlands.

The growing militancy over these all-important issues was successfully undermined by an alliance of Kanu moderates and reformist British de-colonisers. At a rally in Mombasa in July 1964 Odinga suggested that the government should give undeveloped lands to the poor to farm. At another rally, in February 1965, Odinga announced that the government should introduce a limit to the amount of land any one person might buy (Ogot & Ochieng 1995, p 96).

None of Odinga's statements necessarily conflicted with the broad outlines of government policy but they implied a more radical approach, particularly to land, than official policy acknowledged, and brought him increasingly into public conflict with his Cabinet colleagues (Gertzel 1970, pp 56-57).

As a result of these differences over land reform Odinga was stripped of the party's vice-presidency in 1966. He resigned from Kanu and the government on 14 April 1966 and was followed out of the party by 29 members of Parliament. Bildad Kaggia, Achieng Oneko, Joseph Nthula, Zephania Anyieni, Tom Okello Odongo and Oduya Oprong, led by Oginga Odinga, formed the Kenya People's Union (KPU), which was supported by urban workers, trade unions, students, former forest fighters, ex-detainees and a hard core of embittered landless people who supported socialist policies. In their war of words with Kanu over the next three years (1967-1969) the KPU insisted that Kanu's African socialism was simply a cloak for the practise of tribalism and capitalism (Gertzel 1970, pp 56-7). The KPU's constitution defined its objective as the fight for the economic independence of the people of Kenya.

The radicals of the KPU, who posed a potential political threat to the Kenyatta government, now launched their activity from Parliament, led by populist member J M Kariuki, with support from the university. J M, as he was popularly known, regarded himself as a man of the people and stood for justice and the equality of all Kenyan citizens. Both in Parliament and on public platforms Kariuki championed the people's rights to free medical services, education and land (Ogot & Ochieng 1995, p 100). He was staunchly supported by peasants, students and nationalists such as J M Seroney, Martin Shikuku, and George Anyona.

Such arguments failed to move Kenyatta, who viewed his opponents as 'agents of communism' whose mission was to dethrone him. The socialist KPU platform simply confirmed his fears. In its trade of words with Kanu over the next three years (1967-1970) the KPU insisted that Kanu's African socialism was simply a cloak for the practice of tribalism and capitalism (Ogot & Ochieng 1995, p 100).

The KPU claimed that under the Kanu government the status of the peasants, for the most part, remained unchanged and the workers could no longer believe

the government was working on their behalf. In response Kenyatta banned the party in 1969 and threw its leaders into detention. In the same year Tom Mboya was gunned down in broad daylight in a Nairobi street.

In March 1975 Kariuki was found murdered in the Ngong Hills (Ogot & Ochieng 1995, p 100) and, in the following 20 months, a number of other radical politicians and academics, including Flomena Chelagat, George Anyona, Martin Shikuku, Ngugi wa Thiong'o and J M Seroney, were imprisoned or detained on criminal charges (Ogot & Ochieng 1995, p 100).

Hence, by the late 1970s few voices were raised against the ruling clique. Kenyatta continued to rule the country in an increasingly autocratic and unilateral manner, with growing restrictions on freedom of expression of dissenting views both from within Kanu and from outside it. The political realm was increasingly dominated by a small elite group, the so-called 'Kiambu Mafia', resulting in the emergence of a class of capitalists, mainly from Kenyatta's tribe, the Kikuyu (Adar & Munyae 2001). This class enjoyed growing prosperity and political influence and repressed any resistance against it, as indicated in the following section.

#### LAND REFORM INITIATIVES

Land reform in Kenya predates independence. The implementation of the Swynnerton Plan in the 1950s was a political ploy to pacify rural unrest by creating a landed gentry. The essence of the Swynnerton formula was the privatisation of land through the displacement of indigenous property systems, relations, and modes of production and their replacement with a new legal order modelled on the 1925 English Land Law.

The intention was to provide African farmers with sound agricultural development based upon a system of land tenure that made available to them land and a farming system which would support their families. Customary land tenure was viewed as anti-modern, conservative, and incapable of bolstering agricultural modernisation and growth (Ondiege 1996, p 125; Okoth-Ogendo 1998).

The Swynnerton Plan contained a strategy for the development of production in small farming areas in the highlands, which remains the basis of Kenyan agrarian policy today. It provided for what came to be known as 'land tenure reforms', involving the consolidation of fragments of land where fragmentation was severe and the subsequent registration of individual freehold title.

There were three distinct stages in the process of tenure reform. The first involved ascertaining individual or group rights under customary tenure approximating to ownership, that is, the process of adjudication. The second involved the aggregation of all pieces of land over which individuals or groups had rights and the allocation to the individual or group of a single consolidated

piece approximately equal to the several units. This was called the consolidation process. The last stage involved the entry of rights in the record of existing rights or adjudication register into a state-maintained land register and the issuing of a certificate of ownership, that is, the process of registration (Mugabe & Ogolla 1996, p 99). However, the overall thrust of the plan was politically motivated – it was a response to the growing political crisis associated with the Mau Mau revolt among the Kikuyu in the 1950s. Colonial policy-makers thought it would start a process that would create an African rural elite, rooted in land and committed to private enterprise, which would also provide liberal political leadership (Migot-Adholla & Bruce 1994, p 124). The programme was also a product of the debate about the efficacy and superior status gained from Western-style freehold property systems as opposed to the conservative indigenous and traditional anti-modern property systems found in African communities.

#### OUTCOME OF THE SWYNNERTON PLAN

The consequences of the implementation of the Swynnerton Plan were counter-productive. The adjudication procedures were open to abuse by those involved in defining the existing structure of rights. The very process of registration gave rise to conflict and to pre-emptive measures to establish claims to uncultivated land by those with knowledge of the registration procedures.

Registration of title was the focus of violent ethnic clashes during political conflict in Kenya as late as the 1990s. Moreover, registration of title confirmed the rights of male landowners, at the expense of the numerous other parties with claims to the use of the land and to its products. The registration programme weakened the rights of women and also, in certain areas, the rights of tenants to the use of trees and access to grazing land (Heyer 1981).

Kenya's land reform was focused on the promotion and increase of freehold property rights. Registration of land was intended to transform the legal status of affected land from being susceptible to multiple customary rights and interests to being dominated by absolute, individual ownership. The process also converted the land into a commodity which could be sold, leased, charged or mortgaged at the discretion of the proprietor.

Part of the rationale for the programme was that it would give peasant farmers access to credit facilities using the security of registered title (Mugabe & Ogolla 1996, p101; Migot-Adholla & Bruce 1994). However, most smallholder farmers were reluctant to use title deeds for mortgage. This is partly because borrowers were wary of risking the loss of their main economic asset and security. For people who lacked marketable skills and opportunities for other careers the loss of land by default would have had severe consequences. Most financial

institutions did not attach much significance to titles. In place of land titles other forms of security were sometimes used. Those who had buildings or off-farm employment also qualified for formal credit (Migot-Adholla & Oluoch-Kosura 1994, p 135).

The resilience of the customary land system was evidenced in the continued prevalence of land-use practices based on customary norms in areas where land had been registered. Communities have continued to use customary rules of access to multiple sites instead of relying on their registered parcels (Migot-Adholla & Bruce 1994). This resilience was also reflected in the land transactions that were conducted outside of the formal framework of registration because the possession of title did not appear to benefit farmers through credit use and increase in yields. Land registers became outdated and most land transactions were conducted in accordance with indigenous practices rather than statutory law (Migot-Adholla & Oluoch-Kosura 1994, p 139).

