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Re-Examining the Role of Private Property in Market Democracies:Problematic Ideological Issues Raised by Land Registration

Joel M. Ngugi
Foley Hoag, LLP

RE-EXAMINING THE ROLE OF PRIVATE PROPERTY IN MARKET DEMOCRACIES: PROBLEMATIC IDEOLOGICAL ISSUES RAISED BY LAND REGISTRATION

*Joel M. Ngugi**

I. INTRODUCTION AND MAIN ARGUMENTS

In the post-1989 world, the primacy of private property is taken for granted.[1] The final fall of communism, it would seem, is an adequate commentary of the supremacy of private property arrangements in facilitating economic development. Debates pitting plan (with its associated appetite for communal or collective property) against market (with its avowed belief in private property) are now considered superfluous.[2] As

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* Doctor of Juridical Studies (S.J.D.), Harvard Law School, (2002); LL.M, Harvard Law School, (1999); LL.B, University of Nairobi, Kenya, (1996); Associate, Foley Hoag, LLP, Boston. This Article is part of the thesis entitled: *Searching for the Market Criterion: Market-Oriented Reforms in Legal and Economic Development Discourse* which was awarded the John Gallup Laylin Prize for the Best Essay in International Law at the Harvard Law School for the 2001–02 academic year. The awarding Committee was chaired by Prof. Anne-Marie Slaughter, now Dean, Woodrow Wilson School of Public Affairs, Princeton University. I am grateful to my academic advisors, Professors Duncan Kennedy, David Kennedy and Robert Bates for their guidance and inspiration throughout the period I was a doctoral candidate, and especially for their comments on an earlier version of this paper. I thank my wife Sylvia Kang'ara, a true property law theory "guru" for the many discussions we have had on some of the ideas in this Article. I would also like to thank the editors of *Michigan Journal of International Law*, especially C.J. Albertie, for their hard work and thoughtful comments. This Article is based, in part, on research done in Kenya with funds from the Weatherhead Center for International Affairs for which I am grateful.

Editorial note:

Kenyan cases are challenging to locate outside of Kenya. Furthermore, the Bluebook has no specific rule regarding Kenyan reporters. Thus, the editors have tried to include enough information in the cites to allow our readers to find the cases. Typically, the cite will include the name of the case, the court which issued the decision and the date. In some cases, we have also included the name of the deciding judge. Finally, all Kenyan cases are on file with the author.

1. As Gregory Alexander and Duncan Kennedy remind us, "property rights" have long been taken for granted in Western legal systems, not just since 1989. Duncan Kennedy argues that the fact that economists and legal theorists who write about property rights as the basis for all market exchange, merely create the perception that there is a consensus about the definition of property rights, but, in fact, there is no such consensus. Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939 (1985). On the other hand, Gregory Alexander posits that the widely shared view that property materially defines the legal and political sphere in which individuals are free to pursue their own private agendas and satisfy their own preferences free from governmental coercion, is a popular misconception. He argues that there is no such consensus in American legal history about the meaning of property and that the "preference-satisfying" conception of property is rivaled by a conception of property that views property as the private basis for the public good. GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY 1–2 (1997).

2. The World Bank made this clear with *World Development Report 1996, From Plan to Market* which sought to chronicle post-1989 transitions from planned to market economies. WORLD BANK, WORLD DEVELOPMENT REPORT 1996, FROM PLAN TO MARKET (1996).

far as the "Western world" was concerned, it seemed that the task of persuading the rest of the world that private property is the key to efficient market performance and economic development had finally been accomplished.[3] The only task left was for development and policy makers to devise regimes for establishing private property arrangements in the rest of the world. The argument made was that, barring transaction costs, if: 1) the initial endowment of property rights is clearly defined; 2) corruption held in check; 3) freedom of contract entrenched; and 4) the rule of law respected, then a viable market for property, and other rights to economic resources will ensue.[4] The eventual result would be an exchange and reallocation of property rights to the most efficient users with attendant benefit to the entire economy.[5] In the first instance, this Article evaluates how this task of establishing regimes of "clear property rights"[6] supported by a transparent rule of law has worked out in practice.[7]

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3. Hernando de Soto argues that the clear and formal system of private property is the mysterious explanation for why capitalism and economic development thrives in the West but not elsewhere. A formal private property system, de Soto argues, is the primary element that turns assets from "dead capital to "live capital." HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 5–6, 159–62 (2002). Richard Pipes, similarly poses: "Juxtapose the history of England with that of Russia. What emerges? The importance of private property." Richard Pipes, *Private Property, Freedom, and the Rule of Law*, HOOVER DIG. 2001–02 (2001), *available at* http://www-hoover.stanford.edu/publications/digest/012/pipes.html (last visited Apr. 8, 2004).

4. Ronald Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

5. *See, e.g.*, Frank Byamugisha, *The Effects of Land Registration on Financial Development and Economic Growth: A Theoretical and Conceptual Framework* (World Bank Pol'y Res. Working Paper No. 2240, 1999), *available at* http://econ.worldbank.org/files/15367_wps2240.pdf (last visited Apr. 8, 2004); Klaus Deininger & Hans Binswanger, *The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges*, 14 WORLD BANK RES. OBSERVER 247 (1999).

6. It is now accepted that legal articulation of property rights and contract rights are essential precursors to the emergence of strong markets. *See* Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737, 1743 (2002). Ellig suggests that a system of "clear property rights" might, in fact, be used as a mechanism to internalize externalities—a departure from the earlier view that government regulation was required to deal with the problem of externalities. *See* Jerry Ellig, *The Economics of Regulatory Takings*, 46 S.C. L. REV. 595, 596 (1995).

7. Between 1988 and 2000, the World Bank, the foremost development institution in the world, initiated 202 projects involving land administration and titling with a total cost of over US $16 billion. *See* THE WORLD BANK GROUP, URBAN DEVELOPMENT, HOUSING AND LAND, PROJECTS, *at* http://www.worldbank.org/urban/housing/projects.xls (last visited Apr. 8, 2004). The World Bank Group is one of the world's largest sources of development assistance. It consists of five closely associated institutions: The International Bank for Reconstruction and Development (IBRD), The International Development Association (IDA), The International Finance Corporation (IFC), The Multilateral Investment Guarantee Agency (MIGA), and The International Centre for Settlement of Investment Disputes (ICSID). The term "World Bank" refers specifically to the IBRD and IDA.

In addition, I aim to convey four main themes that are often clouded in discussions on private property and its role in capitalist economic development. First, I provide support, using analysis from the land registration regime in Kenya, for Michael Heller's argument that the creation and clear definition of property rights, is *not* sufficient to usher in new markets in these property rights.[8] Rather, *how* these rights are created determines whether productive, efficient, and *socially rational* exchange and utilization of property rights will actually take place. This is notwithstanding the existence of a government that adheres to the rule of law however defined.[9] Indeed, just as unclear property rights may cause inefficient over-utilization of an economic resource, clear property rights might be constituted in ways that gridlock efforts to rationalize utilization of the resource, leading to inefficient under-utilization of that resource.[10]

From a different perspective, common property, undefined or unclear property rights lead to the well-known "tragedy of the commons."[11] This is a situation whereby multiple individuals are privileged to use a given resource without a cost effective way of monitoring and constraining each other's use, making the resource vulnerable to overuse.[12] Conversely, when multiple owners have the right to exclude others from taking advantage of a scarce resource, and no one has an enforceable privilege of use, the resource might be underutilized: a problem known as the tragedy of the anticommons.[13] In both cases, overall system productivity is undermined: one by a system that results in under-policing of property rights, the other by a system that results in over-policing of property rights.[14]

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8. *See generally* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition From Marx to Markets*, 111 HARV. L. REV. 621 (1998) (observing that property rights can create, as well as solve, collective action problems).

9. The definition of "rule of law", as the definition of property, is fiercely contested. *See* Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding, and Serving Palm-Wine*, 29 CASE W. RES. J. INT'L L. 167 (1997); Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998); Joel Ngugi, Searching for the Market Criterion: Market-Oriented Reforms in Legal and Economic Development 128–95 (S.J.D. Dissertation, Harvard Law School) (on file with the International Law Library, Harvard Law School).

10. Heller, *supra* note 8.

11. Garrett Hardin, *The Tragedy of the Commons*, 3 SCI. 1243 (1968).

12. *See id.*

13. Heller, *supra* note 8; *see also* James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anti-Commons*, 43 J.L. & ECON. 1 (2000); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163 (1999); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698 (1998).

14. The argument here is that even assuming, *arguendo*, that it is possible to obtain a *politically neutral* Pareto-optimal equilibrium by continual mutual exchange and trading in property rights, the problem of over-policing property rights might make it impossible to reach

Second, my analysis of attempts to create a clear property regime in Kenya challenges the popular notion in the development discourse that establishing a regime of clear property rights ushers in less government as well as a private sphere where economic actors as private agents pursue their own agendas, subject only to the free market laws of supply and demand.[15] The analysis demonstrates that the binary between less and more government is irrelevant. I use the lessons that the Kenyan land registration exercise has bequeathed to us to demonstrate this. Land registration in Kenya, as in many other countries, was intended to be a technico-legal reform aimed at clarifying property rights in land. However, whereas land registration is a technical exercise, it is also highly manipulable and susceptible to ideological interpretation in order to accomplish hidden political motives. What emerges from this analysis is that the meaning assigned to land registration is different from agnostic mapping or technical mirroring of rights from the customary system to a formal regime. Instead, the capturing of customary rights is often done with the aim of reorganizing and transforming the rights of different groups and individuals. Hence registration entails a choice of interpretation.

The ultimate effect of this choice in interpretation in Kenya was that the technico-legal process of land registration had certain distributive consequences. They were not acknowledged since the registration itself was comprehended as an act of capturing the rights from one system to another, not as an interpretive process. Despite claims to the contrary, including attempts to cloak it as a technical exercise, the registration

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such a desirable optimal position. A given allocation of resources is Pareto optimal if there is no way to reallocate the resources available that would make at least one person better off without making anyone else worse off. *See* ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 307–08 (1995). However, the problem presented by the realization that over-policing compounds rather than ameliorates the coordination problem typical in human interaction is further compounded by arguments that it is, in fact, impossible to obtain a *politically* neutral Pareto-optimal equilibrium. Different scholars have demonstrated that Pareto optimality analysis is both indeterminate and incomplete. It is now generally agreed that wealth and income effects, endowment effects, and adaptive preference formation may all condition preferences on the distribution of legal entitlements, disproving the notion that automatic readjustments would lead to wealth-maximizing and efficiency-enhancing reallocation. *See also* Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 469 (Peter Newman ed., 1998); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Laurence H. Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66, 70 (1972).

15. *See* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 10–11 (1985); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 129–41 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

process necessarily involved giving rights to certain societal groups over other groups competing for the same resources.

A different way to put this is to state that the government is a necessary component of the economic system, or that the polity and economy are not preexistent, self-subsistent spheres but are in fact mutually defining.[16] As such, a theoretical or analytical framework that comprehends economic reform in terms of more or less government is fallacious. When it comes to property rights, the relevant questions are who to protect, and how, not whether the government should regulate.

However, to argue that property rights are really about political choices that the government makes is not to say that the government's choice is translated into reality by a stroke of legislative pen. Quite the contrary. In the case of land registration in Kenya, for example, the envisaged "transformation" (complete commodification of land and the attendant economic consequences[17]) did not entirely follow through as a result of strategic behavior of certain sectors in Kenyan society. These sectors refused to accept all the implications of registration, such as near-absolute powers of the individually registered owner. They organized, invented and mobilized customary norms to frustrate complete operation of the new formal regime of tenure arrangements.[18] At the same time, they facilitated the operation of other aspects of this regime. The analysis merely reinforces the earlier message that property rights are neither natural nor clear. They are merely the products of existing legal policies and social interactions with the institutions emerging from these legal policies.[19]

The third general argument is that it is often not possible to determine the consequences of a law or legal regime *a priori*.[20] I show that arguments that posit a determinate set of consequences as flowing from a change in legal structure or legal institutions overestimate the determinacy of the economic consequences that flow from the legal institutions. Or, as Warren Samuels would have it, the fundamentals of the legal-economic nexus are not as simple and obvious as contemplated by views that maintain that the polity and economy are pre-existent, self-subsistent spheres.[21] Such arguments are also often ideological.[22] Further,

16. Warren J. Samuels, *The Legal-Economic Nexus*, 57 GEO. WASH. L. REV. 1556, 1577–78 (1989).

17. *See* Byamugisha, *supra* note 5.

18. *See infra* Section IX.

19. Robert W. Gordon, *The Real Politics of Law*, 2 JURIST (1999) (book review), *at* http://jurist.law.pitt.edu/lawbooks/revapr99.htm (last visited Mar. 28, 2004).

20. *See* Samuels, *supra* note 16.

21. *Id.* at 1557.

22. I use the term "ideological" here to mean the more ordinary, value-neutral sense of a system of political ideas. Stuart Hall defines ideology as, "the frameworks of thinking and

my analysis demonstrates that when the posited economic consequences follow from enactment of specific legal rules or institutions, it is often

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calculation about the world—the 'ideas' which people use to figure out how the social world works, what their place is in it, and what they *ought* to do." Stuart Hall, *Signification, Representation, Ideology: Althusser and the Post-Structuralist Debates*, 2 CRIT. STUD. MASS COMM. 91, 99 (1985). This is close to Duncan Kennedy's definition of ideology as a method of generalizing claims. According to Kennedy, ideology is:

> [A] universalization project of an ideological intelligentsia that sees itself as acting "for" a group with interests in conflict with those of other groups . . . .
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> . . . .
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> In this conception, the ideology is independent of the interests with which it is "associated," though not so independent as to be altogether distinct. Dependence and interdependence operate both on an ideal level and on a social level . . . .
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> . . . .
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> An ideology is a "project," . . . not just a translation of interests into another medium. Rather, it is a mediation between interests and universal claims. People's understanding of their interests comes about in the context of universalization into ideology, as well as vice versa, so ideology can shape interests, as well as vice versa. Ideology is not a superstructure responding to interests that are "materially based" or otherwise just "given," nor is it "pure" domain of ideas . . . .
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> . . . .
>
> One is an ideologist because one has made a commitment to working within a complex body of texts, a discourse, and accepted the blinders and limitations that inevitably go along with the advantages of such a commitment, and because the commitment to the texts goes along with, and sometimes conflicts with, a commitment to a group or groups in conflict with others.

DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 39–42 (1997) [hereinafter A CRITIQUE OF ADJUDICATION].

Thus, ideology is a system designed by an elite to convince everyone else that a particular set of social, political, and cultural arrangements serves everyone's best interests. Conversely, ideology is a system designed by those who wish to overthrow the status quo and convince others that a new set of specified arrangements will serve everyone's best interests. The latter definition reflects the Althusserian definition of ideology denying that ideology is simply the product of a conspiratorial power group. Althusser argues that ideology is omnipresent; it inheres in every representation of reality and every social practice, and all of these qualities inevitably confirm or naturalize a particular construction of reality. *See* Louis Althusser, *Ideology And Ideological State Apparatuses*, *in* CRITICAL THEORY SINCE 1965 238 (Hazard Adams & Leroy Searle eds., 1986). The definition that best captures the value-free sense I want to convey is Paul Leslie Theile's: "Ideology is the natural and largely unconscious outgrowth of lives lived in particular social positions within a competitive social system." LESLIE PAUL THIELE, THINKING POLITICS: PERSPECTIVES IN ANCIENT, MODERN, AND POSTMODERN POLITICAL THEORY 220–21 (1997).

This means that, based on a group's social position, that group makes judgments about the relative place or worth of other individuals and groups. These judgments then construct belief and value systems used to advocate for and/or establish particular power structures corresponding with these views. At the same time, group members propound beliefs that justify both the judgments and the particular power structures established or proposed to be established. If the group dominates, it creates practices that reinforce and perpetuate the original judgment and power arrangements.

not because of the natural implications of the legal regime or laws, but because of a particular, ideological interpretation assigned to the laws and rules. Whether that ideological interpretation succeeds is dependent on the mechanisms society invents to conform with or challenge that interpretation.[23]

Finally, my analysis of land registration in Kenya hopes to challenge, or at least modify, some of the rigid assumptions of the resurgent neo-liberal orthodoxy.[24] By looking at the land registration experience in Kenya in light of the recent promises of new prosperity founded on formal, secure property rights reflected in a registered title, I intend to draw the attention of law and development scholars to the following lessons:

1. A misunderstanding of neo-classical assumptions and models regarding how markets work and the institutions necessary for the optimum functioning of the market can lead to a prescription of counter-productive rigid legal regimes;[25]

2. The land registration regime in Kenya failed to result in the anticipated economic consequences and this failure could have been foreseen with a proper understanding of the institutions whose evolution and impact shape economic opportunities and performance;[26]

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23. *See* discussion *infra* Section VIII.

