Colonial Township Laws and Urban Governance in Kenya

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Abstract

Rapid population and urban growth in Africa pose severe challenges to development planning and management. This article argues that weak urban governance in Kenya results from the colonial legal order’s shaping of urban form. Kenya’s colonial laws, drawing from those in other British colonies (especially South Africa) and British statute law on local government, public health, housing and town planning, controlled African labour and movement, and Africans’ relation to towns. These laws included ordinances on registration, “master and servant” and vagrancy, while detailed township rules enforced racial segregation and exclusion; the Feetham Commission (1926) led to a hierarchy of local authorities, with no African representation until the 1950s. The dual mandate ideology resulted in different land tenure in the white-settled areas and trust lands; the late introduction of individual land ownership in the trust lands created problems of peri-urban, unplanned development outside the old township boundaries.

INTRODUCTION

Rapid population and urban growth in Africa pose severe challenges to development planning and management, with which under-funded local government struggles.1 Recent studies in post-colonialism and legal geography have explored the historical role of colonial laws in shaping urban space and form, while Patrick McAuslan’s Bringing the Law Back In has tried to reverse the relative neglect of law since the “law-in-development” movement of the 1970s.2

This article argues that weak urban governance in Kenya (particularly controls over African movement, racial segregation in “townships”, and land

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laws that excluded Africans from towns) has been made worse by the colonial legal order. Much has been written about the consequences of white settler land appropriation, particularly the Mau Mau war of 1952–60 which accelerated Kenyan independence in 1963, but the colonial impact upon urban form and governance has attracted less attention. While Kenya’s African population has shaken off colonial rule, and most of the white settler and Indian minorities have left, only recently has the country committed itself to major reform of local government and land law, with the creation of the Second Republic and the 2010 constitution.

A re-assessment of colonial township laws can enhance the existing literature on Kenyan urban governance by drawing upon the sub-disciplines of legal history and legal geography. The author has consulted primary sources in the form of Colonial Office files held in the UK National Archives at Kew, and colonial laws and regulations held in the Institute of Advanced Legal Studies (University of London). Other research libraries with relevant source material include the School of Oriental and African Studies, the Institute of Commonwealth Studies, and Rhodes House in Oxford. The author undertook field research in 2010 in Kisumu, Kenya’s third city and a regional centre on the shores of Lake Victoria; this was the colonial port terminus of the Uganda Railway, which arrived in 1901, but lay outside the white “settled areas” (or the “White Highlands”).

**THE COLONIAL LEGAL ORDER IN KENYA**

Legal pluralism has been called “a fixture of the colonial experience ... characterizing at the present day the larger part of all of the world’s national legal systems”. So it has been with Kenya. In 1906 the East African Protectorate identified different sets of laws governing three different social groups. Law

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7 “Introduction” to the first published reports of the East African Protectorate Law Reports (EAP Law Reports) (1906, Stevens & Sons) at 1. The Foreign Office took over the East
for Africans (“natives”) was “native law and custom provided it is not repugnant to justice or morality … and such Acts and Ordinances as are specifically applied to them”. For “non-natives” (European settlers and Indians) the law was “applied Indian Acts, Ordinances and Regulations, and where these are inapplicable the Common and Statute law of England existing at the time of the passing of the Order-in-Council, 1897”. Thirdly “Mahomedan law, or the Sheriah as expounded by the Shafei school of commentators” applied to “Mahomedan natives in the dominions of the Sultan of Zanzibar”. While there was some attempt to codify law of the different African tribal groups, and Islamic law operated largely independently, the dominant and fastest growing body of colonial law was the second, as befitted the political dominance of the “non-natives”.

In the two decades after 1920 the new Kenyan colony was passing ordinances at a rate of nearly one a week: a substantial output, even allowing that many of these were minor amendments. They were made by a legislative council of colonial officials and elected white settler (with a few Indian) representatives. African interests were supposedly safeguarded by a native commissioner (an appointed British colonial official), but Africans had no direct representation as they were considered “not fit to govern”. This arrangement purported to be representative government, but effectively excluded Africans, who during the colonial period comprised over 95 per cent of the population.

The so-called Devonshire Declaration of 1923 (Devonshire Declaration) asserted that African interests should be paramount, but in reality power was in inverse proportion to the size of the three main racial groups. White settlers were the smallest but most powerful group, and laws profoundly affecting the African population were made without their consent or even

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8 Native was defined as “a native of Africa, not being of European or Asiatic origin and including any Swahili or Somali”; “Introduction”, ibid.

9 The Application to Natives of Indian Acts Ordinance 1903 related to some 30 Indian acts. It reflected the importance of Indian immigration into the protectorate, India’s role as imperial Britain’s most important colonial possession, and a laboratory for utilitarian law-making and social management. See E Stokes *The English Utilitarians and India* (1959, Clarendon).