The statutory registration of title did not fully replace the 'customary' law. Rather, statutory and 'customary' strategies have been used in tandem to secure rights to land and control the disposal of land on inheritance. As land became scarce claims of lineage were asserted to keep or recover control.

The establishment of customary law led patrilineal groups to exclude women's claims to land and the registration of land rights failed to create a 'free market' for land (Sorrenson 1967). This explains why women accounted for less than five per cent of the total registered landholders. Those who profited were heads of households, who, in many communities, were adult males (Kibwana 1990). Registration programme weakened the rights of women and also, in different areas, the rights of tenants to the use of trees and access to grazing land (William & Francis 1993).

The conversion of freehold tenure made it virtually impossible to bring to the register all the multiple rights claimable under customary law. Public grazing lands disappeared as people moved in to claim every bit of land under the rubric of cultivation. For pastoral communities individualisation of tenure was deemed to be inappropriate, since animals had to traverse large tracts of land still held corporately. The Land (Group Representatives) Act Cap 287 of 1968 introduced a category of general territorial rights, which, upon identification, were then vested in group representatives.

The 'group' was defined in such a way as to include anything from a 'tribe' to a nuclear family (Okoth-Ogendo 1998, p 11). This attempt to accommodate some features of customary land tenure generated community disputes across rural Kenya (Kibwana 1990, p 239). However, as Okoth-Ogendo (1994, p 11) has demonstrated, the administration of group registration areas accentuated problems of conflict and accountability during the implementation process.

The widespread existence of absentee landlords was another important feature of tenure reform in Kenya. Large tracts of land remained uncultivated despite recurrent food shortages and landlessness in the country. Private property rights thus encouraged accumulation and speculation, thereby withdrawing land resources from productive use (Mugabe & Ogolla 1996, p 103). The registration process also increased rural debt as farmers failed to pay back loans they had obtained using their privatised farms as collateral, problems caused by speculative trading in land, illegal subdivisions of registered land, and absentee landlordism (Caldwell 1999).

The emergence of a clandestine land market was a key feature of the process. Many people were not willing to consolidate their various parcels and thereby lost the benefits of risk distribution inherent in the structure of fragmentation and the location of parcels and adjudication personnel were often constrained in many areas to apply 'gentle pressure' to achieve this result. As a consequence a clandestine land market emerged, in which parcels that could not be physically exchanged were simply sold, usually to people within the adjudication area but sometimes to strangers and other immigrants. Land prices were extremely depressed, sometimes so low that within a year of being registered, a piece of land could be sold for more than 1 000 per cent of its original purchase price (Okoth-Ogendo 1998, p 12).

Although Kenya enjoyed some of the highest productivity increases in Africa during the initial period of tenure conversion (mid-1950s to late-1970s), the relationship between individual tenure and increased agricultural output is questionable. Many believe that the removal of prohibitions on Africans producing high-value commodities (tea, coffee, and dairy products), coupled with substantial investment in communication and transport infrastructure in the 1950s and 1960s, improvements in extension services, and the establishment of credit institutions have been more important than changes in land tenure arrangements (Migot-Adholla 1985).

In terms of purely economic indicators Gutto (1995, pp 38-39) argues that land tenure reform in Kenya was believed to have led to the overall increase in productivity among the African middle class and peasantry in the 1960s, 1970s and early 1980s – mainly as a result of the lifting of colonial restrictions on access to land, the growing of cash crops and access to agricultural inputs. For instance, Mugabe & Ogolla (1996, pp 103-104) note that after registration there was a marked improvement in land use and environmental management in many areas.

Land registration was also responsible for the increased use of credit facilities, required for land improvement. Privatisation of land among smallholders changed farmers' perceptions of the value of land and encouraged them to invest in permanent improvements, to adopt new technologies from multiple

sources, and to rehabilitate the environment, provided the government ensured an enabling macro-economic policy framework (Caldwell 1999). Ondiege (1996) similarly points out that agricultural production may have increased because of the transition, in some cases by force, from pastoralism to intensive agriculture. For instance, in Machakos district, a colonial destocking campaign pushed the Akamba into intensive agricultural production.

However, William & Francis (1993, pp 390-391) argue that the great transformation of Kenyan agriculture was not brought about by changes in the legal status of the right to land. They maintain that at best it could be argued that registration of title has not prevented agricultural growth, perhaps in part because people have circumvented its rules.

The boom in smallholder farming was made possible by a combination of circumstances. International capital became increasingly important in the political economy of Kenya, and the influence of European settlers declined. This facilitated inflows of investment in transport, processing, and marketing and was associated with new patterns of class formation and emergent class alliances, which underpinned the land question at independence.

Buoyant external and internal markets encouraged the expansion of agricultural production and industrial investment. However, Okoth-Ogendo (1998) contends that whatever contribution land tenure reform may have made to economic growth the gains have been completely offset by the emergence of economic disparities, the redistribution of political power, and the disequilibrium of socio-cultural institutions that have occurred in rural society as a consequence of reform.

Clearly there is little consensus among scholars about the impact of individualised land tenure on productivity, as noted in the example of Ghana. In Kenya, conclusions tend to vary depending on the period of analysis. In the 1980s and 1990s production levels failed to match the increase in population, due, in part, to land tenure problems such as continuous uneconomic land subdivisions and poor agricultural and land-use policies (Ondiege 1996, p 126). Gutto (1995), on the other hand, contends that the decline in agricultural production experienced in the late 1980s and 1990s was partly due to political instability, lack of redistributive strategies, and the related phenomenon of official corruption.

Overall, the reforms created more problems than they resolved, generated more disputes over land ownership, and resulted in a more skewed distribution of land. They also produced and reinforced ethnic-based interests in land, and made the land question more complex than ever. The post-independence government simply retained the colonial land laws and pursued the same land reform objectives. The land policy did not change in spite of the complex issues that developed around it, and despite the fact that the government, after

independence, identified landlessness as a major constraint to the national goal of self-sufficiency in food.

The debate over the efficacy of individual titling was driven more by 'economic reductionism', which tended to link individual tenure as a key prerequisite to agricultural modernisation (Kanyinga 2000). This approach ignores the wider social and political context that shapes access to land and the inherent power relations that define property relations within communal land systems. Although the programme is by no means complete it is estimated that more than 70 per cent of all land outside the arid areas of the Coast, Eastern, North-eastern, and Rift Valley provinces has now been privatised (Okoth-Ogendo 1998).

Writing in 1976 Okoth-Ogendo (p 1) noted that the registration process will only near completion by the year 2050 – a full 100 years since the process began. The land reform programmes implemented in the post-independence era (1963) similarly articulated a political rationale aimed at establishing political stability and not necessarily at comprehensively restructuring the skewed land ownership patterns. A brief overview of the Million Acre Settlement Scheme attests to this argument.

### THE MILLION ACRE SETTLEMENT SCHEME

In the 1960s, as Kenya was attaining its independence from Britain, a massive programme of land transfer was undertaken to convey some 1,2-million acres of formerly European-owned, large-scale farms and ranches into the hands of African smallholders. The programme, called the Million Acre Settlement Scheme, involved some 35 000 African families. The scheme helped to meet the economic demands of colonial Kenya's white settler community, the political objectives of the nationalist leadership, the land grievances of Kenya's poor, and the aspirations of the upwardly mobile and emerging middle class. In the process of achieving all these objectives it helped to make the terms of Kenya's independence economically and politically acceptable to the various factions (Leo 1981, pp 201-2).