24. Development economics as a distinct branch of economics was largely based on structuralist claims that problems facing developing countries were due to structural impediments in the international and domestic economy requiring significant state intervention. However, neo-classical economists of the 1980s argued that economic stagnation in developing countries was a byproduct of poorly designed economic policies and excessive State interference in the economy. As a result of disillusionment with the rate of development in most developing countries and the negative effects of Official Development Aid (ODA), neo-classical assumptions of methodological individualism, the rational utility maximizing model, and the role of markets in the economy regained sway in the so-called "long decade of the 1980s." *See* JAMES G. CARRIER, MEANINGS OF THE MARKET: THE FREE MARKET IN WESTERN CULTURE (1997). The effect of this neo-classical resurgence was basically to shoot down development economics with its structural assumptions—which was "hounded out of economics departments, international financial institutions and journals, in an ideological counter revolution." Kari Levitt, *Reclaiming Development Economics*, International Development Economics Associates (Nov. 6, 2001), *at* http://www.networkideas.org/feathm/nov2001/ft06_Development_Economics.htm (last visited Nov. 14, 2003). The triumph of the resurgent neo-classical theory was announced by Deepak Lal in 1983 when he concluded that "development economics" lacked both formal rigor and empirical support. DEEPAK LAL, THE POVERTY OF 'DEVELOPMENT ECONOMICS' (1983).

25. Here, I merely extend and supplement the critiques put forth by David Trubek and March Galanter of the first "law and development movement." *See* David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974).

26. I build on the scholarship in political economy that highlights the importance of institutions in economic reform. *E.g.*, ROBERT BATES, OPEN-ECONOMY POLITICS (1997);

3. The national elite in developing countries might be able to capture the World Bank's development projects (which typically insist on a particular understanding of property arrangements and impose this understanding on developing countries) to reform property arrangements to lead to a process of perverse development.[27]

I. DEFINING AND PROBLEMATIZING LAND REGISTRATION

Technically speaking, land registration (or land titling) is simply the keeping of public records of all transactions affecting land.[28] Or as Tony Burns defines it: "Land titling is a policy intervention to introduce systems to formally recognize rights in land and enable the state and individuals to trade in these rights."[29]

Two operative systems are ordinarily used for land registration: the registration of deeds and documents and the registration of titles.[30] The former, often described as a negative system of registration, entails the maintenance of a public register in which documents affecting interests in land are copied or abstracted. The latter is the maintenance of an authoritative record, kept in public office, of the rights to clearly defined units of land as vested for the time being in some particular person or body, and the limitations, if any, to which these rights are subject.[31]

As these definitions make clear, land registration as a technical exercise is completely agnostic as to the kind of substantive rights actually

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Robert H. Bates & Paul Collier, *The Politics and Economics of Policy Reform in Zambia*, *in* POLITICAL AND ECONOMIC INTERACTIONS IN ECONOMIC POLICY REFORM 387 (Robert Bates & Anne Krueger eds., 1991); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

27. Here I extend the "second generation" critiques of "law and development" scholars. *E.g.*, James Thuo Gathii, *The Limits of the New International Rule of Law on Good Governance*, *in* LEGITIMATE GOVERNANCE IN SUB-SAHARAN AFRICA 207 (Obiora & Quashigah eds., 1999); GOOD GOVERNANCE AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES (Julio Faundez ed., 1997); KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM (2002); KERRY RITTICH, GLOBALIZATION, LAW AND SOCIAL JUSTICE (2002); James Thuo Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971 (2000).

28. Daniel Wachter & John English, *The World Bank's Experience With Rural Land Titling* (World Bank Env't Dep't, Divisional Working Paper No. 1992–35, 1992).

29. Tony Burns et al., *Land Titling Experience In Asia* (1998), *available at* http://www.surv.ufl.edu/publications/land_conf96/Burns.PDF (last visited Nov. 14, 2003).

30. The Torrens System is a land registration system invented by Robert Torrens and in which the government is the keeper of the master record of all land and their owners. In the system, a land title certificate suffices to show full, valid and indefeasible title. *See* ROBERT STEIN, TORRENS TITLE (1991).

31. *Id.*

registered. Registration is a technical process. The type of rights, whether private or public, communal or individual, market-based or state-based, is of no consequence to the registration system.[32] Registration is simply the act of mapping the rights that different individuals or groups have to a unit of land on paper and keeping a record thereof. It neither privileges, nor requires anything of, an individual or communal ownership system; it neither favors private nor public property.[33] It is neutral as to the exact system or pattern that would emerge after the registration exercise is complete.

Despite this agnostic meaning of land registration, land registration has been used to predetermine the content of the property rights being registered. In such a situation, rather than technically mapping or capturing existing legal rights, registration is used to, or results in, a transformation of legal rights. Therefore, what policy makers often have in mind when they talk of land registration is more than just the capturing of rights of these groups in formal title. By advocating for land registration, they often mean or hope for a reorganization and transformation of group and individual rights. This reorganization of property rights entails a *choice* of interpretation of what particular rights to register and in whose name to register them. To the extent that this choice is not inevitable and that it is masked or denied in practice, this process is ideological.[34]

The remainder of this Article explains how land registration in Kenya involved more than merely capturing the customary rights in land

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32. In other words, using the common idiom used to describe property, land registration does not in any way prejudge which combinations of the sticks in the bundle should be called property. The decision of which sticks are in a person's bundle, and which are necessarily implicated by the act of registration must be made independently. *See* BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 129 (1928).

33. I deliberately but consciously use the terms "private" and "public" here to convey the popular understanding that it is actually possible to distinguish "private" property from "public" property. The truth, of course, is that there are elements of each in every property right. *See generally* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988). (arguing that the search for the "private" owner often yields wrong, unjust and shortsighted conclusions). The same argument applies to "communal" versus "individual" property. *See* Sylvia Kang'ara, Conceptions of Property in Africa and The West (unpublished S.J.D. Dissertation, Harvard Law School) (copy on file with author).

34. This process is actually ideological in two different senses. At the general meta level, it is ideological in the sense that it is a mechanism for legitimating a particular type of society. The masking or the denying of the choice in interpretation is a deliberate discourse aimed at justifying the choice itself. It is therefore "the product of the underlying structure of economic forces and relations, which it legitimates." A CRITIQUE OF ADJUDICATION, *supra* note 22, at 291. It is ideological in a second sense since the privileged choice is but one of the many possible choices of available interpretations. Each choice is independent from, but reflects and is influenced by, a set of actual economic and distributional consequences. *Id.* at 13–15; *see also* KARL MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE 70–78 (Louis Wirth et al. trans., 1936).

and recording them. The registration process in Kenya involved a measure of extinguishing entitlements as well as inventing new entitlements. This claim should not be confused with saying that the registration of land *per se* is an ideological exercise. Rather, it is to make the claim that the registration process involves making a number of decisions based on the interpretation that one assigns to a set of concepts. However, the fact that individuals may interpret the various claims differently makes each interpretation a choice. What is ideological is not the registration process *per se* but the fact that the interpretive choices made are universalized by an elaborate discourse aimed at masking the fact that they are choices.[35]

But I have a consolation to Western property rights scholars who may have thus far interpreted my argument as the inapplicability of the Western property model to the African situation.[36] I hope to demonstrate that the extent of extinguishment and invention of entitlements in the Kenyan land registration process was not necessitated by the Western property system, it was actually only necessitated by a desire to see a particular evolution of the property system in Kenya. In any event, the absolute and individualistic model of property the registration process attempted to establish has probably never existed even in the Western world, but is based on a 19th Century *laissez faire* ideal.[37] The aim of the registration system in Kenya was not to capture entitlements of different individuals under the customary system and record them in formal title. The ideological motive behind the registration appears to have been a need to reorganize the land ownership system so that the land ended up in the hands of economic actors deemed to be more efficient and productive users of the land. However, even issues of efficiency and productivity are moot. Land registration cannot be shown in any determinate, objectively verifiable way to result in a more efficient distribution of land resources. This is in part because the arguments upon which the efficiency argument rests are ideological as well.

II. THEORETICAL AND CONCEPTUAL FRAMEWORK

It is not given that land registration produces economic and social consequences that can be determined *a priori*, though this seems to be the

35. A CRITIQUE OF ADJUDICATION, *supra* note 22, at 11.

36. The distinctions once posited between "Western" and "Non-Western" conceptions of property have come under intense intellectual criticism lately. The result is that these are no longer settled questions, sociologically or jurisprudentially. For an analysis of the history, evolution and ultimate critique of these distinctions, see Kang'ara, *supra* note 33.

37. Gregory S. Alexander & Grażyna Skapska, *Introduction* to A FOURTH WAY? at ix, xv (Gregory S. Alexander & Grażyna Skapska eds., 1994).

received wisdom.[38] The following analysis shows that where such consequences ensue, it is not because of the effects of the registration *per se*. Rather, it is due to a particular understanding of what registration means and entails as well as a particular channeling of competing notions of registration. Where promised positive economic consequences follow registration, it is because the particular interpretation has converged with other factors such as growth of factor markets and an acceptance of the ideology on which the registration results are interpreted.[39]

What the above assertion means is that even where land registration is accepted and carried out under a given set of common denominators, it is still possible for the outcome to be different from the one envisaged by orthodox economic theorizing. In fact, the claim is that the only possible way to determine *a priori* what outcome would ensue, is if one insisted on a particular understanding of the different notions which form the set of common denominators. This would mean insisting on and having the ability to implement and/or enforce only selected interpretations of the different conceptions.

Thus, the only way to debate the economic consequences of land registration is by being ideological.[40] One must be able to *choose* a particular interpretation to the relevant set of concepts and then proceed to enforce *that* particular interpretation. Invariably, those who lose from that particular interpretation—or those who would gain from an alternative interpretation—would contest such a choice. Therefore, the interpreter must contend with competing interpretations. One way to do this is to use the state's monopoly over violence to forcibly silence dissenting interpretations. However, the more subtle and economical way is to persuade those who hold, or would otherwise hold, competing interpretations that the particular interpretation being used is objective, scientific and universal.[41] It is in this sense that registration of land can be ideological.[42]

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38. The standard economic argument is that a clarification of property rights enhances market efficiency because it induces security and lowers transaction costs leading to a creation of a land market. *See* YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS (2d ed. 1997); Lee J. Alston et al., *The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier*, 12 J.L. ECON. & ORG. 25 (1999); Byamugisha, *supra* note 5.

39. Some economists and political economists readily admit that the expected economic benefits of registration will follow only if imperfections in factor markets are removed as well. *See* Klaus Deininger & Gershon Feder, *Land Institutions and Land Markets* (World Bank Pol'y Res. Working Paper No. 2014, 1998), *available at* http://www.worldbank.org/html/dec/Publications/Workpapers/wps2000series/wps2014/wps2014.pdf (last visited Nov. 14, 2003).

40. *See* discussion *infra* note 22.

41. In Gramscian terms, it is necessary for the state to attain hegemony, i.e., to organize the consent of all the groups in support of the interpretation that it prefers. *See* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Quintin Hoare & Geoffrey Nowel-Smith eds. & trans., 1971).

42. Susan Marks identifies five strategies which ideology typically deploys, pointing out that most often it combines them: (1) *universalization*: making social and political institutions appear

The effectiveness of land registration depends on the existence and acceptance by all social groups and economic actors of a set of givens. These givens constitute a conceptual framework which consists of a number of concepts which provide the universe in which a process such as land registration operates at an optimal level. These include concepts such as democracy, human rights, private property rights, economic development, economic efficiency and the rule of law.

It is possible that the many different economic actors share a common conceptual framework. This was true of Kenya during the time period this study covers: the mid-1950s through the 1990s.[43] The many different economic actors included members of the national elite who espoused African socialism[44] and their political opponents who styled themselves as Marxists or Socialists. There were no wild differences in terms of the political variables shared by all these actors:

> In the context of Kenya, "capitalist development" . . . enjoys popular support . . . Indeed, Marxists writing about Kenya politics—as opposed to more ethereal literary and philosophical

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impartial, inclusory, and rooted in considerations of mutual interest while masking differential levels of social power; (2) *reification*: the process by which human products appear as if they were material things and then dominate those who produce them, hence making people and cease recognizing the social world as a product of human endeavor, instead see it as fixed and unchangeable reality; (3) *naturalization*: making extant social arrangements appear obvious and self-evident, hence stabilizing domination by making it impossible to imagine more symmetrical power relations; (4) *rationalization*: construction of a chain of reasoning of which the status quo is the logical conclusion, making it seem as though there are good reasons why things are as they are, and making change irrational; and (5) *narrativization:* construction of histories of progress setting the status quo in historical context, thus imbuing the subsisting arrangements with respect and perpetuation because they are venerable and/or they represent progress. *See* Susan Marks, *Big Brother is Bleeping Us—With the Message that Ideology Doesn't Matter*, 12 E.J. INT'L L. 109 (2001). In the land registration proposals in Kenya, as the story below shows, the strategies used by different social groups included *universalization* and *naturalization*. To the extent that the government also equated land registration with the need for modernization and development, it also deployed the *narrativization* strategy.

43. I am, perhaps, simplifying a very complex situation in Kenya in the period immediately following independence. However, aside from some Marxist elements, renown mainly for harsh rhetoric rather than serious Marxist belief, there appeared to be some faith in these concepts.

44. *See* REPUBLIC OF KENYA, AFRICAN SOCIALISM AND ITS APPLICATION TO PLANNING IN KENYA (1965). For example:

> These African traditions cannot be carried over indiscriminately to a modern, monetary economy. The need to develop and invest requires credit and a credit economy rests heavily on a system of land titles and their registration. The ownership of land must, therefore, be made more definite and explicit if land consolidation and development are to be fully successful . . . Indeed, it is a fundamental characteristic of African Socialism that society has a duty to plan, guide and control the uses of all productive resources.

Id. at 10.

> Marxists—do not take a non-capitalist development route seriously as an alternative for Kenya. In fact, if we ignore terminology and mode of analysis to focus on policy alternatives, we find that the alternatives being considered by Marxists are essentially identical to those being debated within Kenya's Ministry of Economic Planning and Development . . . In short, Marxists and non-Marxists are as one in their acceptance of a capitalist development path for Kenya.[45]

Other actors competing for a stake in the interpretation of these concepts were trade unions, peasants or rural farmers, representatives of social groups, representatives of international capital and investment groups and development agencies such as the World Bank.[46]

All these actors shared a common conceptual framework for understanding and making ethical claims in the post-independence national situation. The debate was not whether land registration was necessary but who and what interests to register. However, as discussed below, different actors desired different outcomes from the registration process.

One would expect land registration to be much more predictable granted that the actors shared this common framework. However, the influence of the common framework cannot be determined *a priori*. This is because the many different concepts constituting the common framework have many diverse interpretations, each of which can be correct. This makes each concept highly manipulable.

The choice of meaning is not driven by a natural meaning of the concept, but by extraneous desires and interests of the different groups. These motivating interests are hidden in the simple act of interpreting the concepts. Hence, understanding the impact of registration on economic development in Kenya involves understanding how each interest group exploited the ambiguity of each term and concept associated with land

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45. CHRISTOPHER LEO, LAND AND CLASS IN KENYA 9 (1984). It should be noted that Leo wrote this in 1984, long before the fall of Communism and the rise of market triumphalism. Furthermore, recent political commentary concerning the political spectrum of Kenya's political elite at the time of independence stated:

> Kenya's political elite have no major ideological differences. Even ideological and programmatic alternatives. In his book Not Yet Uhuru, Jaramogi Oginga Odinga aptly described political parties in Kenya as 'loose amalgams of people with diverse tendencies'. The situation has not changed.

Jaindi Kisero, *Reforms Pact Signals Victory for Moderates*, DAILY NATION, Jan. 31, 2001 (internal citations omitted).

46. Apart from its general brief to alleviate world poverty, the World Bank had given Kenya a loan guaranteed by the British Government which, of course, it was interested in getting repaid. As I discuss below, this loan was used by the newly independent Kenyan government to purchase back the land owned by Europeans.

registration. They did this to pursue their own agendas and thus profoundly shaped Kenya's economic development and the operation of land registration. It is interesting to note is that each group appealed to the scientific or neutral character of these concepts.

III. Two Reform Programs; Two Ideologies

When talking of land registration and reform in Kenya, it is useful to distinguish two registration initiatives:

1. The enclosure, consolidation and registration of plots on African areas in the reserves that began with the Swynnerton Plan[47] of 1954 and still goes on today;[48]
2. The resettlement of Africans in the White Highlands, an area which had been bought back by the independent government from those Europeans who exercised the exit option bargained for in the Independence negotiations.[49]

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47. The Swynnerton Plan was a comprehensive policy document prepared for the colonial Government by the then Assistant Commissioner of Agriculture in Kenya, Mr. Swynnerton, aimed at alleviating the land grievances among the natives in Kenya. *See* R. J. M. Swynnerton, A Plan to Intensify African Agriculture in Kenya (1955) [hereinafter Swynnerton Plan].