11 An average of 47 ordinances a year were passed in Kenya between 1925 and 1934, and 42 between 1935 and 1944 (derived from reports in *Journal of Comparative Legislation and International Law*).

12 In 1929 Africans comprised 97.6%, Indians 1.9% and Europeans 0.5% of a total population of just over 3 million. See H Okoth-Ogendo *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (1991, ACTS Press) at 48.

knowledge. The Colonial Office in London was occasionally pressed by the Anti-Slavery and Aboriginal Protection Society and the Labour Party over its policy towards Africans. However, parliamentary questions were less interested in the Africans than in seeking assurances that the constitution of Kenya would retain an official majority (ie of British colonial officials rather than settler interests) in the Legislative Council “until the Natives are fit to bear their part in the government of the colony”.\(^{14}\) When challenged in 1926 whether the Feetham Commission on local government was considering giving votes to “natives and Indians in municipal government affairs”, a bemused Colonial Secretary Ormsby-Gore responded: “I have no idea whether the question is coming up at all.”\(^{15}\)

The main authors of Kenya’s colonial laws were a small cadre of predominantly Oxbridge-educated law officers, for whom the colonies offered the chance of early advancement to such positions as attorney-general and chief justice.\(^{16}\) Law-making was also informed by various official commissions and reports of expert consultants, drawn from the same cadre of lawyers and other professionals. Indeed an under-secretary at the Colonial Office in London expressed himself “a little distressed over Kenya’s increasing inability to move in any direction without the assistance of an outside expert”,\(^{17}\) and one historian remarked upon the “campaign of commissions” that visited Kenya between the two world wars.\(^{18}\) The Feetham Commission on local government is one such that is discussed below.

The new laws often borrowed from legislation in other British colonies and increasingly sought consistency with it. While British statute law on local government, public health, housing and town planning was influential, Kenya often looked to South Africa, especially the Cape Colony, for experience in managing Africans, and many colonial officials in Kenya had personal connections with South Africa.\(^{19}\) The first major land grant to white settlers was made

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\(^{14}\) Parliamentary answer on 6 July 1926 in CO 533/606 (Kew).

\(^{15}\) Ibid.

\(^{16}\) *Who Was Who* (Oxford University Press) records the service of some of them. JW Barth (1871–1941) was registrar, then attorney-general and chief justice in the East African Protectorate and Kenya between 1902 and 1934; he chaired the Labour Commission in 1912–13 and edited the first edition of *Laws of Kenya*. Sir William Morris Carter (1873–1960) was registrar, judge and chief justice in the East African Protectorate, Uganda and Tanganyika between 1902 and 1924; he chaired land commissions in Southern Rhodesia (1925) and Kenya (1932–33), and subsequently served on the Royal Commission on Palestine (1936–37). Sir Walter Huggard (died 1957) served in Nigeria and Trinidad and Tobago before being attorney-general in Kenya (1926–29); he subsequently worked in the Straits Settlements and South Africa, retiring to live in the latter. Sir William Hamilton (1867–1944) served in Dominica and Lagos, then in the East African Protectorate from 1897 to 1920, becoming chief justice; he was secretary to the Land Committee in 1904.

\(^{17}\) Minute by Bottomley, 25 May 1926 in CO 533/605 (Kew).


\(^{19}\) Two governors, Girouard (1909–12) and Northey (1918–22), had married white South
to a syndicate that was “a virtual who’s who of prominent financiers and magnates”.20

Laws from the early days of the Kenya colony regulated African labour, movement and relations to towns. In particular there were three groups of ordinances relating to registration, “master and servant” and vagrancy. First, the Native Passes Regulations 1900 and Ordinance 1903 required Africans to have a pass to leave the district where they lived. During the First World War these controls were tightened. The Native Registration of Natives Ordinance 1915 required African males over the age of 15 to wear a so-called kipande card around their necks (with their finger-prints and employment history recorded) when leaving their reserves for the “settled” (ie by whites) areas; a 1922 revision required them to carry it when in the township (but not when in the reserve).21 The kipande system (much hated by Africans) enabled employers and officials to control their African labour and enforce labour contracts. While the South African pass laws under apartheid are better known, it has been claimed that “[t]he scope and intensity of controls and pressures placed upon the African population in Kenya by the colonial state to provide labour for settler estates were far greater than those found in any other British colony in Africa.”22

A second tool for labour control was the 1906 Master and Servants Ordinance, pushed through by white settlers in need of “native” labour, and later amended. Originating in a large corpus of medieval and early modern English legislation, these laws were adopted for settler colonies in Africa, the Caribbean and Australia as a common system for regulating labour, enforcing the rights of the master but offering little protection to the servant. While in Britain the 1875 Employers and Workmen Act removed the more punitive sanctions and recognized the rights of workers to collective representation, colonial laws preferred the earlier form.23 The East African Protectorate courts rather ineffectually sought to mitigate the more brutal treatment of labour in Kenya: the High Court in far-away Mombasa urged local magistrates

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Africans while serving there. Kenya’s chief land surveyor, Arthur Baker, was the brother of Herbert Baker, the architect of union public buildings in South Africa. Christiaan Felling, a South African originally from German South-West Africa, was general manager of Kenya railways from 1922 until his death in 1928.