In 1961 the colonial government started dual settlement schemes, the Yeoman and Peasant schemes, administered through the Land Development and Settlement Board (LDSB), which the government had appointed at the beginning of that year to administer the settlement of almost 8 000 families. In order to satisfy the demand of Africans for redistribution of land some farms would be subdivided into smaller holdings.

One scheme was to consist of yeoman farms of about 20 hectares, integrated into the large farm sector. On the other hand peasant schemes with farms of about six hectares were established on land contiguous with the African reserves. The aim of the dual structure, according to the LDSB, was to maintain agricultural

output and stability in the rural areas (Leo 1984, p 73). By mid-1961 it was clear that the schemes were a total failure and should be replaced with a more comprehensive settlement scheme, namely the million acre scheme. The Yeoman and Peasant scheme had tried to achieve reconciliation between Europeans and Africans by means of a plan which ignored the problem of landlessness (Leo 1981, p 222).

The million acre scheme was as delicate and multifaceted a political bargain as those accomplished strategists, the British colonial authorities, ever negotiated. It helped to meet the economic demands of colonial Kenya's white settler community, the political objectives of the nationalist leadership, the land grievances of the poor, and the aspirations of the upwardly mobile and the emerging middle class (Leo 1981, p 201). In essence the programme was geared towards appeasing the growing disenchantment of landless people.

Eligibility for the new programme was based not on what prospective settlers possessed but on what they lacked: land and employment. The deposit required for most of the so-called high-density schemes was nominal, and there were no requirements as to training and background (Leo 1984, pp 53-5). This explains why, at the completion of the million acre scheme, only 3 800 families had been accommodated, less than one-tenth of the total initially envisaged.

In sum, one could argue that the Sywonnerton Plan, the Yeoman and Peasant scheme, and the Million Acre Settlement Scheme were essentially intended to manage a stable transition to post-independence Kenya, and that in them lay Kenya's faulty start in dealing with its crisis of land reform.

The imperative to manage a stable transition predicated on a delicate balance between the interests of the landed gentry and the demands of the Kenyan electorate underpinned the programmes' objectives. The outcome was a failure.

#### OVERALL IMPACT OF THE LAND REFORM PROGRAMMES

Some of Kenya's most deeply rooted political conflicts have their roots in the weak foundations put in place to implement land reform. Since independence a minority of Kenyans had become wealthy, to the exclusion of those who had fought for independence.

The glaring disparities in the distribution of the fruits of freedom were widely accepted as an indirect outcome of the compromises inherent in the transition to independence and democracy (Leo 1984, p 157). Free-market purchase and government lending arrangements led to the emergence of large-scale farmers many of whom were members of Parliament, Cabinet ministers, senior civil servants and urban businessmen. (Leo 1981).

The nationalists, with the exception of the radical fringe opposed to the

principle of compensation itself, came to see land settlement as a way of killing two birds with one stone: defusing rural unrest and promoting the interests of the African landed class. Other squatter settlement schemes were to be launched after independence, but more than half the settler lands were transferred by sale, almost intact, to wealthy Africans organised in partnerships or limited liability companies. Thus a new land policy based on class, instead of race was being established (Ogot & Ochieng 1995, pp 64-65). By 1969 most of those who had been awarded land had defaulted on repayment of the loans, but, since resettlement was partly political, there were hardly any evictions (Leo 1981).

Another problem the land reform programme generated was racketeering. The 'willing-seller-willing-buyer' principle, as mediated through the market institution, concentrated the possession of property in the hands of a few politically powerful individuals. Other transactions, involving private and public land, were equally scandalous. Land racketeering articulated itself in two forms in the post-independence period – the transfer of public land to influential individuals and the exploitation of the landless by bogus land-buying companies (Cheche 1982, p 107). The complexity of these problems was partly the result of the tenure changes pioneered through the Swynnerton Plan and aimed at transforming customary land rights to individual freehold (Wanjala 1996, p 5; Ochieng 1995, p 33).

Political affiliations at this time reflected the extent to which ethnic-based considerations become a defining force in agrarian politics. Kanu's dominance enabled it to apportion land, disproportionately favouring its core support groups, especially the Kikuyu. This conflict over land persisted in post-independence politics and recurred alongside the ethnic violence that erupted during the transition to multiparty democracy in the 1990s (Ndegwa 1997).

At independence the disposition of all land was open to negotiation and by far the most contentious was scheduled land, which included developed white-owned farms in the most fertile regions of the country. Land was a scarce resource for all groups, but particularly for the larger ethnic groups, whose population far outstripped their traditional lands and who were more likely to benefit from a freehold system.

For the Kikuyu from Central Province land scarcity had been aggravated by the land's appropriation by colonialists (Leo 1984). The minority groups, especially the traditionally pastoralist Kalenjin and Maasai communities, whose Rift Valley pastoral lands had been alienated for white settler farming, now faced the loss of these lands because of the introduction of a land market guaranteeing individual tenure, a system more suited to farming communities, especially the Kikuyu and Luo, who were better placed economically to purchase land and would dominate the central state that would administer the land redistribution programme (Ndegwa 1997).

Various tribes were therefore grouped within regional boundaries. The Central region was designated for the Kikuyus, the Eastern region for the Kamba and the Meru, and the Maasai became part of Rift Valley region, which also included, among others, Kalenjin people and most large-scale farming and ranching areas. Areas of the highlands purchased for the settlement schemes were intended to accommodate specific ethnic groups. For example, the largest single settlement area was the strip of land between the Rift Valley and the western side of the Aberdare Mountains, which was set aside exclusively to serve Kikuyus.

The settlement programme, therefore, not only reaffirmed and hardened existing ethnic boundaries, but reintroduced ethnic uniformity in areas where mixing had already taken place spontaneously. In the eastern side of the Rift Valley, meanwhile, it was the non-Kikuyus who had been evicted to make way for Kikuyus (Leo 1984, p 111). Hence, the debate over how best to redistribute the land had a strong tribal bias which found its expression in the political debates that ensued and continue to inform current political conflicts and tension over land matters in contemporary Kenya.

By mid-1965 Kikuyu dominance in government and influence in policy-making was regularly mentioned both inside and outside Parliament. This emerged most clearly in the debates on land. In each successive budget debate in 1963, 1964 and 1965, members from all parts of the house challenged the government's land and settlement policies. Much of the criticism was directed at specific aspects of policy: the squatter problem and the future of labourers evicted from former European farms (Gertzel 1970, p 30). Tribal politics came to dominate the post-independence polity. In sum, the period between the early 1960s and the late 1970s was characterised by the negation of the promised democracy, constitutionalism, and the rule of law.

Opposition politics at this time was animated about land, which, in agrarian societies, forms a central pivot of socio-economic and political power. Land reform became a means through which the then political barons enriched themselves, their families, friends and sycophants. Kenyatta, for example, used land for patronage purposes and to build alliances, a pattern that continued and increased under his successor, President Daniel arap Moi (Kenya National Commission on Human Rights – KNHRC – and Kenya Land Alliance 2006, p 1). Moi consolidated his power through a combination of patronage and violence and land was used as an instrument of both, as seen in the land clashes that ensued in 1992.

In sum, the Kenyatta era was marked by struggles between Kanu, Kadu, and KPU in the Sixties and by the rivalries between the Luo and Kikuyu ethnic groups throughout the Seventies. A hallmark of this political schism was ethnic

mobilisation for control of the independent state. In this regard, as will be shown in the next section, the only difference between the Kenyatta and Moi regimes was the intensity and degree of kleptocracy (Ajulu 1998, p 279).