48. Reference to "African areas" here means the sum of all the land legally held by natives especially after the implementation of the 1933 Report of the Kenya Land Commission. Report of the Kenya Land Commission (1933); *see* Colony of Kenya, Ordinance XXVII (Dec. 1938); Colony of Kenya, Ordinance XXVIII (Dec. 1938); Colony of Kenya, Proclamation No. 20 (1939). The effect of this assortment of legislation was that the areas that had been gazetted as European Highlands remained solely for use by the white settlers. However, in the other areas specifically known as native reserves, temporary native reserves, Native Leasehold Areas or "D lands," natives could acquire land and have equal rights with other races in land acquisition. Reference in this Article to "African areas" refers to the sum of native areas, as defined by the 1939 Native Lands Trusts Ordinance. Ordinance XXVIII, *supra*, § 70 (providing for the extinguishment of all native rights in land outside native areas). For a full description of these areas and how the boundaries evolved over time, see C.K. Meek, Land Law and Custom in the Colonies 76–99 (1949); M.P.K. Sorrenson, Origins of European Settlement in Kenya (1968).

49. The White Highlands refers to the land set aside for European settlement. All native rights to these lands were extinguished by various legislative instruments including the Native Lands Trust Ordinance of 1939. Ordinance XXVIII, *supra* note 48. According to Meek, the alienated lands totaled 10,832 square miles by 1937. Meek, *supra* note 48; *see also* Ordinance XXVII, *supra* note 48 (defining the boundaries of the White Highlands). It is important to emphasize that these lands were *bought* back from the Europeans. It corrects the wrong implication that this initiative was land reform and gives the impression that this was merely a redistributive scheme or a nationalization exercise to redress the earlier colonial appropriation. Second, the government requirement to buy the lands from the Europeans first started the World Bank's involvement with the land registration efforts in Kenya.

Different ideological battles accompanied each initiative, both before and after independence. There have been plenty of ideological battles regarding the land reform associated with the first type of initiative. However, in the second process of reform, there have been surprisingly few ideological battles. For more than thirty years after independence there was no significant contest over the meaning of reform as far as this aspect of reform is concerned. This was so until the introduction of multi-partyism in 1992.[50]

The dominant reasoning is that since the lands in this category were being bought from Europeans, no indigenous or customary laws were applicable. This interpretation would, of course, be consistent with the Colonial Ordinances, specifically the Native Lands Trusts Ordinance of 1939, which provided for the extinguishment of all native rights in land outside the boundaries of the native areas.[51]

The decision not to reopen the debate on the expropriation of the White Highlands after independence is problematic. This decision was inconsistent with other reforms taking place in Kenya at the time. For example, the reforms in the first program were thought of as specifically mapping customary rights to land into formal title. The differing treatment of customary rights to land can only be understood in ideological terms. Aside from sanctifying colonial expropriation, there are two contradictions in this position.

First, the argument is based on the implicit assumption that conquest and colonization amounted in the conquering force acquiring radical title to the land.[52] This is the only argument consistent with the interpretation of extinguishment of customary laws and claims on the basis of expropriation. This interpretation is not problematic merely because of its moral opprobrium. It is also at odds with the intellectual framework of

50. There was a brief but lively contest during the Lancaster Constitutional conference where those who favored federalism challenged the dominant view about the redistribution of land in areas hitherto held by the Europeans. Y.P. GHAI & J.P.W.P. MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA 73–77 (1970). This strand of reasoning was quickly subdued, and met an untimely death when the two major parties of the time merged. The two parties are the Kenya African National Union (KANU), which was the ruling party, and remained in power until December 2002, and Kenya African Democratic Union (KADU), which was itself an amalgamation of several small parties. *Id.* at 212; *see also* Wunyabari Maloba, *Nationalism and Decolonization, 1947–1963*, *in* A MODERN HISTORY OF KENYA 1895–1980 173, 193–194 (William R. Ochieng' ed., 1989).

51. Ordinance No. XXVIII, *supra* note 48, § 70. For a statement of this thread of reasoning, see Gibson K. Kuria, *Who Owns Land in the Rift Walley?* SUNDAY NATION, Apr. 23, 1995.

52. The United States Supreme Court had consistently used this strand of reasoning in cases involving Native Americans. This started with the celebrated case of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823), holding that the right to discovery abrogates all existing native interests in the land and gives an exclusive right to extinguish the native title of occupancy.

those who accept extinguishment of native customary claims to land but point out that it occurred at the point of independence through the negotiated process sealed by a Republican Constitution. The question then becomes whether any customary claims survived the independence bargain.

The contradiction is palpable if one considers the fact that land reform in the first type of initiative (the mapping of customary rights into formal title) was to proceed on the basis of customary claims. Not even the independence bargain muted legally recognizable customary claims to land. One interpretation would hold that the only customary claims that survived the independence bargain are those related to land in the native areas. The question ultimately arises concerning the justification of differential treatment of customary laws.

In the native areas where land reform of the first type occurred, customary laws formed the basis for registration.[53] However, it was imagined that once the customary claims had been established through a process of land adjudication and registered under the new registration statutes that the registered parcel would be removed from the realm of customary laws. The High Court in Kenya ruled title free from the multiple claims and procedures of customary law:

> [R]ights in land under customary law are extinguished upon registration ... the fact that [the appellants] may well have customary right to occupation of the land, such right is not an overriding interest within the true meaning and intent of Section 30(g) of the [Registered Lands] Act. Accordingly, they cannot assert such a right against a registered proprietor or his charge. That holding puts the applicant completely out of court.[54]

Following this line of reasoning, it is clear that customary claims to land are excludable only upon registration of the land under the Registered Lands Act. The converse of the argument is that insofar as no such registration has taken place, customary claims are operative and should

53. *See* The Registered Land Act pmbl., Laws of Kenya Ch. 300 (1985).

54. Wangari Wanjohi & Wambui Wanjohi v. Continental Credit Company Ltd., HCCC [High Court of Civil Cases] No. 3578 of 1987 (Kenya), *reprinted in* 14 NAIROBI L. MONTHLY 42 (1989). The judges were interpreting the Registered Lands Act. Section 28 of the Act makes the rights conferred on the registered proprietor indefensible save and except overriding. One such exception was a subject of contention in this case. Section 30(g) states that the rights of the registered proprietor can be overridden by, "the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed." Registered Land Act, *supra* note 53, § 30(g).

In the case, the appellants had made the claim that they had the rights of a personal possession under customary law. Hence, it is the ruling that customary laws are extinguished upon registration of land that was dispositive of the case.

be given legal effect. Arguing that customary claims are excluded by registration appears to displace the argument that registration is based on customary claims. If the registration process was in fact based on customary claims, the act of registration would not exclude any yet *unregistered* customary claims. It would have been different if the court had ruled that registration is *conclusive* of the customary claims in the parcel in question.

This alternate acceptance and denial of customary claims aspect of the transformation of property relations in Kenya is puzzling. Land adjudication and registration is argued to proceed on the basis of custom, implying that registration is an exercise to capture customary rights to land in formal manner, a title. However, the Courts ruled that once registration has taken place, one can no longer raise any unregistered customary claims—not because of *res judicata* but because registration itself extinguishes customary claims.

The provisions of section 143 of the Registered Lands Act complete the paradox.[55] The section precludes anyone from challenging a first registration *even* on grounds of fraud. The implication is that even if a person is registered as proprietor of a parcel of land without due regard to custom, that registration remains unimpeachable. This is true notwithstanding the fact that customary claims were intended to be the basis for registration.

It turns out therefore that beyond rhetoric, hardly any genuine interest in mapping customary claims existed in the new registration scheme. The combination of the adjudication and registration processes with judicial practice operated to narrow the range of possible effects and impact of land registration.[56] The sum effect is to encourage the registra-

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55. Registered Land Act, *supra* note 53, § 143.

56. For example, Celestine Itumbi Nyamu discusses the concept of land registration and male head of household:

> One example [of how the adjudication process is designed to narrow the bureaucratic criterion for deciding who the individual owner is, and hence function to exclude], is the established practice of registering male heads of households as the official owners of land that is used by families or lineages. A vague resort to custom gives a 'natural' appearance to the fact that the programs result largely in the registration of men as 'heads of household' and exclude women's interests from the official recognition conferred by title.

Celestine Itumbi Nyamu, Gender, Culture, And Property Relations In A Pluralistic Social Setting 213 (2000) (unpublished S.J.D. dissertation, Harvard Law School) (on file with the Harvard Law Library).

Helena Alviar discusses a similar usage of "heads of household" category in Latin America land reforms as well. *See* Helena Alviar, The Place of Economic Development and Feminist Theory in Legal Reform and Policy Design in Latin-America (2001) (S.J.D. dissertation, Harvard Law School) (on file at Harvard Law Library).

tion of individual proprietors with no encumbrances whatsoever. This effect is not warranted by the registration exercise itself, but by a combination of interpretations of several concepts critical to the registration process. Alternative interpretations of these concepts were equally feasible but not chosen for ideological reasons.

Another inconsistency makes the ideology more explicit. In the second reform initiative (the redistribution of land previously held by Europeans), there was no attempt to use customary rights as the basis for land redistribution. It was taken for granted that the parcels of land would be sold on a "willing-seller, willing-buyer basis."[57] The question arises as to why customary principles were employed in the registration process but not in the resettling of Africans in the White Highlands. It is no use to point out that section 114 of the Constitution restored the use of customary laws in these areas.[58] That same section could have restored the use of customary laws in the White Highlands as well.

This contradictory rendering of customary principles in the native areas and White Highlands is crucial for ideological interests. The interest was to progressively establish a class of people who individually owned parcels of land as free hold titles in fee simple absolute. Such an outcome required the progressive but eventual extinguishment of customary claims in land. As far as the White Highlands were concerned, it was administratively and politically feasible to effect an immediate extinguishment to coincide with the birth of the new nation. As for the native areas, the extinguishment had to await the registration of lands under the Registered Lands Act.

Viewing land registration in Kenya through this lens explains why I resisted the simplistic definition of land registration as the technical process of recording interests in land in order to assign titles to the rightful owners as a means to enhance security of title in land.[59] Rather, registration is a systematic attempt to transform property relations in a society. This transformation entails results based policy choices of the reformer. Thus, it is not just a program for capturing unregistered customary claims in land and registering them formally, but a program targeted to achieve certain preferred outcomes.

I am interested in this process for two reasons. First, what is touted as a technico-legal program is in fact a program for massive social reorganization. The transformation envisaged is not natural and inevitable, but a political choice. The technical language in which the process is

57. For a spirited defense of the system, but without an acknowledgement of the contradiction with the use of customs in the "native areas," see Kuria, *supra* note 51.

58. KENYA CONST. (Constitution Act, 1963) Ch. V (Protection of Fundamental Rights and Freedoms of the Individual), § 75.

59. *See supra* Section III.

encapsulated as well as words such as "capturing" and "registration" are only a means of mystifying the reality of social reorganization. That social reorganization is ideological because it aims to justify a particular form of capitalist economic development in Kenya. The charge of ideology does not necessarily mean that the social reorganization envisaged was evil, but that the registration process legitimated the preferred social transformation.

Second, I am interested in examining the precise ways a social transformation, envisaged in this way, can be modified, qualified or subverted by social praxis. The social praxis that I examine below is one that was organized in terms of customary norms to challenge the transformation of property relations that would otherwise have been ushered in by the particular interpretation of the registration process. Such an examination both buttresses the argument about the ideological content of the registration process and challenges the conventional neo-classical assumptions about how land registration leads to determinate processes that result in specific economic consequences.

IV. IDEOLOGY IN THE REGISTRATION PROCESS

Duncan Kennedy has argued that ideology influences adjudication by structuring legal discourse and through strategic choice in interpretation.[60] He has further argued that denying the presence of ideology in adjudication leads to political results different from those that would occur in a transparent situation.[61] In other words, the illusion created by the appearance of determinacy contributes to social patterns rather than just mystify them. People are less likely to accept patterns if they understood that the appearance of determinacy is a mask for determination by political actors.[62]

This is most clear in situations where rights are mapped from one legal system to another such as the land registration in Kenya. We can understand this scenario by looking at registration in two stages. The first stage is the exact moment of capturing different actors' claims and mapping them into the Western category. At this stage, rules had to be made about how to adjudicate the different claims by the natives so that *valid* claims could be registered.

Two chronological methods were utilized to adjudicate these claims. Claims were adjudicated pursuant to the Land Adjudication Ordinance.[63]

60. Kennedy, *supra* note 22, at 4.
61. *Id.*
62. *Id.*
63. The Land Consolidation Act, Laws of Kenya Ch. 283 (rev. ed. 1977) (1964).

This entailed adjudicating competing land rights and deciding in what form to register them. While the rhetoric was that customary norms were being used to determine the valid claims, in truth, traditional and legal inventions occurring at this stage aimed at establishing a registration system that heavily favored individual ownership.[64] This does not mean that there was anything inherent in the Western registration system that necessitated preference for the individual owner.[65] Rather, the particular interpretation and implementation of the system created this preference. As others have shown, the idea that there is sanctity of absolute, individual ownership in the Western property holding system is misplaced.[66] The Western system is facially neutral as to which property arrangement the majority prefers.

Yet, there are many ways in which the registration procedures at the adjudication stage displayed a preference for individual ownership. One such involved registering an adjudicated piece in the name of the male head of the household.[67] The claim here was that the male head was customarily the legal landowner. However, no such custom existed. This was an invention given primacy by those who were interpreting the customary norms.[68]

Furthermore, registration of the male head as the owner under the new scheme radically changed the powers, privileges and rights of the other members in the household in a manner hitherto unknown. Registration entailed several consequences: the absolute power of alienation, use and transfer. No such radical powers accompanied ownership in the traditional society. It is not that the act of capturing traditional claims *per se* transformed the quantum of property rights. Rather, the method of mapping and capturing the customary claims induced this effect. The interpretation and registration of the customary and the Western norms had this effect, not the actual act of capturing and mapping the claims from one system to the other. In other words, it would have been perfectly possible to ease into a registration system that captured the customary system of land holding more accurately.[69] However, in the process of capturing these rights, some of the secondary rights in land (e.g. usufructual rights) over which the participants in the economy had invested considerable social capital to maintain, were

64. *See* Nyamu, *supra* note 56.

65. Singer, *supra* note 33.

66. *Id.*

67. Nyamu, *supra* note 56.

68. *Id.*; *see also* ELIZABETH COLSON, TRADITION AND CONTRACT: THE PROBLEM OF ORDER (1974).

69. I say more accurately because I retain my doubts whether it would be possible to be completely accurate given the struggle for meaning in both the Western and the customary systems.

erased. The argument that it was necessary to privilege the individual-oriented aspects of ownership is therefore disingenuous and a product of ideological interpretation rather than an inevitable consequence of the change in system.

The fact that ideological stakes were strong in the particular brand of interpretation given to what it meant to register land in Kenya is captured by historian Wunyabari Maloba:

> Throughout this exercise [land registration], the [colonial] provincial administration [i.e. the civil service], which had a more vested interest in the matter, was guided by political considerations . . . [They] felt they had to take advantage of the emergency to implement what to them seemed like an agrarian revolution: the pooling together of fragmented landholdings to produce one piece of land under individual tenure. It was their belief that unless they pushed hard, more detainees would be released and probably disrupt the program.[70]

In any event, the very nature of customary claims makes adjudication based on such claims extremely problematic and susceptible to ideological capture. This is because the adjudication process falsely assumes that customs can be precisely ascertained as to assign absolute and irreversible rights based on precise verification. Customary norms are based on "recurring mode of interaction among individuals and groups" while legal rights seek to imbue the rights holder with forward-looking entitlements.[71] As such, general statements that present customary norms as rigid and objectively ascertainable are merely ideological: "For every occasion that a person thinks or says, 'that cannot be done, it is against the rules, or violates the categories,' there is another occasion the same individual says, 'Those rules or categories do not (or should not) apply to this situation.' "[72]

Still, there have been some glimpses in the whole system that show discomfort with the way the system attempted the mapping. The examples show that the registration exercise engaged a definite preference. To the extent that this preference was driven by ideological motives, attempts to universalize can often be detected in their contradictory effects at certain critical junctures. As discussed below, I define these "glimpses at discomfort" as legal chips used to challenge and subvert the strong

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70. WUNYABARI O. MALOBA, MAU MAU AND KENYA, AN ANALYSIS OF A PEASANT REVOLT 144 (1993).

71. ROBERTO UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 49 (1976).

72. SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH 39 (1978).

preference for individual ownership in situations where society's norms expect the application of more communal aspects. They are legal chips because they are stratagems that are carried out by official government agencies, economic actors, individual litigants and judges using legal means. The effect is to tamper with the strong individually oriented bias in the registration process. I have identified, without claiming to being exhaustive, at least six ways in which this has happened:

1. The enactment and implementation of Land Control Act;[73]
2. The enactment and Implementation of Land (Group) Representatives Law;[74]
3. The enactment and implementation of Statutes to Regulate Land Use and Development;[75]
4. The discovery and operation of the African trust doctrine by the judiciary;[76]
5. The enactment of specific safety valve laws to regulate statutory sales and foreclosures;[77] and
6. The operation of the Married Women's Property Act of 1882 to regulate statutory sales[78]

In each of the six ways the legal terrain is altered to temper the strong ideological bias for individual ownership displayed in the land registration process. Therefore the choice of the institutional regime to capture different entitlements in land in formal title leaves unanswered the questions of how to administer and who to register in whose name and for which interests. In answering these questions political preferences crowd out other competing interests in the same property. By packaging the preferences as objective or the only available interpretation of the institutional regime the process becomes ideological. The process denies other available choices and is cloaked as universal and objective.