21 Following protests from Africans and pressure upon the Labour government of the day, the so-called kipande laws were repealed in 1947, only to be re-introduced during the state of emergency to control the movement of those labelled as insurgents.


that “more discretion be used in awarding the punishment of flogging”, and
that they “must not regard floggings as an every day occurrence to be freely
administered but as a serious and exceptional form of punishment”.
In Kenya a 1919 amendment created a labour inspectorate within the
Department of Native Affairs, empowered to inspect and make rules govern-
ing workplace practices, but the system was weak and under-resourced. The
ordinance also made employers responsible for housing their workers, with
implications for urban areas, as discussed below.

The third group of laws were the vagrancy ordinances, six of which were
passed between 1898 and 1930. Any native found outside the reserves without
his kipande was treated as a vagrant who (as well as European vagrants) could
be detained in prison. A government committee report on juvenile crime in
1932 recommended the “repatriation” (i.e., deportation to the reserves or
trust lands) of any unemployed juveniles; in 1947 it was even proposed that
any African unemployed for more than three months would be guilty of an
offence, a measure aimed at increasing the administration’s power to exclude
Africans from urban areas.

These interlocking movement controls were mainly targeted at African males
of economically active age, for whom there was an insatiable demand from the
colony’s railways, harbours and white settlers. The 1912–13 Native Labour
Commission estimated the need for 100,000 labourers. Some 400,000 Africans
served during the First World War in the Carrier Corps (representing a large
proportion of able-bodied men in the colony, which had a population of
about 2.5 million at the time); 20,000 died, mostly of disease and overwork.
There were huge wealth differentials between the races, as the Development
Sub-Committee on Social Welfare reported in 1946: “[p]overty of a massive and
grinding nature, assessed by modern standards, is at present the most outstand-
ing feature of African society almost everywhere in the Colony.”

This article will explore the effects of the colonial legal order upon Kenyan
towns, especially the role of township laws in controlling Africans in towns,
and of land tenure and local government laws in shaping the urban landscape.

THE LAW OF TOWNSHIPS AND LOCAL GOVERNMENT

As the railway and colonial administration penetrated the interior of what
became Kenya, small settlements and government stations grew up, which
were administered under the so-called Townships Ordinances. Until

24 Circular 1 of 1905 EAP Law Reports, above at note 7 at 156.
25 M Parker Political and Social Aspects of the Development of Municipal Government in Kenya
(1950, School of Oriental and African Studies) at 122 and 129.
26 G Hodges The Carrier Corps: Military Labour in the East African Campaign 1914–18 (1986,
Greenwood Press).
27 Parker Political and Social Aspects, above at note 25 at 160. In 1947, 328 Europeans and 71
Indians were recorded as earning over £2,000 each per annum, but not a single African.
28 Regulations for townships were first made under the East Africa Order in Council 1897.
repealed in 1963 to make way for a new Local Government Act at the time of independence, some 30 ordinances concerning townships and municipalities were passed, starting with the Townships Ordinance of 1903. This ordinance created 11 townships, and the number grew to 77 by 1930, their boundaries set by gazette notice. Thus the boundary of the Kisumu township was defined as a 2.5 mile radius of the collector’s office, and “with beacons, distances and bearings is delineated, edged red, on Land Surveys Plan No. 15135.”

By 1906 Kisumu had a part-time town magistrate, judge and town clerk, all of whom were colonial officials operating through a township committee.

A surprisingly large part of the colonial laws of Kenya concerned local government, by which was meant local government in the “settled” or white settler areas. The largest section (or “title”) in the published laws of Kenya concerned townships, municipalities and town planning. The first township ordinance was only two pages long, conferring the power to make rules and levy rates, but a mass of detailed rules followed, both general and specific for individual townships. These rules appear to have been based largely upon the military cantonment rules for British India, with borrowings from British local government law and by-laws. So tangled became these rules, with multiple revisions instigated by local magistrates, that the High Court in Mombasa produced its own compilation of township regulations in 1918. In the detail one can trace the full web of controls that the “colonial masters” imposed upon Africans.

After the First World War and the subsequent creation of League of Nations mandates over the colonies of defeated states, the trusteeship principle associated with Lord Lugard became increasingly influential in British colonial management, and was expressed in the concept of the dual mandate. This meant that Africans were to be kept in reserves under their customary tribal laws except when their labour was required, while towns were to be kept separate and directly administered by the colonial power. In Kenya the physical boundaries of reserves were demarcated by ordinance, and Native Land Trusts were created for them, supervised by British officials through Native Land Boards. These were not responsible for townships, since the government reserved to itself the right to “set aside” land required for “public purposes” such as “Government camps or stations” and the “establishment of townships”.