#### LAND REFORM UNDER MOI'S PRESIDENCY, 1978-2002

After the demise of Kenyatta in August 1978 the then vice-president, Daniel arap Moi, took power. Although Moi was loyal to Kenyatta he was never accepted into his inner circle because he came from a small community, the Kalenjin (Sjögren & Karlsson 2008). However, Moi was regarded by Kenyans as the right candidate to steer the country towards a more accommodating era, without ethnic dominance. This general perception of Moi was reinforced by the decisions and promises he made immediately after taking over the presidency. For example, in December 1978 he released 26 political detainees across the ethnic spectrum, most of whom had been in jail for years (Adar 2000, p 1).

In due course, however, Moi became more interested in neutralising those perceived to be against his leadership. Issues of corruption, ethnicity, and human rights became distant concerns. Instead, he began to centralise and personalise power (Adar 2000, p 1). He used Kanu to consolidate his power by intervening in nominations and replacing Kenyatta supporters with his own. He purged the provincial administration of disloyal elements, maintaining his grip on power. Over time, by re-organising national alliances and patronage networks to ensure patrimonial control, Kanu alienated many within the Kikuyu and Luo constituencies. Kikuyu and Luo grievances were now added to deep pastoralist and coastal grievances, particularly over irregular allocation of land, which proceeded apace under the Moi regime (Klopp 2001, p 477).

Most of Moi's public pronouncements on land matters exemplified his interest in land, which hinged on the need to protect popular interests (Kanyinga 2000, p 1). In retrospect, it is worth noting that Moi was one of the senior Kadu leaders who had vehemently advocated federalism (*Majimbo*) to protect the land and political rights of the smaller agro-pastoralist communities against the large ethnic groups.

His presidency naturally saw a reconstitution of former Kadu elites; their ideology on land soon occupying the centre stage of politics and the state itself. This raised expectations among minority tribes such as the Kalenjin, Maasai, Turkana, and Samburu (the Kamatusa tribes), who subsequently appropriated Moi's land ideology and fenced off their areas against other communities. This led to the closure of the frontiers in the Rift Valley, to which land-hungry groups had once migrated to acquire land. From as early as 1980, and in the process of constructing his own independent base of political support, Moi began to order

the rapid individualisation of farms owned by land-buying groups (cooperatives, companies, and partnerships) and the registration of title for the individual shareholders. This move, too, was aimed at closing avenues of further entry into the heartland of the Rift Valley by land-hungry groups in general and the Kikuyu in particular (Kanyinga 2002, pp 4-6).

Moi's pronouncements on land were made alongside an increasing tendency to use it as a patronage resource. Political patronage evolved as the single most important medium of regulating access to public land. The government continued to give land as a reward for political patronage, with a view to establishing a stable political and economic class.

From the early 1990s, and in the face of increasing pressure for political liberalisation, the appropriation of government land by political elites went even faster as Moi struggled to retain loyalists, a rapidly disintegrating group (Kanyinga 2002, p 5). In such a context public land, highly accessible and less encumbered by international conditions than private property, was an attractive patronage asset. In addition, administration officials, fearful that a change in government will end their privileged access to this public resource, have accelerated their accumulation of land and rents on land allocations.

However, privatisation of prominent public sites, including schools, bus stations, roads, parking lots, markets, police stations, forests, and public toilets, appeared to most Kenyans to be a particularly dramatic display of corruption (Klopp 2000, p 8).

As demands for political liberalisation increased in the early 1990s the appropriation of government land continued unabated in an attempt to contain the mounting pressure for political liberalisation. Invocations of historical injustices scripted into a political discourse about victimhood resonated particularly with ethnic groupings aligned to the Moi regime in the Rift Valley. Demand for territorial land claims, and a re-assertion of 'indigenous' notions of entitlement to belonging, spurred the spread of separatist and ethno-regional politics whose claim to territoriality was politically fuelled by Moi's struggling regime, intent on countering the spread of political liberalism.

Beyond, the land question Moi entrenched a new order whose fulcrum was his control over the party and the civil service (Southall 1998, p 102). The centralisation of power in the presidency and the intensification of kleptocracy were backed by the regime's increasing use of repression and intimidation (Southall 1998, p 102). As in Kenyatta's era, control of the state or proximity to those who had access to control became the main preoccupation of politics.

Access to control of the state was mediated through ethnic mobilisation (Ajulu 1998, p 279). To bolster his grip on power Moi also embarked, from the 1980s, on the gradual 'Kalenjinisation' of the public and private sectors. He began

to 'de-Kikuyunise' the civil service and state-owned enterprises dominated by the Kikuyu ethnic group during Kenyatta's regime (Ajulu 1998, p 279). Despite the intensification of his authoritarian rule he was faced with increasing challenges and was confronted with the reality that the opposition was not about to wither and that pressure from donors was mounting (Klopp 2001, pp 16-17).

On 26 November 1991, at a consultative group meeting in Paris, donors collectively resolved to suspend aid – amounting to \$350-million – to Kenya until corruption had been curbed and the political system liberalised. Within weeks Moi had amended the Constitution to legalise the formation of opposition parties (Brown 2001, p 726). In 1992 many political parties were formed either to appease people or to attract them on the basis of their tribal affiliation. The introduction of multiparty politics brought ethnic politics to the fore as opposition parties quickly splintered into ethnic groupings. As a result, the first multiparty election held in 1992 was a contest that largely rotated around ethnic alignments (Bratton & Kimenyi 2008).

In spite of forceful opposition Moi and Kanu managed to win the 1992 elections (Bratton & Kimenyi 2008). Certain electoral rules were enacted with the sole purpose of favouring Moi. For example, Parliament amended the Constitution in August 1992 to require the winning presidential candidate to obtain at least 25 per cent of the popular vote in at least five of the country's eight provinces. Given the factionalisation of the opposition into clear ethno-regional bases of support, Moi appeared to be the only candidate able to meet this condition, even if he did not obtain the most votes nationally.

Kanu's victory represented an alliance of the minority ethnic groups – those from Coast, North Eastern, Eastern, Rift Valley, and Western provinces. Kanu was locked out of Central Province (Ajulu 1998, p 280). A similar pattern was noted in the 1997 election, when Kanu continued to draw support from the minority ethnic groupings (Southall 1999, p 98).

With the advent of multiparty politics the contest over land was used as a key political strategy to accentuate ethnic divisions/separatism. These struggles were attempts to reassert political power and legitimacy over who was historically entitled to land. Within the Rift Valley region the occupation by Kikuyu was seen as a-historical by the dominant tribes in this region, namely the Kalenjin, Maasai, Turkana and Samburu communities which had constituted the cornerstone of the ruling Kanu party since Moi assumed power in 1978.

Land clashes became an extension of the discourse between national and ethnic citizenship. The clashes began at Meteitei Farm, a co-operative farm located in the Nandi district in the Rift Valley and owned jointly by 310 Kalenjin and 280 non-Kalenjin farmers. On 29 October 1991 a dispute arose between these two groups. With the apparent collusion of local administrators and politicians

the Kalenjin members of the co-operative claimed sole ownership of the land and expelled the non-Kalenjin (Kikuyu, Abaluhya, Kisii, and Luo) members. Those who resisted had their houses and property destroyed (Ndegwa 1997, pp 27 – 33).