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73. The Land Control Act, Laws of Kenya Ch. 302, revised ed. 1981 (1979).
74. The Land (Group Representatives) Act, Laws of Kenya Ch. 287, revised ed. 1970 (1968).
75. *See, e.g.*, The Coffee Act, Laws of Kenya Ch. 333 (rev. ed. 1979) (1972); The Tea Act, Laws of Kenya Ch. 343 (rev. ed. 1979) (1972).
76. *See* discussion *infra* Section IX.B.4.
77. *See* discussion *infra* Section IX.B.5.
78. Married Women's Property Act, 1882, 45 & 46 Vict., c. 75 (Eng.).

V. THE PARADOX OF THE KENYAN CASE: A PARALLEL PROPERTY SYSTEM

There are five different land registration regimes under which titles to land can be registered in Kenya.[79] Each registration regime is created by one of five registration statutes, namely: Registered Land Act,[80] Government Lands Act,[81] Registration of Titles Act,[82] Land Titles Act,[83] and Registration of Documents Act.[84] Basically, each regime provides for fee simple or analogous ownership of the registered parcel of land.[85] They limit the number of persons who can be registered as legal owners to one parcel of land, although recognizing the trust doctrine in which one legal owner may be registered as a trustee for others.[86]

Differences have emerged in the impact that land registration has had. They revolve not around the five different registration systems but roughly on the category of land, size of holding and the type of person holding the land. Categories of land have emerged which differ from each other by how strictly the legal rules are applied and whether persons claiming rights to the land expect all legal aspects to be strictly applied.[87]

Two institutions have emerged to support or oppose the registration system and a strict enforcement of its rules. A powerful set of economic institutions support and supply the national elite with rhetoric supporting the registration system and its entrenchment through the enactment of subsequent laws to implement it. For land parcels owned by such elite, the registration regimes and laws enforcing individual rights of the registered owner are strictly enforced. Any person dealing with this category of lands expects the formal (statutory) law to be rigidly applied.

A second set of institutions supported by powerful traditional norms and fear of political repercussions enabled the parallel existence of a

79. We should note here that two systems of land registration operate in Kenya: registration of deeds and registration of title. *See supra* note 30 and accompanying text.

80. Registered Land Act, *supra* note 53.

81. Laws of Kenya Ch. 280 (rev. ed. 1984) (1970).

82. *Id.* Ch. 281 (rev. ed. 1982) (1962).

83. *Id.* Ch. 282 (rev. ed. 1982) (1962).

84. *Id.* Ch. 285 (rev. ed. 1980) (1962).

85. Registered Land Act, *supra* note 53, §§ 24, 27.

86. *Id.* §§ 27–28.

87. My thinking in this regard has been influenced by discussions with Duncan Kennedy on the same and were originally inspired by his analysis of the U.S. housing situation. *See* Duncan Kennedy, Some Thoughts About Typical U.S. Low Income Housing Markets in Light of "Informality" Analysis (1996) (unpublished manuscript, on file with author).

semi-traditional system of tenure.[88] This was true even in cases where land was already titled and registered.

The first set of institutions was sponsored and supported by the national elite and Western educated local elite who wanted to protect their large tracts of land. This group yearned for the opportunity to be freed from an ethnic system that extracted "certain goods and services from the modern elite,"[89] because it possessed the ability to allocate and induce sanctions such as the ability to control allocation of land and elite status.[90]

The second set of institutions was sponsored and supported by rural farmers and those set to gain economically from the rural sector. This group included both rural farmers and representatives of international capital and investment groups in Kenya.[91] Various strands of neo-Marxists belonged to this group to the extent that they saw the mode of registration pursued by the independence government as "imperialistic" and "capitalistic".[92] To the neo-Marxists ethnic control of land use and allocation was desirable if only to deny the state the land as a resource to promote capitalism.[93] Further, the continued ability of the rural masses to control the land forestalled the possibility of a local bourgeoisie from

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88. My use of the terms "traditional" and "customary" norms throughout this paper, though unqualified and synonymous, need a clarification. I consciously depart from the common rendering of custom as a static condition and aim to convey that many norms construed as customary in the intense land competition surrounding political independence in Kenya were a mixture of traditional and modern claims. This is not unique to Kenya or Africa. Whenever changes occur in a society, different groups organize their claims and interests in new ways as to benefit from such changes. *See* Elizabeth Colson, *The Impact of the Colonial Period on the Definition of Land Rights*, *in* 3 COLONIALISM IN AFRICA 1870–1960 PROFILES OF CHANGE: AFRICAN SOCIETY AND COLONIAL RULE 193 (Victor Turner ed., 1971) (discussing the changes that occurred in most of Africa and their impact on how different groups and individuals conceived of, evaluated and established their land rights).

I would argue that Douglass North makes the same point in his thesis that individuals and organizations decipher and evaluate the opportunities availed to them by the institutional framework in determining what claims to make or what influence to exert and in what direction for institutional evolution to ensue. *See* NORTH, *supra* note 27. When a change occurs, the individual or an organization is constrained by the institutions in place in deciding what claims to make—but the institutions also shape the way the individual or organization will express her claims. *Id.*

89. Robert Bates, *Ethnicity in Modern Africa*, *in* EAST AFRICAN STUDIES XIV 42 (1973).

90. *Id.*

91. *See* LEO, *supra* note 45, at 17; *see also* Michael Cowen, *Commodity Production in Kenya's Central Province*, *in* RURAL DEVELOPMENT IN TROPICAL AFRICA 121 (Judith Heyer et al eds., 1981).

92. *See* Cowen, *supra* note 91.

93. COLIN LEYS, UNDERDEVELOPMENT IN KENYA: THE POLITICAL ECONOMY OF NEO-COLONIALISM 255–63 (1975).

accumulating enough resources to force peasants out of their land to eke out surplus.[94]

For rural farmers, to the extent that land registration seemed poised to break off the system of inducements and sanctions holding the ethnic group together and enabling it to exert the loyalty of the educated elite, land registration was unwelcome. However, land registration was still desired insofar as it represented freedom from government confiscation.

The interests of international capital and investment groups in Kenya was in retaining and enhancing the system of family holdings, especially in areas where export crops such as tea, coffee, pyrethrum and cotton were grown.[95] These multinational corporations supported policies that promoted rather than diminish the rural, peasant sector for two reasons.

First, international corporations were oftentimes able to shape smallholder production of export crops to their advantage. The government gave dominant players a free hand in regulating the industries they were involved in as a way of ensuring quality control and the flow of foreign exchange fetched in international markets. By controlling aspects of each major agricultural industry, these international corporations were able to control production conditions, thereby extracting surplus from the production by small holder operators.[96] An example from the tea industry exemplifies this point:

> From the 1950s onwards there was a parallel development of smallholder tea cultivation. This scheme was instigated by the colonial government under the Swynnerton Plan to develop cash crops in African areas and it was later funded by two other agencies, the CDC and the World Bank . . . It is clear that from the outset the dominant tea-estate firms, such as Brooke Bond and James Finlay, played an important role in shaping the conditions under which the smallholder tea scheme developed. Brooke Bond, for instance, acted as advisers on tea-growing and also assisted in the linking up of British machinery suppliers and the smallholder tea factories. Before Africans were trained to oper-

94. STEVEN LANGDON, MULTINATIONAL CORPORATIONS IN THE POLITICAL ECONOMY OF KENYA 194–95 (1981). This could also be an anti-Marxist position to the extent that the Marxist tradition is wedded to the notion of historical succession of modes of production. The peasant mode of production is meant to give way to a capitalist society. However, here, it would seem that the Marxists saw a possibility of the peasants surviving the onslaught of capitalism, not giving way to it.

95. Here I refer to multinational corporations operating in the agricultural and financial sectors in Kenya, such as Brooke Bond Liebig, Barclays Bank, Lonrho, George Williamson, Unilever, and James Finlay. Several book length works describe the activities of these corporations in Kenya. *See* LANGDON, *supra* note 94; LEYS, *supra* note 93; NICOLA SWAINSON, THE DEVELOPMENT OF CORPORATE CAPITALISM IN KENYA 1918–1977 (1980).

96. SWAINSON, *supra* note 95, at 259–60.

> ate the factories, the major tea companies in Kenya, Brooke Bond, James Finlay, and George Williamson, provided management and technical assistance to the smallholder factories. This enabled them to directly influence the smallholder tea scheme from the growing to the processing of tea . . . [These multinational companies] were able to work the smallholder tea scheme to their own advantage by controlling plucking standards . . . [They] insisted that the smallholder leaf be of a higher standard than the estates. . . This meant that Brooke Bond was able to purchase the higher quality smallholder tea and blend it with its own lower-quality tea.[97]

Second, some international investment groups were interested in loaning inputs and investment money to small holder rural farmers and using the unharvested crops as collateral. They would then acquire a monopoly right to purchase the products of the crops from the farmers. Most of these farms were being operated as family holdings where loose traditional and customary norms determined tenure arrangements. A strictly enforced registration system ousting traditional or customary rights to land would have enabled entrepreneurial Kenyans to acquire land and establish large farms not dependent on investment groups for input credits or marketing abilities.[98] As indicated below, investment groups played heavily on the government's dependence on these crops for its foreign exchange. In particular, they influenced the law affecting major crops that prevented farmers from removing their acreage from the production of these crops without express government permission.[99]

The dual system of tenurial enforcement can be explained as a compromise between the two groups. The modern, educated and political elite desired to obtain their own parcels of land and break free from ethnic sanctions. The rural farmers desired to maintain their interlocking

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97. *Id.* at 257–58.

98. This system acted as a bulwark against expected capitalist development since the international investment groups formed a loose alliance with the rural peasant farmers. This trend led Christopher Leo to remark that capitalistic development is proceeding in Kenya, "not upon the rubble of a disintegrating peasant society, but upon the firm and well-established foundation of a peasant mode of production that is still developing and expanding." LEO, *supra* note 45, at 7. In other words, the alliance between the peasants and the international capital was facilitating the development of the peasant sector at the expense of rising capitalist middle class that would otherwise profit from dealing with peasants.

99. *See* The Coconut Preservation Act, Laws of Kenya Ch. 332 (rev. ed. 1983) (1962) §§ 4, 9; The Coffee Act, *supra* note 75, §§ 17, 38(g); Coffee (Cultivation and Processing) Rules, Laws of Kenya (rev. ed. 1979) (1972) § 3(1) (codification of Legal Notice No. 94/1962, 119/1963, 622/1963, 339/1966); The Cotton Lint and Seed Marketing Act, Laws of Kenya Ch. 335 (rev. ed. 1967) (1962) § 41; The Pyrethrum Act, Laws of Kenya Ch. 340 (rev. ed. 1978) (1962) § 12; The Sisal Industry Act, Laws of Kenya Ch. 341 (rev. ed. 1970) (1962) §§ 13(a), 14; The Tea Act, *supra* note 75, § 8.

political and economic systems with embedded tenure arrangements. To a large extent, the category of land affecting the modern elite was different from that affecting the rural farmers. Hence, the modern elite, as the major political decision-makers, could easily condone the dualism at low risks.

This dualism operated only at a practical level. Technically all lands, especially registered lands, remained under one of the five registration regimes referred to above. In practice, whenever ownership, possession or other entitlement conflict arose, it was resolved according to this dualistic scheme. Generally for lands perceived to be governed by the customary norms, those norms were closely respected despite the black letter of the law. Conversely, for those lands perceived to be within the moderns category, legal rules governing registered lands were strictly enforced. Aside from maintenance of this dualism, specific laws designed to concretize the dualism were enacted. In addition to the Tea and Coffee Acts referred to above,[100] other notable laws that contributed to maintenance of the dualism include the Agriculture Act,[101] the Land Control Act[102] and the Married Women's Property Act.[103] Below, I refer to both of these aspects of selective interpretation and enforcement and the enactment and application of the laws as "legal chips" used to stabilize or destabilize the dual system.[104]

In those few cases when either category was challenged using norms from the other (i.e., where traditional norms were used to challenge ownership in the modern category or rigorous and legalistic registration rules used to challenge or enforce ownership in the traditional category), the courts generally thwarted such attempts. In the rare case, however, a court decision threatened to upset this parallel system, such as the 1998 High Court *Salama Holdings Case*. In this case the High Court ruled that an allocation of land to a private investor was null and void on public policy grounds.[105] This case raised a furor among business people because the person to whom the land had originally been issued had sold it to a third party. The High Court ruled that since the allocation was void in the first place, the third party, despite being a *bona fide* purchaser, had no right of possession to the land. The third party could only sue the seller for recovery of the sale price. In reaching its decision, the High

100. *See supra* note 74.

101. The Agriculture Act, Laws of Kenya Ch. 318 (rev. ed. 1986) (1980).

102. The Land Consolidation Act, *supra* note 63.

103. The Married Women's Property Act of 1882, *supra* note 78 is an English Act of Parliament applicable in Kenya as a "statute of general application" pursuant to the Judicature Act of Kenya. The Judicature Act, Laws of Kenya Ch. 8 (rev. ed. 1988) (1983) § 3(1).

104. *See* Kennedy, *supra* note 87.

105. *Salama Holdings Case*, HCCC No. 3798 of 1998, Msagha-Mbogholi, J.

Court basically reduced the precise wording of the Registered Titles Act to nothing. The Act stipulates:

> A Certificate of Title issued by the Registrar to a purchaser of land upon a transfer or transmission of land .... is to be taken by the courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject only to the encumbrances, easements, restrictions and conditions contained therein and endorsed thereon ... [T]he title once issued would not be subject to challenge on the ground of fraud or misrepresentation to which he was proved to be party ...[106]

By raising arguments about public policy, the Court erased the text of the statute and instead created new rules.[107] However, this was a case in which such a translation of the statutory text was *de trop*. The Court of Appeal promptly overturned the case.

Similarly, when a litigant attempts to claim a right in the 'rural farmers' category based on a strictly textual understanding of statutory text, she is likely to be met with forceful translationist arguments. Each system thrives on its own interpretation of rules. Yet both are governed ostensibly, by the same statutes. The result is a somewhat stable system. It is the possibility of upsetting this parallel system that many, including the economic investors, are worried about when they speak of "tenure insecurity" in Kenya, and not the existence of the parallel system itself.[108]

Why has this informal bifurcation arisen and how does it continue to flourish? To answer this question, I first identify the reasons put forward to support land registration in Kenya and elsewhere and contextualize these reasons in the specific case of Kenya. We will then see how these rationales were proved wrong on the ground in Kenya and how the legal

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106. Registered Land Act, *supra* note 53, § 24.

107. Courts often refer to "immanent" rules of interpretation when they seek to "translate" the meaning of a statute beyond that which the plain text of the statute would seem to permit. *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 443 (1995); Frank Michelman, *A Brief Anatomy of Adjudicative Rule-Formalism*, 66 U. CHI. L. REV. 934, 935 (1999).

108. This is a universal fear of investors, not a product of the parallel system. Even where no such dualism exists, there is always a fear that the rules may be rendered differently in interpretation hence causing confusion. Rules are interpreted consistently, not because of the natural qualities of the norms being interpreted, but because of the community of interpreters who thwart alternative interpretations. For a detailed discussion, see Section IX.

This interesting trend merits further attention because it modifies some of the very widely held neo-classical teachings on the market and the impact of legal institutions on economic development. For a general discussion of agrarian development in Kenya and class formation exists, see ROBERT BATES, BEYOND THE MIRACLE OF THE MARKET: THE ECONOMY OF AGRARIAN DEVELOPMENT IN KENYA (1989). *See also* LEO, *supra* note 45.

regime impacted social norms and institutions to produce this bifurcation.

VI. THE RATIONALE FOR LAND REGISTRATION

Five different, but related reasons for why registration was a priority in terms of economic development can be discerned from literature on the subject.[109]

First, it is argued that the customary tenure system was communal and therefore inefficient because it led to the tragedy of the commons.[110] The communal customary system was associated with improper land use because in this system, it was argued, different persons have the right to use the land. Exercise of these rights by all the persons who possess them creates interdependencies that remain outside the explicit calculus of the choice makers. Since none of the rights-holders can exclude the others, they impose external diseconomies on others who hold similar rights.[111] This leads to overuse and inefficient use of the land. In making this argument a presumption was made that traditional African customary systems were indeed communal.[112]

This argument is supplemented by the classical liberal argument for private property as an "essential element for insulating the individual from the intrusion of the State"[113] and, in this case, the traditional society. The argument is suffused with the efficiency perspective. Formal registration of title enhances security of tenure since it eschews fluidity in tenure arrangements among native Kenyans. It was thought that registration of individual titles would remove uncertainty in ownership, thereby reducing litigation and enhancing security.[114] The basic assumption in these arguments is that private and individual land holding would encourage native Kenyans to change their inefficient and irrational land

109. *See* Swynnerton Plan, *supra* note 47; *see also* Byamugisha, *supra* note 5 (discussing the World Bank studies on the link between land registration and economic performance).