29 Gazette notice of 7 September 1903: Township Rules in Laws of Kenya (1928, Waterlow) at 43.
30 In Laws of Kenya (ibid), the largest of 22 titles was IX (local government) which comprised 427 pages (28%) out of a total of 1504 pages; by contrast title XVI (native affairs) was only 36 pages long.
32 Lord Lugard The Dual Mandate in British Tropical Africa (1922, Frank Cass). In Kenya the “dual policy” after 1922 had a somewhat different meaning, referring to the “complementary development” of African peasant farming alongside white plantation agriculture: Dilley British Policy, above at note 18 at 179.
33 Kenya Townships Act 1902.
The Kisumu Township, for instance, was specifically excluded from the “Kavirondo Native Land Unit” when the boundary between them was defined in a schedule to the Native Lands Ordinance.\textsuperscript{34} Although the Devonshire Declaration asserted that African interests in Kenya were to be “paramount”, successive governors consistently favoured the settler interest. As Governor Grigg put it in 1926 (wrongly, as things turned out): “[f]ighting a long and losing rearguard action against the settler is the most short-sighted statesmanship. He will have complete power one day, and it is essential in native interests to secure his co-operation in a sound native policy by steady leadership here and now”.\textsuperscript{35} Thus “trusteeship in the early years of the century was in constant counterpoint with the parallel policies of increasing deference to the principles of white self-government”.\textsuperscript{36}

The grant of a measure of self-government to Kenya was followed by a review of the local government arrangements by a three-man commission of inquiry. The governor’s telegram proposing the commission to the colonial secretary in London shows a degree of confusion over what it was supposed to do:

“There is growing difficulty and widespread complaint regarding the local Government of Nairobi Town which has widely outgrown the present municipal boundary and spread in the suburbs over a large area. Problem is complicated by the Indian question … will deal first with Nairobi where the general problem is rendered especially urgent by the recent spread of malaria and the growing anxiety regarding the public health … I cannot take action without independent expert advice.”\textsuperscript{37}

Its terms of reference subsequently emerged as:

“To make recommendations as to the establishment or extension of local Government for the following areas in the Colony:
1. Nairobi and its environments,
2. Mombasa and its environs,
3. Such settled areas as the Commissioners may consider suitable for the establishment of local Government.”\textsuperscript{38}

A background paper, prepared by Logan, the colonial official who acted as secretary to the commission, made clear that the commission should concern itself with local government in the “settled” (ie white settled) areas, while its

\textsuperscript{34} CO 533/711 and CO 533/513/1 (Kew).
\textsuperscript{35} Governor Grigg to Colonial Secretary Amery, 25 June 1926 in CO 533/605 (Kew).
\textsuperscript{37} Telegram of 21 May 1926 in CO 533/605 (Kew).
\textsuperscript{38} Letter from Governor Grigg to Colonial Secretary Amery, 23 July 1926, in CO 533/605 (Kew).
recommendations might be introduced to native areas “at a later date when the African has proved himself fit for more power”.³⁹ Logan’s paper assumed that “the local interests of the white farmer and non-native town dweller are distinct from the local interests of the African in his Reserve”, and drew a somewhat spurious analogy with borough and rural district councils in Britain.⁴⁰

The chairman of the commission was Sir Richard Feetham, a judge of the South African Supreme Court. Notwithstanding the recent Devonshire Declaration on the supremacy of African interests, the Colonial Office expressed itself more concerned about Indian than African sensitivities at a time of growing pressure for self-government in India itself: “I should not have looked to a South African official – even judicial – to find an acceptable solution to a problem in which Indian interests are largely concerned.”⁴¹ Governor Grigg reassured his superiors that Feetham was “a first rate man: he is English, not South African, by birth, education (Marlborough and New College) and professional training (Inner Temple) ... absolutely impartial and capable chairman.”⁴² The Colonial Office comment was “[m]y doubt was how Indian feeling will regard the appointment”.⁴³ Feetham travelled from Durban to Mombasa and chaired the commission for six months in 1926, mostly in Nairobi, but with a mainly recreational visit up-country, which included Kisumu. His private papers reveal his conventionally pro-settler bias: “[m]ost of the settlers here have brought English standards with them – and are intent on making nice homes, and beautiful surroundings.”⁴⁴

Governor Grigg’s hope was that the Feetham Commission might lay the foundations of “a new public spirit and sense of obligation throughout the European community”.⁴⁵ The colonial administration was also concerned with the rising costs of local government, which were largely being met by grants-in-aid from the central administration. The Township Fees and Conservancy Ordinance 1908 allowed for the levying of various fees. However, the usual source of local government revenue (property rates based on capital or annual values) was opposed by the settlers, as was any attempt to introduce a betterment levy through town planning legislation.