A lexicon of difference was introduced during this period to denote the indifference towards outsiders felt by self-defined local people, the Kalenjin and Maasai. For instance, *madoadoa* and *kwekwe* (blemishes) referred to the 'contamination' of the ancestral lands of the Kalenjin and Maasai in the Rift Valley region by migrant ethnic groups, especially the Kikuyus. These new settlers were also referred to as *Chui* (leopard), a more insidious reference to the interlopers as land-grabbers (Ndegwa 1997, pp 27-33).

Clashes also occurred in parts of Coast Province (Likoni-Kwale) prior to and after the 1997 general elections, in areas that were known to be 'opposition zones'. As in the Rift Valley Province economic crises in the Coast Province centred on land. Over the years high-value land along the Kenyan coast had been purchased by well placed political elites from within and 'outside' the area, a fact that caused great resentment in ordinary people. In times of political crisis it has been possible to politicise the land issue and turn it into a campaign against the upcountry people, as evoked by the infamous separatist slogan *wabara kwao!* (upcountry people back to their original areas) (Ajulu 2001, p 211).

There is ample evidence to the effect that the 1992 and 1997 ethnic violence in the Rift Valley and Coast provinces was motivated by the government (NCCCK 1992). Ruling party /state-orchestrated 'ethnic land clashes' threatened the cohesion of the country, as internecine civil wars were clandestinely promoted by politicians fearful of losing political office and anxious to protect their illegal gains (Gutto 1995, pp 38-39).

The primary means used to accentuate this rivalry among ethnic groups was to invoke narratives of historical injustices to which indigenous communities had been subjected with regard to territorial politics that centred on indigenous claims to land. The period between 1992 and 2001 saw government's continued efforts to divide the opposition, to deploy state assets (like land) to promote its own political agenda and to propagate ethnicity in order to remain in power.

Democratic consolidation was not tenable and the struggles over constitutional change continued throughout the post-1997 election period. In sum, Moi's regime, like that of his predecessor (Kenyatta), was marked by the continuation of a failed programme of land reform. It is evident that the continued sustenance of patrimonial control of the state was predicated on the ability to dispense political patronage, with land providing a strategic resource.

Part of the ease with which this was sustained was the fact that Kenya's post-independence state has systematically failed to formulate a new regime of

land laws seeking to alter colonial land ordinances that have stubbornly persisted in the post-independence period. The lack of a constitutional framework to deal with land reform and the centralisation of the land administration system have led to the massive disinheritance of communities achieved through a sustained practice of patrimonial politics that oscillates through irregular land acquisition processes.

In the post-independence period the state adopted all the ordinances relating to the control of land and made them laws by which the post-colonial state was to regulate access to land. The Land Titles Ordinance of 1908 (which initially applied only to coastal areas because the Crown Lands Ordinance of 1902 covered the interior) became a law (Cap 285) under which a person could become the absolute owner of a piece of land and the immovable properties thereon by registering a claim or a right to the land. This ratified titles or claims registered under the 1908 Ordinance: registered claims became conclusive evidence of absolute ownership of land, thereby sealing the fate of the landless and squatters and intensifying the insecurity of their tenure.

The Crown Lands Ordinance of 1915, which became the Government Lands Act (Cap 280), vested in the president all the powers in relation to the leasing, granting and disposition of government land or former Crown Lands. The Act also retained the commissioner of lands (an appointee of the president) as the administrator of all public lands.

Like the ordinance the Act treated the state as the main landlord. Enormous powers of control over land that had been vested in the state through the governor were now transferred to the president to hold in trust. The concentration of power over land in the presidency and the central government reflected the general tendency towards the centralisation of political and economic activities (Kanyinga 2000, pp 52-53; KNHRC 2006, p 2).

Land reform as a precondition for increased rural economic production and development was undertaken to check and counteract the development of African politics rather than to give economic progress a positive and tangible political significance for rural Africans (Harbeson 1974, p 231). Nation-building since independence had shown little recognition of the objectives of African nationalism with respect to land.

#### LAND REFORM UNDER KIBAKI'S PRESIDENCY: 2002-2007

Kenya's third multiparty elections, in December 2002, revived hopes for the realisation of the much anticipated democratic transition. The elections were promising because, for the first time, the opposition parties were united. In October 2002 a coalition of opposition parties was formed under the National Rainbow

Coalition (NARC). In the presidential election Moi's chosen successor, Uhuru Kenyatta, son of Jomo Kenyatta, candidate for Kanu, won only 31 per cent of the vote, compared to 63 per cent for Kibaki.

NARC won 125 of the 210 elected seats in the 224-member National Assembly, Kenya's unicameral Parliament, leaving Kanu with 64 seats and smaller parties in control of the remaining 21. Exercising their hard-won democratic rights Kenyans therefore overwhelmingly rejected the party that had ruled for 40 years. In doing so they showed contempt for the wishes of former President Moi and refused to be cowed by the powerful political lineage of the Kenyatta family.

In essence the NARC win heralded the dawn of a new political era (Anderson 2003, p 331) and the outright rejection of the dynasty Moi had attempted to introduce in lieu of ethnicity by his choice of Uhuru Kenyatta as his heir apparent. Many Kenyans nurtured strong hopes of a better democratic outcome that would bring to an end ethnic polarity, corruption, declining economic growth and infrastructural decay.

Unfortunately, as in the preceding years, no meaningful reforms were achieved. Under Kibaki's presidency the new ruling coalition promised to focus its efforts on generating economic growth, combating corruption, improving education, and rewriting the country's Constitution.

The period between 2003 and 2007 was characterised by extensive political animosity between pro-government and other political parties. The initial euphoria had been replaced by scepticism, mainly because of the alleged breach of a Memorandum of Understanding on power sharing among the constituent parties of the NARC coalition (Sjögren & Karlsson 2008).

Plans to create the office of executive prime minister, a post intended for Raila Odinga, were abandoned, a move described by Raila's party, the Liberal Democratic Party (LDP), as not only a breach of the agreement in a narrow sense but a betrayal of a pact symbolising a new mode of politics based on broader ethno-regional representation and power sharing (Sjögren & Karlsson 2008). Consequently, the LDP was gradually marginalised within the ruling coalition and informal political alliances grew in strength as 'pork-barrel politics' began to whittle down the collective strengths of the NARC coalition government (Anderson 2003, p 341). Like the preceding regimes Kibaki's first period in office was beset with controversy, particularly with regard to his inability to deal with corruption scandals and to exercise leadership in relation to graft.

Grievances over land issues found expression in a series of farm invasions by the Maasai in August 2004, further affirming the unresolved nature of Kenya's land question. More than 100 Maasai were arrested for invading white-owned farms in Laikipia District. Their chief grievances were the loss of land they had suffered through colonial instigated policies such as the Maasai treaties of 1904

and 1911, which granted the settlers high-potential grazing land, giving the Maasai in exchange unproductive reserves and depriving them of up to 35% of their territory. Another grievance was the failure of the land titling programme aimed at pastoral communities (Rutten 1997).

The government's response to the crisis fuelled widespread controversy. Police were sent to arrest the invaders and incidents of human-rights violations and the use of excessive violence were reported in the news media. The then minister of Lands, Amos Kimunya, was cited as saying government did not recognise the agreements the Maasai community had signed with the British colonial authorities and blamed the demonstrations on economic saboteurs out to prevent the tourism sector, Kenya's leading foreign exchange earner, from recovering (Mathangani 2004). Government's stern response was shaped by its desire to maintain investor confidence in the wake of the invasions. The need for foreign exchange generated by tourism seems to have overridden genuine concerns about land hunger. However, the minister's position was challenged by his fellow ministers,<sup>4</sup> who claimed that the Maasai had a very real grievance – their land had been leased for 99 years and, since this lease had now expired, they were entitled to reclaim it.