110. Swynnerton Plan, *supra* note 47.

111. This is the standard rendition of the tragedy of the commons. Hardin, *supra* note 11, at 1244–45. The Swynnerton Plan heavily relied on this and similar arguments to advocate for a reform in the tenure holding system. Swynnerton Plan, *supra* note 47.

112. This assumption has since been dispelled and falsified. *See generally* ANGELA CHEATERS, IDIOMS OF ACCUMULATION: RURAL DEVELOPMENT AND CLASS FORMATION AMONG FREEHOLDERS IN ZIMBABWE (1984) (analysis of the socioeconomic structure of the African freehold farmer and their role in agricultural production and development).

113. Swynnerton Plan, *supra* note 47. Similar arguments have been made by liberal approaches to property rights. *E.g.*, CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1941).

114. Instructively, the registration statutes precluded the possibility of challenging a first registration even on grounds of fraud or mistake. *See* The Registered Land Act, *supra* note 53, § 143.

utilization techniques. As van Meerhaeghe remarks, "further economic growth calls for a change in mentality. The conservatism and illiteracy of the agricultural population often prove an obstacle to any progress in that sector."[115] As I demonstrate below, however, the customary tenure arrangements were neither communal nor inefficient.[116] Further, the argument that land registration would ensure security and less litigation was not borne out in practice. This is due in part to the fact that the security land registration is thought to bring, does not follow from registration *per se* but from a particular interpretation of rules related to registration.[117]

A third reason stated for land registration is the posited link between land-ownership security and unit productivity. This argument assumes that land registration enhances tenure security. Tenure security accruing from land registration "removes uncertainty on whether or not landowners can reap the benefits of long term investments they make such as on-farm tertiary irrigation systems, drainage, soil and water conservation, and construction of a rental house."[118] The argument is that positive expectations about exclusive enjoyment of returns earned from investment induces land owners to make land-based investments in agriculture and non-agricultural investments.[119] The effect is increased demand for investment which in turn boosts demand for complementary inputs such as labor and agricultural inputs including credit.[120]

A related argument is that land registration of titles would produce title documents for use as loan collateral for individual farmers, leading to an increase in credit supply. Land registration facilitates more precise identification of landowners, thus reducing moral hazards and adverse selection in the credit market. This reduction of moral hazards and adverse selection leads to less transaction and information costs. These reductions are passed on to the borrower and investor. Since economic development involves moving resources from savers to investors, obtaining loans is simplified, hence contributing to economic development. Loans taken using the titles as collateral could be used for further investment in the farm. Moreover, an increased demand for investment

115. M.A.G VAN MEERHAEGHE, INTERNATIONAL ECONOMIC INSTITUTIONS 153 (Longmans, Green & Co. Ltd. ed., 1964).

116. *See also* Shem Migot-Adholla, *Indigenous Land Rights Systems in Sub-Saharan Africa: A Constraint on Productivity?*, 5 WORLD BANK ECON. REV. 155 (1991); Nyamu, *supra* note 56.

117. *See* discussion *supra* Section III.

118. Byamugisha, *supra* note 5, at 5.

119. *Id.*

120. *Id.*

could cause an increase in labor and technology, a positive externality.[121] Security of tenure and easy alienability of land leads to the creation of a dynamic land market. This land liquidity promotes efficiency by encouraging land to be sold to the person who values it most and encouraging people to sell land they do not need since they would be able to easily reenter the land market. In addition, registration of individual titles reduces transaction costs and information asymmetries making mutually beneficial exchanges of property rights easier and more efficient.[122]

Another land registration rationale involves land liquidity, deposit mobilization and investment linkage.[123] The argument is that land registration transforms land into a liquid asset thereby unlocking the resources embedded in it for use directly in investment or indirectly through financial intermediaries. Registration enhances liquidation by making the land securely and efficiently transferable through the land market.[124]

Lastly, the link between labor mobility and efficiency is based on the efficiency of redeploying labor released by the use of more efficient technology on the land. The release of this labor results in more useful and efficient contributions to other sectors of the economy.[125]

VII. CONTEXTUALIZING THE RATIONALES

A. *The Impetus for Land Registration and Titling in the Pre-Independence Period*

One of the most acknowledged facts in Kenya's transition to independence is the centrality of land grievances in the *Mau Mau* war.[126] Less acknowledged, however, is how land reform and choice of economic policies were packaged so as to produce circumstances to blunt emerging radical African politics.[127]

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121. *Id.*; Gershon Feder & Akihiko Nishio, *The Benefits of Land Registration and Titling: Economic and Social Perspectives*, 15 LAND USE POL'Y 25, 26–28 (1999).

122. Klaus Deininger & Gershon Feder, *Land Institutions and Land Markets* (World Bank Pol'y Res. Working Paper No. 2014, 1999), *available at* http://lnweb18.worldbank.org/ESSD/essdext.nsf/24DocByUnid/E765B7E36D16149085256B990063A21A/$FILE/landinstitutionsandmarkets.pdf (last visited Apr. 8, 2004).

123. Byamugisha, *supra* note 5, at 10.

124. *Id.*; *see* DE SOTO, *supra* note 3.

125. *See* Byamugisha, *supra* note 5, at 11.

126. *See* Ghai & McAuslan, *supra* note 50; Maloba, *supra* note 50.

127. For compelling accounts of this aspect of the political and economic aspects leading to Kenya's independence, see MALOBA, *supra* note 70; H.W.O OKOTH-OGENDO, TENANTS OF THE CROWN: EVOLUTION OF AGRARIAN LAW AND INSTITUTIONS IN KENYA (1991); SORRENSON, *supra* note 48. However these aspects are typically ignored in popular discourse on Kenya's history.

The reserve policy[128] precipitated serious problems of landlessness, especially in Kikuyu country and in the Kavirondo, that culminated in the Mau Mau Revolt.[129] The restlessness was fuelled by the fact that land shortage forced families to be more dependent on waged employment. With time, flagrant social differentiation became evident in the rural areas as certain homesteads and communities were in a position to accumulate more than others.[130] The colonial economy of expansion of settler production based on contraction of native production and increased restriction of the peasant economy was recipe for open revolt from the masses.

The colonial response to the growing unrest was co-option. The various policy strands were put together in a comprehensive government policy document by the then Assistant Director of Agriculture, R. J. M. Swynnerton.[131] The government policy culminated in The Swynnerton Plan.[132] In the Swynnerton Plan, the problem facing African agriculture was construed as the consequence of African land tenure system and not land shortage caused by colonial expropriation. By eschewing the obvious causal relationship between the colonial occupation and the colonial land policies to the problems facing African agriculture, and instead arguing that the basic problem was the indigenous tenure arrangements, the colonialists were able to recommend modernization and reform to remove the constraints supposedly posed by the African tenure arrangements. Unsurprisingly the Swynnerton Plan proposed individualization of tenure among the Africans as the panacea:

> Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer a unit of land and a system of farming whose production will

128. *See supra* note 48 and accompanying text.

129. Kikuyu country is in today's Kenya central province in the areas around Mt. Kenya. Kavirondo refers to the areas traditionally occupied by the Luo ethnic group, especially the area around Lake Victoria in Nyanza province. See DAVID MAUGHAN-BROWN, LAND, FREEDOM AND FICTION (1985), for a standard account of Mau Mau Movement and the centrality of land in the struggle. Both Maloba and Leo have good accounts of the Mau Mau war and political and economic events that shaped the war and the independent Kenya. *See* MALOBA, *supra* note 70; LEO, *supra* note 45.

130. *See* GAVIN KITCHING, CLASS AND ECONOMIC CHANGE IN KENYA: THE MAKING OF AN AFRICAN PETITE-BOURGEOISIE 1905–1970 55–56 (1980). By making this point, I do not claim African societies were egalitarian. Rather, I imply that the indigenous systems/norms in place in pre-colonial times that facilitated a balance through inter-generational transfers and kinship ties had been removed by the colonial incursion. Therefore, differentiation was not only exacerbated but also became more visible. Robert Bates has convincingly made this argument. *See* Bates, *supra* note 108, at 31.

131. *Land Utilization and Settlement: A Statement of Government Policy* (Colony and Protectorate of Kenya, Sessional Paper No. 8, 1945).

132. Swynnerton Plan, *supra* note 47.

> support his family . . . He must be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security against such financial credits as he may wish to secure . . .[133]

However, the real aim of the Swynnerton Plan was not to individualize land but to create landed African gentry that would participate more soundly in intensive and large-scale agriculture thereby creating a stable and conservative middle class to provide a bulwark against nationalism and the radical policies assumed to accompany it.[134] By arguing that progress was conditional upon tenure reform, the Swynnerton Plan merely affirmed that time was ripe for major reorganizations in the political economy of colonialism.[135] This explains why the leitmotif of the Swynnerton Plan was *tenure reform* rather than *land reform*.[136] Such a construction justified the reforms to the African peasantry while maintaining the pattern of land distribution. Three facts demonstrate this point. First, the Swynnerton Plan only targeted peasants within the Mau Mau districts.[137] Second, even there, it was directed at a select group of educated, "progressive" farmers already engaged in the production of settler crops the emerging local elite.[138] Third, the colonial government targeted and seized land belonging to individuals involved with the independence struggle and placed it in the pool of common land to be redistributed.[139] To this extent, individualization of tenure was a political tool that came in handy to blunt Kenyans' demand for land redistribution.[140]

It ought to be borne in mind that this time period was the decolonization era in international law.[141] While it was clear to the colonialists that they had to leave Kenya, it was imperative that to carry out decolonization in such a way that the established colonial economic and social systems were neither disturbed nor altered. The overriding aim was to retain the economic basis of colonialism.[142] For this strategy to come to

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133. *Id.* at 9.
134. M.P.K. SORRENSON, LAND REFORM IN THE KIKUYU COUNTRY 118 (1967).
135. OKOTH-OGENDO, *supra* note 127, at 71.
136. *Id.*
137. *Id.*
138. *Id.*
139. MALOBA, *supra* note 70, at 144.
140. *Id.*
141. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).
142. Maloba, *supra* note 50, at 197. The then Governor of Kenya is reported to have commented that the British Empire "is not breaking up, but growing up." A resolution on the grant of new constitutions to colonial territories stated "the increased volume of inter-imperial

fruition, it was necessary for colonialists to place power in the hands of the collaborating emerging local elite whose stake in the status quo would safeguard the link between the former colony and the imperial power by espousing conservative economic and social policies. First, the conservative elite had to be created; this was the function of the tenure reforms of the 1950s.

The effect of the tenure reforms was the creation of a class of conservative nationalists who, though eager for political independence, were not inclined to support radical policies or politics. This way the problem of the Mau Mau uprising was skillfully navigated and the stage set for cautious conservative politics.[143] The colonialists had succeeded in their primary approach to systematically diffuse political nationalism by creating a social class within the African ranks with similar interests, aspirations and ideals as those of the ruling colonial elite.

Thus, it is clear that the real objective of the registration exercise in Kenya at the height of the Mau Mau revolt was massive social reorganization. However, various government policy papers, including the loan justifications to the World Bank, justified the land registration exercise in economic terms. These two positions are not mutually exclusive, but mutually reinforcing. The idea was to create a landed African petty bourgeois to serve the capitalist economic development path envisaged while politically blunting radical African political claims.

B. *The Impetus for Registration and Titling in the Post-Independence Period*

A more difficult question is why the independent Kenyan government accepted land registration on the same terms. I attempt three responses. The first relates to the theme of social re-organization but is less stark—at least in rhetoric. The independent government was interested in economic development, defined in terms of modernization and industrialization.[144] To bring about this development, both conservative and radical wisdom held it was necessary to capture the peasants to promote meaningful peasant contribution to the economy. This need was brought about by the fact that the peasants straddle two economies—a consumption economy and a cash economy—in a way that defies the

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trade resulting from an expanding commonwealth would assist in solving economic problems." *Self-rule in Colonies the Only Way*, E. AFR. STANDARD, Oct. 13, 1956, at 1.

143. OKOTH-OGENDA, *supra* note 127, at 69–77.

144. *See* Robert Bates, *Some Conventional Orthodoxies in the Study of Agrarian Change*, 36 WORLD POL. 234 (1984).

dictates of both.[145] By straddling two economies, peasants are able to obtain a measure of security and freedom from the both market and the government. This is exceedingly frustrating for any government whose prime objective is modernization. Since the peasants have an acerbic ambivalence toward the market, it is foolish to expect them to obey the market's laws—and often they do not.[146] It was therefore the government's goal to force peasants into a position where they must obey both market and government dictates.

Second, the independence bargain in Kenya was supported by departing colonialists and the national elites. Departing colonists supported the land registration bargain because they wanted full compensation from the government for their large parcels if they chose the exit option at the time of independence. The national elite lent their support because they were quickly buying off the large tracts of land being sold by departing settlers.

A third factor was the paradoxical pressure for the land registration bargain from peasants and other small holder agriculturists who wanted to guarantee their parcels against feared governmental confiscation in the future. Most of these peasants had lived during the time when the colonial government had grabbed their former lands and wanted assurance that the new government would not have an opportunity to do the same.

VIII. EXPLAINING THE BIFURCATION

A. *Institutional Framework*

As hinted in Section III above, land registration did not actually usher in all the envisaged changes: there was no major social re-organization, no spectacular break-up of the traditional African family, and no British-revolution-style enclosures and sales among the small scale holders of land.[147] Why did the radical new registration regimes not, in fact, cause the envisaged massive social re-organization and re-

145. The terminology and thoughts of "capturing the peasant" are borrowed from Christopher Leo. LEO, *supra* note 45, at 19. The metaphor of peasants *straddling* two economies is originally from Cowen, *supra* note 91.

146. There is need to clarify an often confusing theme here. Stating that peasants are ambivalent toward the market and cannot always be counted on to obey its laws differs from doubting that peasants are rational economic actors. It affirms the fact, which may seem irrational, that, from the peasant's position, it is at times *more* rational for them to make decisions from a purely neo-classical view. For examples of such situations see Robert Bates & Amy Farmer, *Community Versus Market: A Note on Corporate Villages*, 86 AM. POL. SCI. REV. 457 (1992).

147. *See* Kang'ara, *supra* note 33.

structuring? The answers to this question explain the bifurcation of the property system at the practical level.

One of the two lessons Robert Bates drew from his study of agrarian development in Kenya is that politics matter in determining the degree to which efficient outcomes are attainable.[148] Politics create the conditions conducive for parties to bargain and reach efficient and mutually beneficial outcomes. However, this study of land registration in Kenya confirms that the formal system of property supplies only one part of institutions that shape the conditions to facilitate attainment of these mutually beneficial agreements. The success of the system of property rights established in Kenya depended on the way other social norms would impact formalized norms. On the other hand, this impact depended on how the different actors organized and deployed the appropriated social norms.

The actual experience of land registration in Kenya bears out Bates' conclusion in a particular sense. It shows the inefficacy of relying on formal rules as the only determinant of how a market is established and maintained. It emphasizes the importance of recognizing formal legal rules as only one of many social institutions that determine economic performance. In Kenya, massive and elaborate social norms prevented an immediate emergence of a land market that would have spurred on the emergence of a new social order.

Second, Bates concluded that in a world of positive transaction costs, political institutions supply the incentives that lead to the organization of interests.[149] They thereby help determine which economic interests become politically effective interests. This would explain why, despite a formal title registration for almost all land in Kenya, effective support for the existence of parallel customary norms regulating specific aspects of land use and access remains.[150] The stark legal land registration regime in Kenya was balanced by a judiciary willing to use various legal devises to temper the excesses of the system.

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148. BATES, *supra* note 108.

149. *Id.*

150. By referring to "customary norms," I do not claim there are precise ways of establishing norms which represent a certain culture. I agree with Nicholas Dirks that through social practices, people in society are constantly negotiating questions of power, authority and the control of the definitions of reality. *See* Nicholas Dirks, *Introduction* to CULTURE/POWER/HISTORY: A READER IN CONTEMPORARY SOCIAL THEORY 4 (Nicholas Dirks et al eds., 1993). This is as true of cultural norms as it is true of the interpretations of legal norms, including the merely technical issues. *See* Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law* 1985 WIS. L. REV. 565 (1985); Duncan Kennedy, *The Political Stakes in "Merely Technical" Issues of Contract Law*, 10 EUR. REV. PRIVATE L. 7 (2002).

B. *Legal Chips as Stabilizing or Destabilizing Factors*

The parallel system enabled security of tenure by selective use and disuse of legal and social norms to maintain and tolerate particular property rights. Among peasants, though land was formally registered under one of the five registration regimes mentioned above, in practice, other forms of social and traditional claims and control were accepted and tolerated notwithstanding the very precise and total rights bequeathed by formal registration. What is more is that, to a large extent, these forms of traditional claims and control were given the force of law, notably by judicial interpretation of the various registration statutes. Thus, whenever a landowner tried to use registration to shut out other traditional claims, both societal sanctions and legal hurdles were sprung on his path.