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³⁹ W Logan “A paper on local government in Kenya”, id at 5.
⁴⁰ Ibid.
⁴¹ Bottomley, 25 May 1926, in CO 533/605 (Kew).
⁴² Ibid.
⁴³ Ibid.
⁴⁴ Letter to his mother of 14 December 1926 in Feetham papers (in Rhodes House Library).
⁴⁵ Letter from Governor Grigg, above at note 38.
As Governor Grigg stated: “[t]here is a tendency throughout [the settled] areas to look to Government for services of every kind, while resenting the imposition of any taxation sufficient to cover the services which are required … It is high time that a stronger sense of financial and political responsibility were built up among all sections of the European population.”

The Feetham Commission recommended a hierarchy of four types of local authority, ranging from a full elected council at the top, through a municipal board to grade A and B townships. The Local Government (Municipalities) Ordinance 1928 followed Feetham in providing for the creation of municipalities, with half of their funds provided by central government and the balance from market and other fees. Nairobi was the first to have full council status, while the port and second town of Mombasa had a municipal board. Kisumu was upgraded from a grade B to a grade A township in 1930 (allowing it to keep its own accounts) and in 1941 became the sixth municipality in Kenya; nevertheless African representation on its municipal board did not come until the 1950s.

Although Africans were by far the largest population group in the towns as well as the country, the Feetham report hardly mentioned them at all. The proposals for elected members only addressed European and “Asiatic” voters (two Europeans and one Asiatic for every 50 qualified voters), and the population figures it cited for Nairobi did not include “natives”, although they far outnumbered the other groups from the start. Townships were managed by committees or boards comprising mostly appointed officials. A white Nairobi councillor of liberal leanings in 1924 tentatively suggested that African membership of municipal boards might help avoid “the tendency to subterranean discontent”, but he was ignored. Much of the body of township and local government rules, which survived for four decades after the Feetham report, excluded and segregated Africans, as the next section will show.

The 1920s was also the decade when statutory town planning joined local government law for Kenya’s “settled areas”. A Town Planning Ordinance was passed in 1919, with later revisions mainly concerned with raising new sources of revenue. The Town Planning and Development Ordinance 1931 followed legislation in England (1925), Western Australia (1928) and New Zealand (1926), and obliged municipalities to prepare planning schemes. Its provisions for betterment levies were vehemently opposed by white settlers as “inequitable, completely unsuitable to a Colony such as Kenya … unworkable in practice … We are mostly small men financially, civil servants, trade employees, professional men … The effect must be centrifugal, driving men out from

46 Ibid.
47 The other municipalities at the time were Nairobi, Mombasa, Nakuru, Naivasha and Kitale.
48 Councillor Giles in 1924, quoted in Parker Political and Social Aspects, above at note 25 at 184.
the centres to remoter homes, and increasing still further the Colony’s incredible burden of expenditure on roads and transport”.\textsuperscript{49} Town planning activity was mainly concentrated upon Nairobi, where planning schemes were prepared by successive visiting consultants. In 1913 Dr Simpson, the segregation specialist, prepared the first on Colonial Office instructions; the second, in 1926, was by Walton Jameson, an engineer from South Africa; the third, in 1948, was by Thornton-White, a British-born professor of architecture at the University of Cape Town.\textsuperscript{50}

**SEGREGATION AND CONTROL OF “NATIVES” IN TOWNSHIPS**

As has been said, power in colonial Kenya was in inverse proportion to the size of the three racial groups. Europeans, the smallest but most powerful group, never comprised more than 1 per cent of the population; the second (Indians or “Asiatics”) comprised less than 5 per cent, and the remainder were African (as far as imperfect population censuses can tell us). Racial stereotypes were summarized in 1950 as:

> “Europeans on the whole regard Indians on the whole as dirty, insanitary and unscrupulous. Indians reciprocate with the view that Europeans are smug and self-satisfied, selfish and discourteous. European and Indian alike think of the rural African as a loveable child, and of his urban contemporary [sic] as a bumptious, ill-natured, ungrateful, shiftless and often criminal ‘go-getter’. His leaders, in general, they stigmatise as half-educated and vicious.”\textsuperscript{51}

The Africans’ views were unmentioned (and perhaps unmentionable).