Maasai have lost huge chunks of land to non-Maasai through the land tenure system, a factor which has fed their resentment. The influx of agricultural groups and large-scale capitalist farmers following the freehold conversion to individual land rights held under statutory group title has aggravated their landlessness.

The resolution of the land issue was one of President Kibaki major promises during the 2002 election campaign (KHRC 2002). To that end, having won the election, Kibaki instituted the Ndung'u Commission to investigate patterns of corruption and unfair allocation of land and to propose remedies. However, the commission's report was deemed too controversial and the Kibaki government never implemented its recommendations (KHRC 2002).

The report noted that 'the practice of illegal allocations of land increased dramatically during the late 1980s and throughout the 1990s ... and land was ... granted for political reasons or [was] simply subject to "outright plunder" by "a few people at the great expense ... of the public"' (KHRC 2006). As resources for political patronage declined with the foreign-aid freeze of the 1980s the government turned increasingly to public lands and, as stocks of available public lands diminished, properties reserved for public purposes, such as roads and road reserves, public parks, playgrounds, game parks and reserves and forests were pilfered by state officials (Ndung'u Commission 2006).

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4 Cabinet minister in the Office of the President, William ole Ntimama, a Maasai by origin, who has consistently championed the Maasai, was quoted by the *East African Standard* (26 August 2004) as castigating Land Affairs Minister Amos Kimunya for claiming that Maasai land was leased for 999 years and not 99 years, as historically reported.

The commission also found that 'most illegal allocations of public land took place before or soon after the multiparty general elections of 1992, 1997 and 2002' and cited the families of presidents Jomo Kenyatta and Daniel arap Moi as some of the beneficiaries of the illegal allocation of public land. The annexures to the Ndung'u report contain the names of Mr Moi and five of his children, Mzee Kenyatta's widow, Mama Ngina, and scores of MPs, top civil servants, military officers, high court judges and former Cabinet ministers (Ndung'u Commission 2006). The commission's recommendations included an inventory of public land, a comprehensive land policy, and the establishment of a Land Titles Tribunal to review each case of suspected illegal or irregular allocation of land. Many of these ideas are contained in the draft land policy drawn up by the Ministry of Lands in 2006 (Ndung'u Commission 2006). However, neither the policy nor any of these important recommendations has been implemented because of political sensitivities. A good number of those implicated in the report held senior government positions in the then NARC government (2002-2007) and continue to do so in the coalition government established in February 2008.

Other reform initiatives during this period included the Draft National Land Policy (DNLP) of 2006, whose vision is to guide the country towards efficient, sustainable, and equitable use of land for prosperity and posterity (NDLP 2006). The object of the policy is to secure rights over land and provide for sustainable growth, investment, and the reduction of poverty in line with government's overall development objectives.

The draft policy acknowledges the ineffectiveness of the current Constitution in establishing an efficient, accountable, and equitable institutional framework for land ownership, administration, and management. These deficiencies have resulted in the inequitable distribution of land, particularly to women, children, minority groups, and persons with disabilities (NDLP 2006). However, since the NDLP underscores the need for a Constitution with broad principles on land, the policy proposals may not be realised without a new constitutional order.

The present Constitution, specifically s 75, declares the sanctity of title, regardless of how it was acquired. In addition, the Constitution provides for the protection of private property, including land. Attempts to change the status quo have so far failed, but unless there is a complete overhaul of the property provisions of the Constitution the land redistribution contemplated in the draft policy, will not materialise (KNLA 2006).

## THE 2007 ELECTORAL VIOLENCE AND THE POLITICS OF LAND

The 2007 post-election crisis was the result of two sets of factors: long-term and immediate. The long-term factors are highlighted in the historical antecedents of

the elections discussed in this paper, while the immediate factors are those that underscored the fallout within the ruling coalition, NARC, soon after it attained power in 2002.

One of the immediate factors is the unresolved issue of constitutional and legislative reforms, which involve the organisation and distribution of political power and resources. As stated above NARC had promised a new constitution within 100 days of its ascent to power. The deadline was postponed again and again, and certain Cabinet ministers from the inner circle of power obstructed and eventually walked out of the National Constitutional Conference, the so-called Bomas Talks.<sup>5</sup> In place of the negotiated 'Bomas draft' the government presented a proposed constitution that, in many significant respects, ran counter to the Bomas draft. For example, the government version, also known as the 'Wako draft',<sup>6</sup> recommended a presidential system with centralised powers (Sjögren & Karlsson 2008).

The Bomas draft, on the other hand, in line with the election pledges made in 2002, proposed a more far-reaching power-sharing constitution, which, among other things, would reduce the power of the president by means of decentralisation and the parliamentary process. After protests and demonstrations the government's proposals were subjected to a referendum in October 2005, in which the government side (symbolised by the banana) lost to the opposition (symbolised by the orange).

Those Cabinet ministers, mainly from the LDP, who had supported a 'no' vote were subsequently sacked from government and created an alliance with the then opposition party, Kanu. The orange symbol was used to initiate the Orange Movement, which, a year later, was established formally as the Orange Democratic Movement-Kenya (ODM-Kenya) party (Sjögren & Karlsson 2008).

In the two years between the 2005 referendum and the 2007 elections early campaigns revolved around the main protagonists, Mwai Kibaki and Raila Odinga. In terms of party affiliation Kibaki's government mutated first into NARC-Kenya in 2006, then, in September 2007, into the Party of National Unity (PNU), an alliance that, among other parties, incorporated Kanu, the former main opposition party. A split in the ODM between Kalonzo Musyoka and other top leaders resulted in Musyoka remaining in the ODM-K in August 2007 as Raila Odinga and other leaders defected to another 'orange party', the Orange

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5 The conference took place at the Bomas of Kenya theatre facility, Nairobi, and was widely referred to simply as the Bomas Talks. The Bomas draft was initially formulated by the Constitution of Kenya Review Commission, appointed in 2000 to gauge the views of Kenyans about what they wished to see incorporated in their new constitution.

6 The Wako draft – the government version of the constitution – was named for Amos Wako, Chief Justice of Kenya, who was believed to be the key author of this alternative constitutional document.

Democratic Movement (ODM), largely because of squabbles between Raila and Musyoka over presidential nominations prior to the elections (Sjögren & Karlsson 2008).

The relevance of these party structures to the present discussion is their ideological and ethnic basis. The PNU attracted politicians and, by extension, people from the so-called 'Mount Kenya area', mainly the Kikuyu. The ODM, on the other hand, drew its support mainly from communities living in Western, Coast, Nyanza, Rift Valley, North-Eastern and Nairobi provinces. ODM-Kenya's support came mainly from Eastern Province, the home-turf of its presidential hopeful.

On 27 December 2007 the country held its fourth multiparty elections. An estimated 14.2-million Kenyans (82% of eligible voters) were registered to vote, while 2 547 parliamentary candidates were qualified to run in 210 constituencies. A total of 15 331 candidates was approved to compete in the 2 498 local wards. Nine candidates competed in the presidential election.

The elections were administered by the Electoral Commission of Kenya (ECK), a government body established by the Kenyan Constitution. The ECK has 22 commissioners, 19 of whom were appointed by President Kibaki. However, according to European Union and Kenyan observers the new commissioners were appointed without proper consultation with opposition parties, violating the Inter-Parliamentary Parties Group (IPPG) Agreement of 1997, which calls for consultation with opposition parties (Dayne 2008).