Various persons legally and successfully used the following seven techniques to freeze attempts by persons to break free of such societal control of land. Courts and other administrative agencies used these means to uphold customary norms related to land-ownership at the expense of the rights imbued by the legal titles under the registration statutes.

1. The Enactment and Implementation of the Land Control Act

Though the land registration regimes arguably provide for the whole cluster of rights that Honoré described in his paradigm case,[151] the Land Control Act[152] was enacted for the singular purpose of restricting and controlling the right to freely alienate land in agricultural areas. The preamble states that the Act is "[a]n Act of Parliament to control the transfer of Land in certain areas and for purposes connected therewith."[153]

The Act creates a Land Control Board at the local (village) level that is meant to vet all land transfers. The law permits the Land Control Board to deny approval to transfers that in some way trammel customary law by being substantively "unjust". In practice, however, the Land Control Board distinguished between the two categories of land, accepting a faithful interpretation of the registration regimes to one and a translationist interpretation of the registration statutes to the other. Thus, the Land Control Boards were able to act within their statutory mandate yet main-

151. A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE: A COLLABORATIVE WORK 107–26 (A.G. Guest ed., 1961) (specifying the incidents that constitute the bundle of rights of ownership of land as: 1) the right to possess; 2) the right to use; 3) the right to manage; 4) the right to the income; 5) the right to the capital; 6) the right to security (immunity from expropriation); 7) the power of transmissibility; 8) the incident of absence of term; 9) the prohibition of harmful use; 10) liability to execution; and, 11) the residual rights on the reversion of lapsed ownership rights held by others.

152. The Land Control Act, *supra* note 63.

153. *Id.* pmbl.

tain the dual system of land-holding depending on the category of land in question.

As Okoth-Ogendo explains, the theory of land control in the small-farm areas was initially social. Specifically, the state had a duty to prevent the improvident from exercising their rights to their own detriment.[154] However, the rationale for land control throughout the whole country has become more political and economic than social. Okoth-Ogendo states two ways in which the Land Control Boards exercised their discretion to deny approval for land sale transactions: (1) where family members have not approved the transaction be it a sale, transfer or a subdivision; and (2) where the vendor cannot adequately demonstrate alternative means of subsistence for his or her family in the event the property in question is sold or subdivided.[155]

Given these two operational observations, the Land Control Board exhibited some form of paternalism toward the seller by ensuring that a landowner only sold land after rational calculation of his interests and those of his family. This kind of regulation was borne out of the state's recognition that an individual landowner's actions had repercussions beyond that individual. Through the Land Control Boards, the state sought to establish public rights in the private property.

One could also view the Land Control Board as an efficiency-enhancing regulatory board. Rather than give each person with an interest in a parcel of land the right to exclude by formal registration, the statute aimed to eschew the problem of inefficient under use by giving legal rights to only one person. However, discretionary power was granted to Land Control Boards to enforce the equitable unregistered rights of the "equitable" owners at their behest. In exercising their discretion, the Land Control Board could then address economic and other policy issues and appropriately address the problem of the anti-commons.

On the other hand, empirical studies have shown that attitudes regarding charges and mortgages represent a different set of values. In almost every occasion consent to charge or mortgage property or to act as a guarantor was granted.[156] This was due to the fact that most Land Control Board members, as government appointees or members of the elite and educated middle class, accepted the state favored economic argument that the flow of credit to agriculture or commercial enterprises was beneficial and should be encouraged. Since most property owners

154. H.W.O. Okoth-Ogendo, *African Land Tenure Reform, in* AGRICULTURE DEVELOPMENT IN KENYA: AN ECONOMIC ASSESSMENT 152, 172–74 (J. Heyer et al eds., 1976).

155. *Id.* at 174.

156. *Id.*

seeking credits tended to be members of the educated, elite middle class, it follows that this dynamic at the Land Control Board merely entrenched the dual system.

2. The Enactment and Implementation of Land (Group Representatives) Law

The Land (Group Representatives) Act provided for incorporation of representatives of groups who have been recorded as landowners under the Land Adjudication Act.[157] Under the provisions of this Act, the land may be registered in the names of group representatives after incorporation.[158]

This legislation did not introduce a new registration system but was meant to enable certain ethnic groups in Kenya—primarily the Maasai, Samburu, and Somali—to register their land and hence reap the fruits of registration without fundamentally changing the customary ways of holding land.

This Act exemplifies land reform that is respectful of community values dear to certain ethnic groups.[159] It applied in most semi-arid parts of the country and permitted individuals to incorporate themselves into a group, elect group representatives who are then registered as the owners of the land jointly owned by the group as a whole. The land jointly owned by the group is then used by all group members under the direction of the group representatives, presumably as governed by the customary norms of the group.[160] Therefore, the use, sale, transfer, mortgage or any other transaction of the land or any part thereof, is, for practical purposes, subject to the customary norms of the group—although technically the land is registered in the name of the group representatives as trustees for the group.[161]

3.The Enactment and Implementation of Legislation Regulating Agricultural Exports

Another factor that frustrated the emergence of a vibrant land market was the significant presence of international capital that stood to gain by a flourishing peasant economy. The independent government was eager

157. The Land (Group Representatives) Act, *supra* note 74.

158. *Id.* §§ 5, 6, 7 and 8.

159. *See* Joel Ngugi, *The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa*, 20 WISC. J. INT'L. L. J. 297 (2002).

160. The Land (Group Representatives) Act, *supra* note 74, § 18.

161. For some of the problems associated with this system, see Ngugi, *supra* note 159, at 329; Xavier Péron, *Land Privatization and Public Appropriation of Land Among the Maasai in Kenya: A Status of Double Deprivation* (Fr. Inst. for Res. in Afr., Working Paper No. 22, 1995).

to control the agricultural export industry for two reasons. First, control of the industry would allow the government to more easily harness an agriculture industry surplus for purposes of re-investment in accordance with the import substituting industrialization policies.[162] This was because the government regulated the sale of export crops to more easily levy taxes on the farmers. Second, regulation of the planting, cultivation, processing and sale of export crops allowed the government to assure foreign agro-industry investors of continued business, profits, supplies, and quality of produce. Thus, international capital present in Kenya with a stake in agro-industry strongly supported individualization of tenure to the extent that it meant that individual farmers would put their parcels of land under export crops, which would, in turn, lead to increased supplies of export crops produce. Hence, a somewhat unwitting alliance between international capital and the peasants growing export crops arose.

This alliance, by its operation, frustrated the emergence of a potential local bourgeoisie and thus the emergence of a land market in two ways. First, specific restrictions on sale and use of land intended to ensure return of investment by international capital were written into law. These were mainly restrictions in the form of laws regulating agricultural industries, production, marketing and export of major agricultural exports such as coconut, coffee, cotton, pyrethrum, tea, and sisal. These included laws prohibiting the planting of crops without a license from a state minister or the appropriate board.[163]

The converse of these prohibitions had the real bite. These statutory provisions stipulated that the responsible minister or board may grant or deny application to plant any of these export crops, and in granting may impose such conditions as they fit. One condition commonly imposed has been a restriction on the power of the landowner or the license grantee to uproot any crop or cease cultivation of a particular crop.[164] As a result of these laws, the rights of an individual landowner cultivating of any of these crops to use the land as he or she pleases were seriously curtailed. At the same time, however, these regulations benefited international capital by statutorily ensuring supplies and quality of produce for processing and export.

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162. Ngugi, *supra* note 159, at 345.

163. The Coconut Industry Act, Laws of Kenya Ch. 331 (rev. ed. 1983) (1962) § 8; The Coffee Act, *supra* note 75, §§ 17, 38(g); The Coffee (Cultivation and Processing) Rules, *supra* note 99, § 3(1); The Cotton Act, *supra* note 99, § 41; The Pyrethrum Act, *supra* note 99, §12; The Sisal Act, *supra* note 99, §§ 13(a), 14; The Tea Act, *supra* note 75, § 8. Most of these provisions empowered the minister to, *inter alia*, delineate the areas in which the crops may be planted, as well as regulate and control the varieties, cultural conditions, method of production, quality of the produce, and control of pests and diseases.

164. *See supra* note 163 and accompanying text.

4. The Discovery and Operationalization of the "African Trust" Doctrine by Judges

In cases where a person is registered as a sole proprietor of land but only registered as such because the other family members acquiesced to registration or were ignorant about its effects, the courts have been willing to construct a trust doctrine which operates to deny the person the rights of a sole proprietor. Courts have declared that the registered owner holds the whole or part of the land for a person entitled to the land under customary law and subsequently ordered the land to be transferred to such person. A classic example of use of the African trust doctrine as a remedy for injustice caused by the adjudication of land is *Alan Kiama v. Ndia Muthunya & Others*.[165] In this case, a clan agreed, in 1959, to register a 47-acre plot of clan land in the name of one clan member. The agreement was that the land would later be subdivided into individual holdings for each family head in the clan. Although the clan members lived on the plot, the registered landowner technically remained the absolute landowner. In 1972, the registered landowner decided to exchange the land for a fifteen acre plot. The new owner brought suit for ejectment of the clan members. The High Court ruled in favor of the clan holding that the registered owner had held the land in trust for the clan members. On appeal, the Court of Appeal affirmed the decision holding that a "resulting trust arose out of the relationship of the parties" and "the circumstances of the case."[166]

S.F.R. Coldman aptly summarized the implication of this trust doctrine:

> Whatever the legal merits of this decision, its social and economic implications could be far reaching. If the appeal had been allowed [i.e. if the court had not implied a trust in operation], large numbers of people would have been rendered landless . . . On the other hand, it should be remembered that one of the purposes of the land registration program was to create a land market and to enable the better farmers to acquire land even at the cost of making others landless. The effect of the ["discovery"

165. CAK [Court of Appeal of Kenya] C.A. No. 42 of 1978 (as yet unreported).

166. Under English law, a voluntary conveyance of land into the name of another will result in a trust for the grantor, at least where there is evidence of such intention of the parties. Hodgson v. Marks & another, 2 All E.R. 684 (1971). A Kenyan case confirming the "trust" device is Muthuita & another v. Wanoe & others, [1982] LLR 41 (CAK), No. 12/82. However, this line of thought is balanced by another case holding that once the title of the land owner is registered, the land ceases to be subject to customary law and is governed instead by a complete code of substantive law under the Registered Land Act, and that customary rights of occupation or use are not overriding interests under that statute. *See* Esiroyo v. Esiroyo, [1973] E. Afr. L. Rep. 388.

> of the trust doctrine] is that whenever a person is registered as the absolute owner of land but on the understanding that other persons (usually family members) are to retain a beneficial interest in the land, their rights will not be overridden on any dealing with the land so long as they are in actual occupation or possession, and sales, leases, mortgages of the land will therefore become virtually impossible, unless all such persons concur. Registered conveyancing, far from being safe and simple, becomes dangerous and complex, and the courts, in attempting to discover and give effects to the understandings on which persons are registered as owners, are effectively re-adjudicating land rights.[167]

5. The Enactment of Specific "Safety Valve" Laws to Regulate Statutory Sales and Foreclosures

A judicial willingness to curtail the statutory powers of sale of chargees or mortgagees where courts felt that permitting such sale would violate commonly held notions of justice or fairness emerged at this time. In doing this, the courts created a number of jurisprudential devices of which the following list is only representative:

- A strict adherence to the doctrine of notice;[168]

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167. S.F.R. Coldham, Case Note, *Alan Kiama v. Ndia Mathunya and Others*, C.A. No. 42 of 1978 (as yet unreported), 1983 J. AFR. L. 62, 64 (1983).

168. This operates by placing undue burden of proving notice on the mortgagee or chargee. For example, the chargee or mortgagee must prove not only that they served the notice effectively (for example, not by regular mail), but also that the notice clearly stated the number of days in which the chargor or mortgagor must redeem the property. *See, e.g.*, Trust Bank Ltd. v. Kotedia, [2000] LLR 2382 (CAK), No. 61/00. In *Ochieng & another v. Ochieng & others*, the court required production of proof of posting to sufficiently discharge the burden of proving service of notice. Ochieng & another v. Ochieng & others, [1995] LLR 393 (CAK), No. 148/95. Four years later the same court distinguished posting "under certificate of posting" from "registered post" and held that a notice served through the former avenue was not validly served. *See Trust Bank Ltd. v. Kotedia*, *supra*. More stringently, in *Okoth v. Trust Bank Ltd.*, an injunction was issued against the exercise of the statutory power of sale on the sole ground that the letter of notice stated that payment was due within fourteen days of the date of the notice, while under the statute a notice of three months was required. Okoth v. Trust Bank Ltd., [1997] LLR 87 (CCK), No. 1135/97. This was notwithstanding the fact that, in fact, three months had already elapsed since the serving of the notice. The court insisted that the statute must be interpreted strictly as requiring the notice to state that the sale will only become exercisable three months after service of notice. *Id.* On appeal the Court of Appeal of Kenya affirmed the decision requiring the three month notice period be stated explicitly on the statutory notice, adding that that the three month period must commence at the date of service, not on the date of the notice. Trust Bank Ltd. v. Okoth, [1998] LLR 1270 (CAK), No. 177/98.

- Invalidation of statutory sale where other options or remedies to return the charged or mortgaged amount are available to the chargee or mortgagee;[169]
- Affording allegations of fraud by the chargor or mortgagor or a dispute as to the amount of debt as grounds for invalidating or stopping a statutory sale;[170]
- Stopping statutory sales on grounds of unconscionable interests on the loaned amount;[171]

Charles Kanjama poignantly and accurately captured the conflicted judicial position on whether and when to enforce the statutory power of sale:

> The Court of Appeal has harkened to its notion of justice with consummate flair, in turn dodging or bulldozing through precedents when these fail to serve its contemporary feelings of fairness. One would think that sections 74 and 77 of the Registered Land Act and sections 69, 69A and 69B of the Transfer of Property Act were fairly clear on the nature of the statutory power of sale, statutory notice and the remedies to an aggrieved party. Yet wading through two labyrinthine decades of the Court's judgments is as fruitful as trying to scrutinize the ageless face of the Sphinx.
>
> The discreditable practice of borrowers refusing to heed repeated notices to repay yet frustrating the realization of securities offered to chargees by obtaining *ex parte* injunctions has reached endemic proportions.[172]

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169. *See* Nat'l Bank of Kenya v. Mwithukia [1998] LLR 130 (CCK), No. 223/98; *Trust Bank Ltd. v. Kotedia*, [1997] LLR 87 (CCK).

170. *See* Russell Co. Ltd. v. Commercial Bank of Africa Ltd., [1985] LLR 1415 (CAK), No. 31/85; Mbuthia v. Jimba Credit Fin. Corp. & another, [1986] LLR 3292 (CAK), No. 111/86. In *Ihenya v. Barclays Bank*, the court restrained a chargor from exercising the statutory power of sale effectively on the basis of a dispute as to the amount under the charge, arguing that should the substantive suit determine the chargor had cleared the debt, a prior sale of his property would have resulted in an irreparable loss. Ihenya Agencies v. Barclays Bank of Kenya Ltd. & others, [1997] LLR 507 (CAK), No. 3/97.

171. *See* Pipe Plastic Samkolit (K) Ltd. v. Nat'l Bank of Kenya Ltd., [1996] LLR 62 (CCK), No. 1078/96.

172. Charles Kanjama, *The Baffling Statutory Power of Sale*, *available at* http://www.lawafrica.com/HOTB/hotb2.asp (last visited Mar. 29, 2004).

6. The Operationalization of the Married Women's Property Act of 1882 to Regulate Statutory Sales

In cases where a person is registered as a sole proprietor and then he deals with the land without the knowledge of his wife, the courts have been willing to nullify such dealings on the ground that the land was jointly owned by husband and wife and that the husband's dealings were fraudulent and therefore void *ab initio*. In the *Grace Muchiru Case*,[173] the property in dispute had been registered in the name of the husband, but had been purchased during the subsistence of the marriage. The husband subsequently mortgaged the property. When he defaulted in payments, the mortgagee sought to realize the security by statutory sale. The wife filed suit seeking an injunction on the grounds that she was a co-owner of the property, that she had not consented to the mortgage transaction, and that therefore the same was void *ab initio* for fraud. The High Court held that since the property was acquired during the subsistence of the marriage, despite the fact that it was registered in the sole name of the husband, and no trust was registered under Section 126 of the Registered Land Act, the plaintiff may prove to be a co-owner by evidence.[174] Such evidence may be given under the Married Women's Property Act of 1882.[175] The court therefore issued an injunction to stop the sale of the property by the mortgagee.

The implication of this case and other similar cases, is that the efforts of financial institutions to realize security in cases of default of payment of mortgages where wives who had not originally consented to the transaction are curtailed when such wives challenge the sale. This means that a husband registered as a sole owner of property requires spousal consent to mortgage or charge the property, hence curtailing the otherwise absolute powers of the registered owner as provided in the statute.