Africans were only welcome in towns as obedient workers. The colonial official who first laid out Kisumu township expressed a typical hostility: “[t]he towns which have sprung up in Africa are a serious disruptive force, as they too often form sanctuaries for youths who wish to avoid tribal obligations, and whose education in the slums of these centres is mainly vicious.”\textsuperscript{52} A later commentator wrote: “until forced to do so by African discontent, crime, prostitution, and the instability of a labour supply never resident long enough to be well-trained, the European and Indian populations in the towns have not regarded the African as an integral part of town life”.\textsuperscript{53}

When a few years after the Feetham report a new colonial secretary (Lord Passfield, the socialist Sidney Webb) sought better treatment for Africans,

\textsuperscript{49} Minority report to Select Committee (1931): CO 533/414/3 (Kew).
\textsuperscript{50} GA Myers Verandahs of Power: Colonialism and Space in Urban Africa (2003, Syracuse University Press).
\textsuperscript{51} Parker Political and Social Aspects, above at note 25 at 1.
\textsuperscript{53} Parker Political and Social Aspects, above at note 25 at 99.
the Kenyan administration defended its approach with the dual mandate argument:

“In view of the fact that Government has set aside large areas of land for the use and benefit of the native tribes of the Colony, it is only proper that the townships, which were primarily established for occupation by non-natives, should be reserved for those who should properly reside there, and that the residence therein of natives should be confined as far as possible to those whose employment on legitimate business requires them so to reside.”

The physical form of townships reflected these attitudes. They provided spacious and racially exclusive European residential areas, which were largely segregated from the Indian population by building-free zones, and even more segregated from the African population. The justification was provided by medical officers of health, for whom racial segregation was a means of preventing tropical diseases such as plague and malaria. In 1905 the Land Committee for the East Africa Protectorate recommended segregating the racial groups, and the Townships (Public Health, Segregation of Races) Rules empowered the governor to reserve areas for the following specified land uses: European residential; Asiatic residential; locations for “Asiatics of the working classes”; “native” locations; commercial areas for Europeans and/or Asiatics (but not natives); and open spaces.

Kisumu was the first Kenyan township to demarcate both racial and also tribal quarters. The Kisumu Township Rules (first issued in 1904 and revised no fewer than 37 times up to 1926) divided the township into three areas. Area A (the government area of Milimani) was reserved for Europeans, living in stone-built bungalows in spacious grounds; area B (the “bazaar”, an embryonic central business district) was reserved for “Asiatics”. No “native huts” were allowed in areas A or B, and no “native” was allowed to reside there except as a lessee, registered domestic servant, registered employee or dependant. Separate European and Asian business areas developed near the railway terminus, while other immigrant groups lived in area C in separate villages reserved for each ethnic group (eg Arabs, Nubians, Ganda, those employed as tax collectors, police and sanitary workers). There were heavy penalties for any person in area C who allowed an unauthorized person “to sleep in any hut or other building”.

54 “Memorandum on legislation and regulations in Kenya affecting natives living in municipalities and townships” (1931): CO 822/37/9 (Kew).
56 Laws of Kenya, above at note 29 at 254.
57 Kisumu Township Rules, sec 85.
or others in tents or outbuildings in the vicinity of shops or dwellinghouses who are not the actual house or shop servants in the immediate employ of the owners or occupiers of such houses or shops”. 58 Perhaps these segregatory measures were considered to justify the official description of Kisumu in 1922 as “far and away the best laid out and kept town in Kenya”. 59

The physical form of Kisumu as a racially segregated township resulted from its first professionally surveyed layout, together with a report on sanitary conditions in 1907 by a visiting consultant civil engineer, G Bransby Williams. 60 At the time, it had a population of 5,000–6,000, comprising mostly Africans, with a mere 30 Europeans and 600 Indians. The Europeans lived on the high ground overlooking Lake Victoria, with the African police housed nearby in huts which Williams considered “the best in the country”. 61 The Indians in the bazaar area lived in corrugated iron shacks on small plots totally built up, with no outside space. Williams wrote: “[t]he greater number of the Indian traders of Kisumu are poor men, and the insanitary condition of the bazaar is, to some extent, the failure of the officials who were responsible for letting the land in the first instance.” 62 He recommended moving and replanning the bazaar “by increasing the area of the holdings, fencing them in, and removing the latrines, washing places and kitchen out of the houses into the back yards”. 63 In 1921 Indians were opposing the small plots (1/12 or 1/18 acre) that the colonial authorities were offering at auction, and calling for larger half acre plots. 64

Williams reported that that Kisumu’s African workers lived in a separate “native quarter” north-east of the town (towards the present districts of Manyatta and Nyalenda). He recommended for them a layout of squares, with huts occupying each alternate square, so that: “[t]he inhabitants would subsequently migrate to the unoccupied squares when the ground on which they were living had become fouled” (ie after use as a latrine). 65 Anticipating future growth, he suggested that 200 acres on such a layout would be adequate for 10,000 Africans. Under his scheme of alternate unoccupied squares this would have represented high densities (100 persons per acre), yet he made no mention of piped water or sewerage provision, or apparently even public latrines.