Several members of the ECK openly declared shortly after the election results were announced that they did not agree with the decision to declare Kibaki winner of the election and that there were serious problems with the vote count. The credibility of the election results was questionable given the discrepancies in the tallying of the results. For instance, in Molo, a small town in the Rift Valley, the results document reportedly reflected 50 145 votes for President Kibaki, but the ECK chairman publicly announced that Kibaki had won 75 261 votes (Dayne 2008).

In some constituencies the total number of votes counted exceeded the number of registered voters. In Maragua District, a Kibaki stronghold, the document received by the ECK showed voter turnout to be 115 per cent – this was later changed by the chairman of the ECK to 85 per cent (Dayne 2008). While the voting process was managed effectively what was disputed was the counting and tallying of the results, with the ECK accused of having doctored the results in favour of Kibaki.

The live broadcast of a press conference held by the leaders of the ODM to protest against what they regarded as the illegitimate and illegal swearing-in of Kibaki and to call for countrywide demonstrations was interrupted and an

indefinite ban was slapped on future live broadcasts as well as on political rallies and demonstrations. The protests against Kibaki's swearing-in, which erupted spontaneously across the country, were met with police brutality, resulting in many civilians shot dead or wounded and an even greater number internally displaced (Dayne 2008).

Suspected Kibaki supporters, as well as some Kikuyu living outside Central Province, were targeted and attacked by communities that had voted for the opposition ODM. Their property and houses were looted and burnt, large numbers were chased away from their homes, many were injured, and some were killed. Correspondingly, many people from Western Kenya, Nyanza and Rift Valley were targeted in Central Province.

The violence claimed about 1 500 lives, and resulted in approximately 350 000 internally displaced people (IDP), who fled the violence-stricken areas. There have been various interpretations of the causes of the violence but a cursory glance at the voting patterns makes the reasons for the controversy over the results clear.

The 2007 election outcome contrasted starkly with those of 1997 and 2002. In 1997 President Moi won the election, with his party garnering the majority of seats in Parliament, a trend that was replicated by President Kibaki's win in 2002 under the aegis of NARC. Such anomalies confounded not only the political parties that disagreed with the election results but the wider public, who could not conceive how a presidential win is possible if the president's party does not have a majority of parliamentary seats. The resentment over the irregularities found expression in the violence that emerged among supporters of the two dominant parties.

Some observers have described the violence as a tribal conflict between the president's Kikuyu ethnic group and the Luo and Kalenjin ethnic groups. Indeed, Kikuyus were the principal targets in some areas, although the Luo and other ethnic groups were also targeted by the security forces and by Kikuyu groups. Kenyan civil society and human rights advocates argue that it is a mistake to describe the violence simply as a tribal conflict, since, for many Kenyans, the trigger was the rigged elections and fears of a return to dictatorship (Dayne 2008).

I, however, argue that the violence experienced in parts of the Rift Valley, for instance, was not spontaneous but well orchestrated according to deep-seated and historically ingrained territorial politics relating to land ownership. In the Rift Valley the election outcome in essence resuscitated old grievances between communities viewed as supporters of the regime, which had 'illegitimately' won the election.

A contest centred on the politics of land is not new in post-independence Kenya. The experience of the rivalry between Kanu and Kadu in the 1960s and

1970s during Kenyatta's era, the violent clashes of the early 1990s in the Rift Valley and Coast provinces, and the December 2007 election violence (most pronounced in the Rift Valley), is that botched and politically manipulated land reform has defined the various modes of political expression and contestations Kenya has witnessed during these periods. In other words, political discord in Kenya cannot be understood effectively without understanding the interplay between the politics of land and the wider socio-economic and political system.

The two, I argue, are closely interwoven, and attempts to analyse election violence as an expression of a disenfranchised people with no history of ethnic rivalry and political competition are inadequate in explaining Kenya's political dynamics. Unfortunately, the ethnic factor in the country's politics has often been dismissed, overlooked, or considered secondary.

The Waki Commission, set up to investigate the underlying causes of the 2007-2008 post-election violence acknowledged the role played by ethno-geographic inequities. Constitutionally, individuals may own land in any place in Kenya and in law no part of the country belongs to a particular ethnic group. Nevertheless, this phenomenon is a de facto characteristic of many areas, particularly as many of the districts created since the 1990s have been ethno-specific, leading to the creation of ethnically homogenous effective 'native reserves'.

This, in turn, has created the notion of 'insiders' who are native to a place and 'outsiders' who have migrated there, a notion that has been tapped by aspiring politicians (Waki Report 2008, pp 30-33). This raises the question of the balance between group interests and the rights of individuals, as entrenched in the Constitution. The Waki Report further noted that failure to implement the recommendations of the Ndung'u report into irregular land allocation increased a sense of frustration, as those implicated hold senior public office. Beyond expressing discontent with the failure of the government to deal decisively with irregular land allocation the report (2008, p 32) succinctly noted the role historic injustice coupled with political orchestration might have played in the violence:

In discussions of post-election violence, many Kalenjins argue that it is a product of longstanding anger over land distribution following independence. They argue that land was alienated by the colonial government and then unfairly parceled out to Kikuyus and other groups whom they view as outsiders. Many Kalenjins believe that issues relating to land were the reason for both the pre-electoral violence in the 1990s and the post election violence after the December 2007 elections.

As violence escalated and in response to intense pressure from the international community the government accepted international mediation under the leadership of former United Nations Secretary-General Dr Kofi Annan, and the African Panel of Eminent Persons (Dayne 2008). Both the ODM and the PNU appointed representatives to the mediation team, which resolved to explore both short-term and long-term solutions to the crisis.

The long-term solutions centred on issues such as land reform; tackling poverty and inequity; addressing transparency, accountability and impunity; and supporting equal access to opportunity (United Nations 2008, p. 1). One of the major requirements recognised in the deliberations was the need to deal with the teething problem of land reform, constitutional reform, and a power-sharing arrangement, among other institutional reforms, to avert recurring conflicts in the country.

To allow for the implementation of the reforms, on 28 February 2008 a long-awaited political settlement was reached when Mwai Kibaki and Raila Odinga signed a power-sharing agreement. The settlement was contained in two documents, namely, the Agreement on the Principles of Coalition Government and the National Accord and Reconciliation Act 2008.

Perhaps what the grand coalition offers is an opportunity to constitutionally entrench wide-ranging land reforms that will ensure security of tenure irrespective of indigenous claims to designated areas, which are easily manipulated into ethnic feuds orchestrated as part of electoral malpractice aimed at winning elections. Hence, to make sense of the Kenyan political crisis, it is prudent to acknowledge the extent to which politicians use agrarian politics and narratives of historic injustices endured by communities as a way of circumventing political defeat.

In as much as Kenya's political deficiencies can be attributed to defective constitutional regimes, weak parliamentary systems, authoritarianism and electoral laws, the form that political rivalry, competition and patrimonial politics take reflects the botched attempts to deal with the question of land. In a country where close to 75 per cent of people are land-based, the sustainability of the grand coalition project is contingent on how the historic question of property relations is addressed.

The fact that some IDP are currently refusing to return to their farms in the Rift Valley for fear of reprisals, despite government assurances of their security, indicates the mammoth task of reconciliation and restitution the current government must undertake to avert future electoral violence. The current National Land Policy (NLP)(2008) provides an opportunity to deal with the structural, policy and political deficits that encumbered the attainment of a comprehensive programme of land reform. Despite the policy's noble objectives the mechanisms and expansive nature of the envisaged reforms are over ambitious

and fail to acknowledge the experiences of countries that have attempted similar programmes.