Both legal and cultural chips are used by various stakeholders to maintain a stable property system in Kenya among peasants, especially in rural land mainly occupied by peasants and other small holders. On the other hand, land owned by large-scale farmers, absentee farmers or members of the landed national elites, different chips are played to stabilize the property system. Here, legal techniques are used to maintain the system. There is an almost fanatical adherence to the freedom of the sole registered owner. People dealing with such lands are constantly aware that they are dealing with titled property and that their rights are stipulated or limited by the particular land regime under which it is registered.

173. Grace Muchiru v. Simon Muchiru, HCCC No. 290 of 1998, Kasanga Mulwa, J.
174. *Id.*
175. *See supra* note 103.

There are no strong societal values or expectations driving the decision-making as far as these lands are concerned. In the few cases brought to challenge ownership of such lands using moral, traditional or cultural templates as their basis for the challenge, legal chips and legalistic interpretations of the law were deployed to frustrate such claims. To this extent, registered titles to lands are seen as sacrosanct, secure and impossible to impeach even by the government. Such cases have been mainly in the high valued urban lands especially in and around Nairobi and in cases government land grants.

Thus, for this category of lands, security of tenure is assured by resort to legal chips and an obsequious enforcement of the land registration regime by the state. The property system and tenure security is assured by the formal registration regime and judicial interpretation of its laws.

7. Cultural Chips as Stabilizing or Destabilizing Factors

What was most effective in this regard was the selective disuse of legal rights necessary to establish the social order envisaged by the registration regime. Persons formally registered as sole proprietors of land were reluctant to use their legal powers to evict their kith and kindred settled on the land. Forced evictions by persons registered as the sole owner of a plot of land were met with threats of violence from the rest of the villagers.

Lastly, insistence on sole ownership despite recognized traditional claims of right to use or own part of the land was accompanied by the fear of social ostracization. As demonstrated by Robert Bates, the need to be socially accepted is a powerful incentive for most people in African societies to organize their economic activities. Bates also found that this is a useful trend economically and should be welcomed rather than discouraged as it enables inter-generational transfers. It is thus not possible in the large majority of cases for a person to violate traditional norms and run off to live in the city. In any event, it would be impossible to get a buyer for land sold as a consequence of what would be perceived to be putrescent moral norms of the seller who has kicked out his siblings or family using what would surely be perceived to be unfair means.

As a result, an elaborate system of tenure evolved where both systems existed side by side. If there were any obstacles to development, it was not due to fears of impeachment of one's rights to the land. Indeed, the first time that such fears emerged, it was not due to fear of the fluidity of tenure caused by the parallel system, or by socially acceptable means but by use of sheer violence.[176]

176. This was during the politically instigated land clashes in Kenya that preceded the advent of multi-party politics in Kenya around 1992.

IX. THE WORLD BANK AND LAND REGISTRATION IN KENYA

The foregoing analysis shows that in the peculiar case of Kenya, formalization of title through land registration regimes neither enhanced nor eroded security of tenure in parts of Kenya. Therefore, the argument that formalization of title, as insisted by the government, the World Bank and other development agencies, is partly incorrect. As shown above, none of the reasons given as necessitating formal land registration in the particular sense in which it was carried out has been borne out by the actual experience. In this section, I analyze the principal reasons for the insistence of registration of land in development orthodoxy.

A. *Land Registration and Changing Relational Realities*

From what I have described above, I see many ways in which the land registration process reshaped relational realities in the Kenyan society.

First, the property regime was being used to create a new form of societal relationships and organizations rather than attempt to reflect the existing one. By insisting on individual ownership in terms of exclusivity of ownership and use and a clear definition of ownership, the property regime was used to deny relational realities that existed. At the same time it attempted to forge new relational realities. To serve this purpose well, the "non-appropriation" justification provided good technical and intellectual rationale. But in crafting this regime, I see the instrumental rationality argument clearly: attempts at under-socializing the human being/transactions; hoping that removing her from the social context would help 'equilibrate' her actions only through the price mechanism. In Kenya, as far as land was concerned, this was not to be.

Second, the initial allegation that indigenous tenure systems constitute a disincentive to investment has been proved to be largely unfounded. Hence, there has been no correlation between increased investment and land registration.[177] For example, studies have shown that there is no higher incidence of registration in commercialized areas—which would be expected if there was any relationship between formal titling and investment.[178] As I have already noted, formal titling did not necessarily lead to less litigation and tenure insecurity. Despite the expensive adjudication process, and the statutory stipulation in the law that

177. Such an increase was reportedly seen in Thailand. *See* Philip von Mehren & Tim Sawers, *Revitalizing the Law and Development Movement: A Case Study of Title in Thailand*, 33 HARV. INT'L L.J. 67 (1992).

178. Migot-Adholla, *supra* note 116.

first registrations would not be challenged in courts,[179] litigants have found novel ways to bring litigation to challenge first registrations. Further, studies have shown that there is no relationship between formal titling and access to credit.[180] Most credit demand among small-holders relates to short-term production credit for which crop is generally accepted as security.[181] Thus, the tenure/collateral argument is largely false. Also, as an empirical matter, the supply of credit, particularly for small holders, has not expanded as a result of titling.

A slow growth of land markets restricts the possibility and efficacy of foreclosures and undermines the tenure/collateral argument. As demonstrated above, the forms and terms of land transfer, including sales, are determined by economic, social and cultural factors. These factors are not altered by administrative fiat through titling.[182]

Third, the process of formalization of title aimed to create a social dynamic that would separate the political from the economic in property relations. This way, it would be easier to make the move of distinguishing the public from the private. In other words, formalization of title would help break the "social embeddedness" and hence formally separate the economic from the political. This way, it would be possible to redefine demands for land in purely economic terms and without any attendant consequences on the political.

Therefore, by fragmenting economic demand for land from the political foundation, it became possible to transform the African demands for land from being political (and public) to being economic (and private). This way, the economic demands for land would now be handled in the private sphere through purchases, leases, and similar devices without political repercussions. By merely changing the architecture of property, it was possible to simultaneously transform a political and public grievance into an economic and private affair to be addressed in the marketplace and attempt the transformation of social relations.

The emergence of formally rational law is viewed by some as necessary for the emergence of formal justice, composed of strict procedures that result in the differentiation of legal and political dimensions of society.[183] The greatest advantage of this in the Weberian typology is that the "formal justice" through "the use of legal reasoning applied through

179. The Land Registration Act forbids challenging first registration of land even on grounds of fraud. Land Registration Act, *supra* note 53, § 143.

180. Migot-Adholla, *supra* note 116; Frank Place & Shem E. Migot-Adholla, *The Economic Effect of Land Registration on Small-holder Farms in Kenya: Evidence from Nyeri and Kakamega Districts*, 74 LAND ECON. 360–73 (1998).

181. Migot-Adholla, *supra* note 116; Place & Migot-Adholla, *supra* note 180.

182. Migot-Adholla, *supra* note 116.

183. von Mehren & Sawers, *supra* note 177, at 69.

logical procedures to the facts of the case"[184] fosters capitalist development by its general effect of predictability that a formal system provides. Both these aspects of "formal rational law" as evidenced by title are further elaboration of ideology. The mode of reasoning parallels that of typical law and modernization theory. It sees modern law as a prerequisite to economic development—and assumes it is central to the creation and maintenance of a market economy.

This whole logic rests upon the assumption that the relationship between law and economic development is a universal, reproducible and invariable relationship.[185] This is because, it is argued, the predictability that modern law supplies naturally encourages the growth of capitalism by increasing economic confidence within the society. This results in long term investments rather than short-term speculations, hence stimulating and stabilizing the market.[186] Translated into political realities, this logic counsels the necessity of programs to introduce a specific system of laws that are extrapolated to react in the unstable and undeveloped traditional society to cause a shift in its economic and political structures.

The argument is faulty on at least three counts. First, it exaggerates the degree of predictability that is obtainable under a system of formal institutions. The assumption is that the "rational" system of formal laws leads to predictable outcomes. However, this aspect of "predictability" falls prey to the realist critique of the formal classical system of rules. The impression of predictability and administrative convenience is illusory.[187] The realist critics have long shown that the "rational" system is as manipulable and dependent on contextual variability as an informal customary system would be. The apparent stability and "predictability" of the system is mainly due to "well-accepted conventions within the community of regular interpreters of the 'system'"[188] not to the natural capacity of the formal norms to be stable. Seen this way, it is then possible to argue that it is always open for parties with a stake in upsetting the conventional interpretations of particular norms/rules/formal institutions to throw out new arguments that would necessitate reinterpretation of the rule.

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184. *Id.* at 72.

185. Jean Wu, *Overseas Chinese Capitalism and the Marginalization of the Rule of Law: A Reassessment of the Relationship Between Law and Economic Development*, 4 BERKELEY McNAIR J. (1996), *at* http://www-mcnair.berkeley.edu/96journal/wu.html (last visited Apr. 8, 2004).

186. *Id.*

187. Gordon, *supra* note 150, at 566, n.1.

188. *Id.*

In such circumstances, then, for the conventional interpretation to adhere, one is forced to make a choice that is informed less by the nature of the rule/institution itself and more on the policy desirability of the interpretation. When it becomes clear that several different plausible interpretations to the same formal rule/institution are possible, it becomes more difficult to interpret one as more efficient because the efficiency argument is pitched on the stability of the institution itself which, in turn, contingent upon stability of interpretation of other questions related to it. In this regard, the only way one can justify the particular interpretation as efficient is by accepting the set of other interpretations of linked questions that stabilize that interpretation. If one chose to accord a different interpretation, then one opens up the possibility of the existence of multi-equilibria from which it is not possible to make an efficiency argument.

At best, this suggests that there is the possibility of the existence of more than one equilibria. At worst, there would be no way of telling what interpretation would be efficient since the interpretation that seems most efficient in the particular practice setting may only be so because of other linked stabilizing interpretations which, if rendered differently would have resulted in a wildly different assessment of efficiency.[189] In both courses of action, the particular choice would mean that the business of choosing one over the other is political—an act of expressing preference of a certain group that would benefit from the interpretation over another group.

Second, it presumes that the traditional mode or culture independent of formal law is incapable of producing a functional level of stability and security sufficient to inspire economic confidence in the economic actors. In terms of jurisprudential analysis, the dichotomy between the traditional customary norms of property ownership and the formal norms of private property has been shown to be tenuous.[190] At the same time, empirical studies have shown that the assumption that customary tenure system leads to less economic returns is, at best, unsupported by extant evidence.[191] Further empirical impugning of this position has been supplied by the experiences of the experiences of modern capitalist economies in East Asia. Here, it has been demonstrated that tradition, in the form of personal and professional networks can, and does actually sustain the economic norms of property and contract rights. This con-

189. Kennedy, *supra* note 14, at 472.

190. There are a number of ongoing projects aimed at dispelling the Western-Non-western bifurcation of conceptions of property ownership along an arbitrary individual-communal line or efficient-inefficient system. *See, e.g.*, Kang'ara, *supra* note 33; Nyamu, *supra* note 56.

191. *See* Migot-Adholla, *supra* note 116.

tributes to economic prosperity while marginalizing and retaining primacy over the use of formal legal institutions.[192]

Lastly, the aspect of differentiation of the political from the economic is meant to remove certain modes of reasoning which are in themselves policy choices, from debate by fencing them off as legal questions deducible by logical procedures. However, the logic turns out to be contingent on the very first choices made. This becomes ideological in the sense that the analysis is suspended at this juncture, hence constructing the policy choice as inevitable or immutable.

C. *The Indeterminacy of Land Registration*

It may thus be said that during the existence of this parallel system it was possible to say that there was security of tenure because there were constant negotiations and renegotiations of the social forces at play. At the informal level, one always knew the status of the land one was dealing with. Consequently, one knew the institutions that would come to play should one take particular actions on or regarding the land. We might say that at this time security of tenure referred mainly to public means of enforcement with less emphasis on individual ownership and land use. My argument is that the parallel system ensured secure property rights in the sense envisioned by the World Bank between 1956 and early 1980s. At this time, the World Bank privileged individual ownership of titled land as a means of safeguarding against governmental encroachment or confiscation. To the extent that this parallel system removed the concern over forcible confiscation by the government then it would seem to have adequately ensured "security of tenure."

However, this parallel system, though spawned by a registration system that would be supported by most neo-classical commentators, would be considered unsatisfactory even by neo-classical economists despite its stability and despite the fact that it ensured security of tenure. First, the situation meant that the national political and economic elite was able to legally fence off and protect massive tracks of land and just hoard them for speculative purposes. This would be wrong from both sides of the debate. For socialists and dependency commentators, this granting of individual, indefeasible titles thwarted attempts to achieve a more equitable distribution of land.[193] This frustrates neo-classical theory that land registration creates a land market that ensures an efficient use of the resource since the national political and economic elite basically got large tracts of land for speculation purposes. Yet, speculation causes a speculative bubble—the price of land as an asset displays an explosive

192. Wu, *supra* note 185, at 211.
193. JARAMOGI OGINGA-ODINGA, NOT YET UHURU (1967).

divergence from its fundamental value.[194] The speculation problem in land markets can be quite severe.[195] By 1966, the Kenyan government had already perceived it to be a big problem:

> There is also urgent need for a land tenure policy to ensure that projected agricultural development is not concentrated in the hands of the few. Having regard to some of the problems of transition, a working party might be established to consider the need and practicability of establishing ceilings on individual ownership of property, and to advise on the machinery for making these effective.[196]

The parallel system frustrates neo-classical theorists for another reason: it enables the peasants to continue to remain uncaptured—one of the major, if unstated objectives of the land registration system. In other words, the development path enabled by this perception of "security of tenure" ensured a particular development path in Kenya. The development spawned by this perception, on the other hand, favored and was reinforced by the alliance between a thriving peasantry and international capital.

Apart from the above unanticipated effects of land registration, which can be added to the fact that the implementation of the registration process *per se* was marked by manipulability of essentially indeterminate concepts, there are several other consequences that challenged the orthodox thinking about the effect of legal institutions on an economy. There is a tendency in the literature to regard law and legal institutions

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194. A price bubble is a situation in which "the arbitrary, self-fulfilling expectation of price changes may drive actual price changes independently of *market fundamentals*." ROBERT P. FLOOD & PETER M. GARBER, SPECULATIVE BUBBLES, SPECULATIVE ATTACKS, AND POLICY SWITCHING 3 (1994). If bubbles exist in asset markets, market prices will differ from their fundamental values. On how exactly speculative bubbles occur, see CHARLES P. KINDLEBERGER, MANIAS, PANICS AND CRASHES: A HISTORY OF FINANCIAL CRISES 13 (1996).

195. *See* Walden Bello, *Globalization in Crisis: The End of a "Miracle"*, MULTINATIONAL MONITOR, Feb. 1998, *at* http://www.globalpolicy.org/globaliz/econ/globcris.htm (demonstrating the severity of land speculation problems in Thailand).

196. REPUBLIC OF KENYA, AFRICAN SOCIALISM AND ITS APPLICATION TO PLANNING IN KENYA 38 (1965). The Kenyan government's attitude towards development in the mid-1960s was a strategy for dealing with three thorny issues: (1) the justification of the Kenyan government's controversial decision to deny working permits to hundreds of British Indians who had settled in Kenya but who had been denied British passports to travel back; (2) justification of the selective program of Africanization taking place, especially in the Civil Service; (3) the alienation of the increasingly popular radical Marxist voice within Kenyan politics. This government publication seems anxious to demonstrate that the problems of which Marx wrote little affected Africans, stating, "Marx' criticism of the society of his time and place was a valid one . . . [But] it bears little similarity to Kenya today . . . African traditions have no parallel to the European feudal society, its class distinctions, its unrestricted property rights, and its acceptance of exploitation. The historical setting that inspired Marx has no counterpart in independent Kenya." *Id.* at 6–7.

as technical tools that, once adopted, will produce the desired outcome.[197] The Kenya land registration process challenges this thinking as it failed to usher in the expected economic outcome.

What is more is the fact that the registration process appears to have generated results that challenge the orthodox thinking about the evolution of a rational legal system as a significant factor in facilitating the development of capitalism.[198] I am referring here to Weber's argument that the formal, rational procedural law is the prelude to capitalistic development because this genre of laws is calculable and predictable in both adjudication and public administration.[199] However, in Kenya, despite this provision of legal form, it did not result in particular economic development. Indeed, the opposite seems to have happened. There was, instead, a re-invention of customary law as a strategic maneuver to thwart the full application of the "formal, procedural rationality" laws.

The outcome of the registration attempts has led to a very interesting evolution of the concept of "security of tenure" as it is used by many multilateral agencies. Though proved to be misconstrued on the ground, the "security of tenure" argument still survived and acquired both intellectual and legal integrity through ideological peddling. As Robert Bates, David Laitin and Anthony Marx have shown regarding race consciousness and hegemonies, the "security of tenure" argument, through repeated usage, was packaged in a necessitation logic that increasingly reified the concept.[200] The important thing about the reification process is that the reified concept is not necessarily as functional as it may seem in retrospect. Rather it is in its *stability* and not *coherence* that the concept becomes powerful and ideological. In its reified mode, a concept can be expanded or constricted to comprehend various competing usages that fit the wider political project being pursued. This is true of the securitization of tenure in Kenya.