The next development in housing the urban African was the “location”, a term borrowed from South Africa. The kipande system, combined with tighter enforcement of the Vagrancy Ordinance of 1920, was intended to reduce the

58 Id, sec 87.
59 Colonial annual report, quoted in Anyumba Kisumu Town, above at note 5 at 100.
61 Id at 11.
62 Id at 8.
63 Id at 13.
64 Parker Political and Social Aspects, above at note 25 at 71.
65 Williams Report on the Sanitation, above at note 60 at 12.
influx of Africans into the townships, but could not operate unless an area was defined where Africans were allowed to live, hence the “location”. Section 43 of the Municipal Corporations Ordinance 1922 empowered local authorities to lay out locations and “compel all natives residing in the municipality, except as are employed in domestic service or exempted by the Governor, to reside within such locations”. The alternative was that African workers would live outside the township boundary, which meant that: “[we] shall have on the fringe of every urban area a most undesirable school for crime … it is [the local authorities’] duty to the European residents to ensure that the location pours daily into its labours in the town a clean, healthy and contented community”.66

Following South African legislation, the Native Authority (Amendment) Ordinance of 1924 made the chief native commissioner responsible for regulating African housing, and created a Native Trust Fund responsible for building accommodation from beer-hall profits: the so-called “Durban system”.67 In Kisumu the township boundaries were extended in 1923 in order to include certain native villages and bring them under tighter public health controls; however the boundaries were tightened in 1930, excluding some of the villages, probably as a cost-saving measure and to reduce the number of Africans counted as resident within the township. The use of streets and footpaths by Africans was restricted under the township rules; a night-time curfew applied to them, and they committed an offence if they stayed outside the locations overnight or longer than a specified period without permission. Such tight controls were justified by a colonial official in these words:

“Unrestricted movement of natives into and within townships leads to the collection in these areas of the worst class of idle disorderly and criminal natives. Such a class makes its living either by begging or by stealing. In the former case they impose themselves upon the hospitality of those members of their tribe who are in employment, relying upon native custom to preclude refusal, and become an intolerable burden upon a decent and industrious community.”68

Employers were required to ensure that their workers were “properly housed”, but not where “a servant is able to return to his home at the conclusion of his daily work or to obtain suitable or proper housing at or conveniently near to his place of employment”.69 Domestic servants were housed on the same plot as their (usually European) employers. The railway (the largest single employer of Africans) housed them in rows of single-room barracks called “landhies”, which were timber frame structures with corrugated iron roofs and cladding,
usually without water or electricity. Williams described these in Kisumu:
“rows of small rooms, about nine feet square, in each of which two men and
two women sleep, whilst in others 30–40 people sleep in a one-roomed building
which should not be made to accommodate more than half that number”.70

These poor housing conditions continued for half a century, employers
claiming that “in boom periods building costs are too high, and that
depression years are not the time to build ... when I asked for examples of
employers housing apart from servants quarters, my informants could not
produce a single example, ... such provision as Africans have made for them-
selves is squalid and overcrowded almost beyond belief”.71

While the township rules required lodging houses to provide space stan-
dards of 30 square feet (and 350 cubic feet of free air space) per person, and
a minimum floor space of 100 square feet for habitable rooms, and court
reports include occasional prosecutions for overcrowding,72 enforcement gen-
erally seems to have been lax. Improvements in African housing, and pro-
vision of family accommodation, only began after the Second World War.73

LAND TENURE LAWS AND URBAN ISSUES

What in Kenya is usually called the “land question” has been dominated by
the inequalities of white settler land confiscation, as has its historiography.
The co-existence of different land tenure systems under the dual mandate pol-
icy, and the implications for urban governance, are less well recognized and
require some explanation.

The foundations of white settler land-holding, which made many Africans
“squatters” in the land of their ancestors, lay in a succession of ordinances
passed in the first two decades of the 20th century, which can be summarized
briefly.74 The 1902 Crown Lands Ordinance provided that empty land (or any
land vacated by a native) became crown land, and made it available for transfer
to Europeans. By 1914 nearly five million acres of land had been so trans-
ferred, and by independence in 1963 over seven million acres. A deeds registry
system was created for these land grants, followed by a Torrens-style official
registry of titles75 to bring land titles under tighter government control. The
1915 Crown Lands Ordinance extended the 1902 ordinance to vest in the

70 Williams Report on the Sanitation, above at note 60 at 12.
71 Parker Political and Social Aspects, above at note 25 at 103.
72 EAP Law Reports, above at note 7 at 99.
73 A Hay and R Harris “Shauri ya Sera Kali: The colonial regime of urban housing in Kenya
to 1939” (2007) 34 Urban History 504; A Hay and R Harris “New plans for urban housing in
Kenya, 1939–1963” (2007) 22(2) Planning Perspectives 195; R Harris “From trusteeship to
development: How class and gender complicated Kenya’s housing policy, 1939–1963”
74 See Okoth-Ogendo Tenants of the Crown, above at note 12.
75 A land registration system introduced in South Australia in 1858 by Robert Torrens, in
which the government is the keeper of the master record of all land and its owners.
crown “all public lands in the Protectorate ... and all lands acquired by His Majesty for the public service, including all lands occupied by native tribes”, while the Government Lands Ordinance of the same year empowered the administration to grant land to individuals (white settlers) on 999 year leases, which were in effect freeholds. These ordinances were a major factor in the Mau Mau uprising and the end of colonial rule in Kenya.