### CAN THE NATIONAL LAND POLICY END KENYA'S LAND CRISIS? SOME CONCLUDING THOUGHTS

The National Land Policy recognises the systemic shortcomings of Kenyan land reform: the continuity of a colonial land reform regime, centralisation of land administration and governance, a lack of accountability and transparency, the disinheritance of communities, the absence of a constitutional framework dealing with land reform.

The primary goal of the NLP is to attain security of land tenure – seen as a trigger for sustainable development, investment, and the reduction of poverty. However, the links between security of tenure, investment growth, poverty reduction, and sustainable development are not as simplistic as expressed in the NLP document, which draws heavily on observations made in the Ndung'u report, and previous drafts of land reform policy bodes. It seeks to identify the various challenges facing Kenya's land question and it offers a partial 'problem scenario' but it fails dismally to suggest practical steps. In essence it offers a framework for a set of policies and legislation that would allow the attainment of the following objectives:

- Increased access to land – equitable land ownership and use which is environmentally sustainable.
- Increased efficiency in the operation of the land market.
- Increased efficiency in the utilisation of land and land-based resources.
- The creation of dispute resolution mechanisms.

On the land tenure front the overall principles informing reform are equity and non-discrimination. In order to rationalise existing systems of private land ownership the NLP seeks to harmonise existing modes of statutory tenure under the Land Act; to ensure that the alienation of private rights to land takes into account all other legitimate rights held or claimed over the affected land, for example, the rights of spouses and children. With regard to leasehold it is proposed that the duration of leases does not exceed 99 years. In terms of the allocation of public land the policy proposes a ceiling limiting the amount of public land allocated to individuals or other entities and the harmonisation and elimination of multiple allocations.

On a more controversial note the policy seeks to bring to an end land tenure conversions introduced in 1955 by the Swynnerton Plan. Historically, the processes

and procedures of land adjudication and consolidation were intended to eliminate customary tenure and replace it with statutory tenure – however, this process has been dismally slow. The process of tenure conversion has failed not only in Kenya but in other countries that have attempted to implement such a policy.

A major goal of land tenure conversion is to enhance people's land tenure rights with a view to delivering or securing security of tenure. In this regard land tenure reform is intended to facilitate the development and investment decisions of rural people, government institutions, and the private sector, which, in turn, will benefit rural livelihoods and facilitate infrastructure developments, service provision, and economic development (Sibanda 2003).

From a purely economic perspective the upgrade of land tenure rights is seen as an impetus to greater economic efficiency, growth and prosperity within the agricultural sector. Land tenure reform is therefore the basis of the restructuring or reorganisation of a proprietary regime and the institutional and administrative order that sustains such a proprietary system (Rutten 1997; Sibanda 2003).

The upgrade of land tenure rights is effected in two dominant ways – the issuing of title deeds subject to statutory law and the transfer of land to communities subject to traditional laws of succession, that is, customary law (Rutten 1997). Conceptually, tenure reform that seeks to replace communal tenure with freehold conversions typifies a 'replacement paradigm' approach.

The replacement paradigm advocated by the NLP is based on antiquated neo-classical economic theories which argue that traditional African land-tenure systems lead to an inefficient allocation of resources because property rights are not clearly defined, costs and rewards are not internalised, and contracts are not legal or enforceable (Rutten 1997). This theory holds that individualising land tenure increases the landholder's security of tenure, increases investment by improving tenure security, and will transfer land to those who are able to extract greater value from it as more productive users bid land away from less productive users.

The basic tenet underlying the legislative reform of land tenure is to protect the land rights of holders and ensure that the 'rule of law' is applied when these rights are removed or land is sequestered by the state. The empirical evidence of changes in land tenure and distribution of landholdings suggests that these policy ideals are rarely achieved (Moyo 2004). The implementation of the Swynnerton Plan is an example of this inherent shortcoming.

Another key pillar of the NLP relates to land issues requiring special intervention – historical injustices; pastoral land issues; coastal region land issues; the land rights of minority and marginalised groups, women, inhabitants of informal settlements, and children; land used for informal activities; and the impact of the HIV/AIDS pandemic on agricultural production and access to land rights.

Among the mechanisms proposed to deal with these issues is the institution of a land redistribution programme aimed at providing the disadvantaged and the poor with access to land for residential and productive purposes. A key proposal is the need to institute land restitution measures to restore rights to those who have been unjustly deprived of them. The proposal is based on the recognition that the lack of access to land may be due to unfair governmental policies and laws. To this end, the government proposes to develop a legal and institutional framework for handling land restitution claims that have arisen since 1895, when Kenya became a colony.

In South Africa the land reform policy programme is made up of three pillars, namely: tenure reform, restitution, and redistribution. The legal framework that guides this programme is codified in the country's Constitution. Land restitution, as mandated by s 25(7) of the South African Constitution (1996) seeks to restore land to those who were forcibly removed from it, provided the dispossession can be proved and occurred no earlier than 19 June 1913. The restitution policy is guided by the principles of fairness and justice and, according to the 1997 Department of Land Affairs White Paper on Land Reform Policy, the process is driven by the demands of claimants who have been dispossessed.

A total of 79 000 claims were lodged with the Commission on Restitution of Land Rights (CRLR) before the 1998 cut-off date (South Africa, Department of Land Affairs – DLA, 2004). According to the government nearly 90 per cent of the claims had been settled by 2006. The majority of the outstanding claims involve a large number of communities and are often marked by protracted struggles between communities and landowners.

In Namibia, in comparison, the restitution process was seen as too complex and adversarial to implement immediately after independence. One of the key deliberations at Namibia's land reform conference in 1991 was whether ancestral land should be returned or alternatives to redistribution sought. Political groups representing minority ethnic interests (Herero, Nama and Damara) argued for the restitution of their ancestral land.

Stakeholders realised it would be practically impossible to reconcile many of the competing claims to freehold land. The proposed restitution cases were viewed as too sensitive and conflicting and thus capable of derailing the conciliatory gestures that marked the transitional process (Melber 2002, p 2).

Based on South Africa's experience one can argue that rights-based reforms such as restitution programmes tend to disenfranchise claimant communities and often reflect the tensions inherent in attempting to attain rights restoration and sustainable development simultaneously. These tensions are emblematic in the ways in which adversarial relations have marked South Africa's restitution programme, and the limited livelihood gains this programme has generated.

Conflicting and overlapping rights to land, claims of lineage, and the role of traditional leaders in accentuating these binaries should be taken into account in the creation of Kenya's restitution programme. The diversity of ethnic communities (42 in total) and the extent to which narratives of land dispossession have gained political resonance among key political actors as a conduit to building political alliances with their constituencies are bound to complicate the programme.

Beyond addressing the policy and legislative framework required to end Kenya's land crisis, the ecological and demographic dimension underpinning the success of the country's land reform deserves acknowledgment, as noted above. The scarcity of adequate arable land, coupled with Kenya's increasing population and its inability to diversify its economy, puts insurmountable pressure on land access as a primary pivot of livelihoods creation and sustenance amongst Kenya's burgeoning population.

In sum, the success of land reform and the alleviation of the structural ills associated with intermittent land-related violence are and will remain a daunting challenge in Kenya. Demographic pressures coupled with a harsh climate are ample reasons to evolve economic diversification strategies that transcend the country's preoccupation with land reforms as a panacea for its intermittent political ills.

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