D. *The Registration of Land, Liberalism and the Rights Discourse*

The introduction of land registration can also be understood as the process of introducing different actors to the concept of registered land as a legal category to which forward-looking rights could be applied. The purpose of the process and the discourse of land registration was to

197. KATHARINA PISTOR & PHILIP WELLONS, THE RULE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT: 1960–1995 16 (1998).

198. MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds. & trans., 1968).

199. *Id.*

200. Bates, *supra* note 89; DAVID LAITIN, HEGEMONY AND CULTURE: THE POLITICS OF RELIGIOUS CHANGE AMONG THE YORUBA (1986); ANTHONY MARX, MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, THE UNITED STATES, AND BRAZIL (1998).

sensitize different actors of potential for the rights discourse to mediate the fundamental contradiction that was necessarily being introduced into the society.[201]

The act of introducing the category of "registered lands" to which certain forward-looking rights applied was intended to convince both strong and weak actors that the third actor, first the latter-day Colonial state and later, the new independent state, would protect both by use of its collective powers. However, the discourse of rights depends for its success on the faith of all the actors. The problem here was that the indigenous or ethnic actors who saw themselves as relatively weak did not have such a faith in the rights discourse.

These "weak" actors viewed the registered land category as only giving them rights against the state that they had traditionally associated with predation. However, they did not see the newly introduced rights as mediating their individual interactions. In other words, they failed to see or accept the very *raison d'être* for registration and the introduction of the rights: the hope that the "weak" party will find a sufficient reason to fuse with the "strong" party without fear of domination.[202]

Instead, the "weak" actors were willing to use rights discourse in property relations to erect legitimate controls on the power of the state, but not to structure their individual relationships. For relationships between weak and strong actors, they turned instead to traditional customary norms.[203] In other words, the actors failed to accept an important aspect of modernization that was being introduced. While they were willing to accept the possibility of rights to fence off the state, they were uninterested in using them to structure their social or economic individual relationships.

The problem of non-acceptance of the repercussions of registered lands as granting individuals specific rights to structure both individual and state relationships, made it difficult to employ efficiency arguments in favor of land registration.[204] The liberal structure upon which capitalist development was envisaged for Kenya depended upon the acceptance by all of the belief and faith in the rights discourse and its various associated beliefs. Differently stated, there was critical need for the actors to

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201. *Id.*

202. *Id.*

203. In this context, I emphasize *traditions* and *traditional* because most of these norms turned out to be not very *traditional* but heavily revised (even invented) by the changing situation. This is not unique to this situation. As Nicholas Dirks, explains, this is because through their daily social practices people in society are "constantly negotiating questions of power, authority and the control of the definitions of reality." Dirks, *supra* note 150.

204. *See* discussion *infra* Section X.E.

be persuaded that it was possible to overcome the liberal contradiction in practice as well as in theory.[205]

To return to Kennedy's characterization, in liberal thinking, a weak person aims to induce the State to use its power to control the strong without putting the state in the structural position of the strong person.[206] The answer supplied in liberal thinking is the concept of rights: a person who believes in rights is in a position to deny that his feelings toward others are contradictory. He can believe that he wants, to fuse with them, *so long as they respect his rights*. He can believe that he is fused with the state so long as it protects rights, and opposed to it when it does less or more.[207]

However, the Kenyan situation presented a deeper problem. People were willing to accept the second part of the equation without the first one. They were willing to "fuse" with the state to the extent that it would restrict itself from preying on them. The rights were to be used to tie the state's own hands so that it was unable to confiscate or interfere with their property arrangements. Hence, these people were using land registration as a means of setting up the government to solve the "Weingast paradox."[208] A government that is strong enough to create and protect property rights is also strong enough to confiscate and expropriate them. Therefore, for such a government to create reasonable expectations in investors that it will not confiscate or alter property rights, it must give credible signals of its commitment to respect tenure arrangements.[209] Hence, the "weak" actors thought of registration more as a way of tying the government's hands and eliciting credible statements of its commitment to respecting private property. An alternative way to look at this suggestion is to use the political science concept of time-inconsistency.

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205. *See* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, *in* CRITICAL LEGAL STUDIES 139 (Allan C. Hutchinson ed., 1989) [hereinafter Blackstone's Commentaries].

206. *Id.*

207. *Id.* at 144.

208. The Weingast paradox of sovereignty explains that while the state must be strong enough to enforce property rights and contracts, that strength can also be a source of apprehension for economic actors because it may empower state officials to act in ways that undermine economic investors' expectations to reap the fruits of their investments. The only way to solve the paradox is to have both a strong state as well as state political institutions structured in a way that gives confidence to economic actors that the government will not use its power to undermine private investment. *See generally* Douglass C. North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 49 J. ECON. HISTORY 803 (1989). North and Weingast argue that before the Glorious Revolution of 1688, the English Crown's decisions were arbitrary and capricious, but with the 1688 change of power came political institutions which facilitated the protection of property rights and the credibility of the government. This gave economic actors the security to invest in their property.

209. *Id.*

Time-inconsistent policies are those in which policy-makers have an incentive to deviate from pre-announced policies after the economic actors have already acted on their strength.[210] Since economic actors will base their decisions on the expectation that the policy-makers will deviate after announcing the policies or rules, the result is sub-optimal economic activity. In this scenario, one way for the policy-makers to make their commitments in rules or policies credible is to bind themselves by a set of rules that limit their exercise of discretionary power to alter the pre-announced rules or policies.[211]

In the case of Kenya, however, people accepted only the first part of the equation, namely that the State needed to make credible commitments that it would not reverse policies and rules related to land ownership. At the same time, however, people did not intend or envisage fusion with the state to extent of their individual property relations. As far as fusion with others was concerned, they preferred to structure their personal relationships, including property relations, on customary norms, not the liberal concept of right. In other words, they fragmented the operation of the rights discourse: as far as their relationship with the State was concerned, they were willing to accept the liberal concept of rights to structure and direct this relationship. However, as far as their own relations with others, they preferred and continued to resort to their own customary norms.

This paradoxical situation has been enabled and supported by what Claude Ake calls "salient duality."[212] As explained above, in Kenya, like in most of the rest of Africa, there is a partial displacement of the state by informal communities and ethnic groups.[213] The most important reasons for this are the legacy of the colonial state, the manner in which independence was granted, and how different communities strategically transformed themselves and their institutions to the new circumstances. However, the continued entrenchment of the ethnic groups can be explained by the deep suspicion and skepticism that many continue to feel toward the State:

> [The state] has only succeeded in creating [an entity] that is mainly a coercive force unable to transform power into authority; and domination into hegemony . . . The colonial state was inherited rather than transformed. Like the colonizers before

210. Joel S. Hellman, *Constitutions and Economic Reform in the Post-Communist Transitions*, *in* JEFFREY SACHS & KATHARINA PISTOR, THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA 56 (1997).

211. *Id.*

212. CLAUDE AKE, DEMOCRATIZATION OF DISEMPOWERMENT IN AFRICA 6 (1994).

213. *Id.*

> them, most of the nationalist leaders regarded the state as the instrument of their will. They privatized, and exploited it for economic gain and used it oppressively to absolutize their power. [The state] *is largely regarded as a hostile force to be evaded, cheated, defeated and appropriated as circumstances permit.*[214]

As far as property relations and registration of land in particular was concerned, formal registration was seen as one way to appropriate the state's power and restrict its predation. On the other hand, the alternative social formations have been transformed into social polities that members of the community turn to structure their individual relationships.

This development—the retail or "unwholesale" acceptance of the liberal idea of rights to govern property relations—was unanticipated by those who called for registration on efficiency grounds. In my view, it is in part to tackle this issue that the registration exercise has been suffused with individual aspects of the tenure system that was being introduced. It was hoped that by emphasizing the individual aspects of land ownership, the society would be pushed more toward believing that they needed the liberal discourse on rights to structure individual dealings. The shift in World Bank thinking about the meaning and need for "security of tenure" reflects this realization. The emphasis in the clarification of the individual owner and emphasis in the private law regimes comes as part of this realization. We therefore see all these, in this context, as efforts to persuade individuals of the possibility of the rights discourse to solve the "fundamental contradiction."[215]

E. *The Evolution and Shift in the Meaning of "Security of Tenure"*

In the recent studies by the World Bank, it is becoming increasingly clear that what is meant by "security of tenure" is no longer freedom from fear of encroachment or confiscation by the government or as indicator of how well a government has managed to resolve the Weingast paradox.[216] The government could be understood to have resolved the paradox by permitting the parallel system to exist. Allowance of the traditional institutions to continue to operate informally in the rural areas coupled with a promise and willingness to vigorously enforce individual ownership in urban and large-scale farms, created a confidence that the government would not interfere with ownership of property. Instead, the World Bank increasingly privileges a definition of "security of tenure"

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214. *Id.* at 7 (emphasis added).
215. *Blackstone's Commentary*, *supra* note 205, at 139–41.
216. *See* discussion *supra* note 210.

that emphasizes two aspects of private ownership of property: 1) utmost clarity in the identification of the private owner; and 2) the granting of extensive power to the private owner to develop, change, and alienate the land as he pleases without restriction.

This changed perception of the definition of "security of tenure" emphasizes the increasing use of private law regimes. In a sense, the World Bank has shifted its emphasis and hence the meaning and reasons for supporting formal registration of titles. Additionally, this change in meaning tracks and corresponds to a similar change in World Bank thinking about development generally and about reigning attitudes concerning the role of government in economic development.[217] What is more is the fact that this change also points to a similar change in the channeling of government resources as advocated by the World Bank and other multilateral development agencies.[218]

This shift in meaning and emphasis commits the government to channel more resources toward institutions that would serve these two functions. A good illustration of this trend is the agitation for the reform of the judicial system—reasons for which are typically hinged, not merely on the quick delivery of justice, but on commercial need of an efficient judiciary. While neo-liberalism rebukes government intervention in the market and calls for a diminution of the government, in truth, what is happening is the re-channeling of government resources from the more "public" aspects of intervention to the more "private" forms of intervention. By withdrawing resources from the provision of subsidies for primary healthcare or elementary education, for example, to extensive

217. This shift in thinking was initially sparked in the 1990s by concerns over the relative ineffectiveness of international development aid and the pervasive effects of endemic corruption in many developing countries. These concerns prompted international financial institutions (IFIs), notably the World Bank and the International Monetary Fund (IMF), to revisit their traditional approaches to development. The outcome of these inquiries was a new strategy in disbursing development "aid": use of conditional lending to induce policy reform and alter the institutions of governance, and the role of the government in the borrowing countries. This shift in policy was most definitively introduced by the World Bank's annual report in 1989 its reference to the development crisis in Africa as a "crisis of governance" calling for a change in the structure of the state and economy in developing countries. *See, e.g.*, Joachim Ahrens, *Governance, Conditionality and Transformation in Post-Socialist Countries, in* GOOD GOVERNANCE IN CENTRAL AND EASTERN EUROPE 54 (Herman Hoen ed., 2001) ; Gathii, *Retelling Good Governance Narratives*, *supra* note 27; Gathii, *The Limits*, *supra* note 27; RITTICH, *supra* note 27.

218. Since the World Bank's 1989 annual report describing the development problem in most of Africa as a "crisis in governance," development donors have insisted that governments in developing countries must shed the fundamental economic roles they had arrogated to themselves. Transformation of the economic role of government, the so-called "governance conditionality" was explicitly made conditional to the receipt of further development aid. *See Governance-related Conditionalities of the International Financial Institutions*, United Nations Conference on Trade and Development (UNCTAD), G-24 Discussion Paper Series No. 6, U.N. Doc. UNCTAD/GDS/MDPB/G24/6 (2000).

and expensive projects to ensure a streamlined formal system of land holding, the government shifts its use of resources from a "public" project (which is supposedly bad) to a "private" project (which would supposedly breed more productivity and efficiency). Such a shift of resources also involves massive political choices that are never made explicit in the many technical, supposedly politically neutral policy prescriptions. By channeling resources to the more "private" projects, the government also shifts massive resources from certain classes of people (mainly the rural poor) to another class of persons (mainly the rising petty bourgeois). This decision is inherently political, but deemed merely technical and politically neutral by the mere posturing of the economic reform project.

In this sense, the World Bank entrenches certain ideological positions while posturing as mere technocrats. By fragmenting the land registration issue from its political and institutional foundations, the World Bank manages to render a thoroughly political choice into a scientific technical decision—in essence making political decisions without the attendant political debate. The implicit distinction between public and private is achieved by arbitrarily positing the axis and fashioning justifications of intervention and non-intervention depending on what side of the axis the intervention falls. All interventions beyond the arbitrary, bright line are termed as wasteful public intervention. Interventions on the other side of the line, though they be of similar quality, are deemed to create conditions for private investors and are hence permissible.[219]

A third related factor is the fact that this shift in meaning actually encourages and enables a shift in the alliances of classes that have formed in Kenya, which in turn produces a different development pattern.[220] In the earlier system that produced the bifurcation explained above, a thriving peasantry formed an alliance or at least mutually reinforced international capital. What is interesting is that the rhetoric of security of tenure in this second form has been captured and appropriated by the local bourgeoisie who now use the courts to clarify ownership and disposal mechanisms. For example, there has been a sharp increase of cases in which a certificate of title has been proved to

219. Brian Langille has discussed a similar attempt to naturalize a specific definition of indeterminate concepts such as "intellectual property" and "subsidies" in international trade law. International law treats these concepts as self-defining while there is an infinite number of potential definition. For example, it is difficult to determine the definition of "subsidy" since a state may argue that almost any chosen regulatory regime impedes exports and hence constitutes a discriminatory trade barrier. Brian Alexander Langille, *General Reflections on the Relationship of Trade and Labor*, *in* FREE TRADE AND HARMONIZATION (Jagdish Bhagwati & Robert Hudec eds., 1996).

220. *See* LEO, *supra* note 45.

be conclusive of ownership of the parcel of land despite competing claims by third parties.[221]

CONCLUSION

The foregoing account of land registration in Kenya indicates that processes we might imagine to be "merely technical" may, in fact, be highly complex and complicated. Rather than translate into economic consequences in a unilinear fashion, they usher in unanticipated economic and political responses, as well as enable strategic normative and instrumental deployment of formal categories. This account shows that the economic strategy reflected in the specific legal arrangement, namely formalization of individual title, espoused particular political goals. However, not only did the economic effects extrapolated not follow, but further, the legal arrangements elected to convey the economic outcome proved capable of delivering unanticipated political and legal outcomes.

To rationalize the legal arrangement and the extrapolated economic and political effects means containing or managing the meanings of the categories created by the legal scheme, in order to channel the effects and avoid slippage. In other words, it means assigning meanings and relationships—denying some, strengthening some, weakening some. This complex creation and negation of subjects and meanings reflect desired political and economic objectives and the role ideology plays in legitimating legal and political arrangements. It also demonstrates that the government must play an integral role in denying specific meanings, granting others as it allocates rights to one group at the expense of the others.

The story of land registration in Kenya shows how power relationships born of articulated meanings are created by legal discourse and how that discourse can systematically empower and dis-empower. It also shows the fictitious nature of legal institutions. Most importantly, this account demonstrates the dangerously loose space opened up by enactment of formal legal categories that a transforming government can use to shape politics and interpretations of private law in a way that may perversely distort the market. By focusing on the nested, sequential nexus between formal, sound institutions such as "clear property rights", the neo-liberal discourse tends to ignore this space. The results are twofold. Either, the economic and political elite appropriates this space to shape the ensuing market to the detriment of the general social welfare or the meanings and interpretations are so varied that the extrapolated

221. *See, e.g.*, Salama Holdings Case, HCCC No. 3798 of 1998, Msagha-Mbogholi, J.

advantage of formalizing the institutions does not follow. Both fall short of the neo-liberal desideratum of "clear property rights" and resultant investor confidence.

The account of land registration in Kenya challenges the neo-liberal development in another fundamental way. Rational choice theory assumes the rational, utility-maximizing actor selects the alternative that maximizes utility and/or contribution to goals and preferences, but within institutional constraints.[222] One such institutional constraint is the feasible endowment set. For the actor to rank her preferences over possible outcomes to make the choice that yields the most preferred outcome the endowment set must be fixed. This is the power of formal, clear legal rules on property and freedom of contract in neo-liberal theorizing. It is assumed, for example, that land registration would ensure clear property rights that can define the feasible set in a definite way. However, from the account of land registration in Kenya, it turns out that even formalization of title does not, absent ideological ordering of legal categories, solve the problem of the fixed endowment set. Rather than being fixed, the endowment set tends to be in flux. This is because the value, exclusivity and transferability of property depends, not just on two specific actors contracting but also on third parties such as their families, clans, courts, and society at large. It depends on how all others play their various chips for the ultimate value, or ownership of property rights to be assessed. This social aspect of property rights must be reflected in the definitions of property rights that legal and economic scholars formulate. They must also be taken account of in formulating legal reform.

222. *See* Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998).