While academic attention has understandably focussed on white settler farmland, the land tenure laws also had a major impact upon urban growth and governance. The land occupied by the townships was state land under government leasehold control. After the land had been surveyed, that not required for government use was subdivided into plots and usually auctioned for residential or business use by individuals and companies (both British and Indian, but not African). Outside the township boundaries were the reserves or trust lands where most of the African urban population was required (indeed usually preferred) to live, and the convenient ideology of the dual mandate allowed the township to evade responsibility. Successive annual reports on Kisumu municipality refer to the situation:

“In view of the close proximity of the native lands the housing problem has not been so acute as in some of the other municipalities.”

“[F]ar the most part goes home nightly or lives in lodging-houses in the surrounding African area [ie the reserves or trust lands] ... the density of population on the borders of the town is probably higher than within the town itself, which is an indefensible state of affairs.”

“There is no municipal African housing scheme, and although the lack of housing is not felt so much in Kisumu since many of the Africans working in the town either own or rent accommodation in the surrounding African land unit, the Board must sooner or later address itself to the problem, not least because its omission means unhealthy suburban development on the perimeter of the municipality.”

As Parker put it in 1950: “[w]henever peripheral development of this kind takes place, some measure of control is ultimately necessary, because lawlessness or drunkenness may prevail there, or the lack of services may produce disease which spreads to the town, or because certain township services (such as malaria prevention) need to be extended into surrounding areas if they are to be effective.”

77 Id (1947) at 30.
78 Id (1946) at 31.
79 Parker Political and Social Aspects, above at note 25 at 101.
A major change came when Africans were allowed individual freehold tenure in trust lands. The Swynnerton report (part of the colonial response to the Mau Mau uprising) recommended that an African landed class be created, by facilitating individual African ownership in the trust lands; following the East African Commission report of 1955, this resulted in an “ambitious programme of social engineering, aimed at the total extinction of customary land law”. It was brought into law by the Native Lands Registration Ordinance of 1959, replaced just before independence by the Registered Lands Act 1963. Procedures were laid down in the Land Adjudication Act 1968 for the “ascertainment and recording of rights and interests in Trust land”, which comprised the systematic adjudication of boundaries, consolidation of holdings and registration of individual ownership. It was intended that the new land registration system would eventually replace the older laws designed for white settlers, but they have still not been repealed half a century later, a situation which has facilitated corrupt land allocations.

The enlargement of municipal boundaries added trust lands and newly granted freeholds to the former leasehold areas of the former townships, with major implications for urban governance, as the Kisumu case shows. Its municipal boundary was extended in 1972, enlarging the official urban area 20 times, from the 15 square kilometres of the former township (the “Old Town”) to 297 square kilometres (and a further 120 square kilometres of Lake Victoria’s waters). In 1962 the Old Town had a resident population of only 23,000, but by 1990 the population of the post-1972 expanded urban area was 190,000; this more than doubled to 396,000 by 2010. The municipality compulsorily acquired land north of the town under the Land Acquisition Act 1968, intended to be a land bank for future planned development, but much was corruptly re-allocated to land speculators, leaving the council with little for public use.

The co-existence of leasehold with freehold and trust land caused many problems. Registered title land and freehold land had separate map registers, reflecting their different origins. The boundaries of titled land (council-acquired land and other estates) were recorded in the Nairobi Lands Office, while freehold land was recorded on registry index maps in the local

Lands Office. Furthermore the land certificates issued under the Land Adjudication Act of 1968 defined plots by general boundaries, while leaseholds and registered titles were defined by fixed boundaries, creating opportunities for corruption. In collusion with land surveyors, landowners could apply for official boundary corrections, enlarging their land into the acquired titled land which appears blank on the registry index map. Thus a land parcel could be registered under two different statutes, both legal but overlapping on the same space, and recorded in separate land registries.

The Old Town continues to be closely regulated, 40 years after the expansion of municipal boundaries, and is seen as “detached” from the majority of the population, with an “inherent perception on the traditional role of the local authority” inherited from the colonial era. Meanwhile two thirds of the people live in peri-urban informal settlements outside the Old Town, on former trust land converted to individual registered rights. Densities in these areas can be as high as 150 households per hectare (compared with 15 in the high-income areas of the Old Town), and they are largely unplanned and unregulated, with mixed land uses, poor infrastructure and utilities, and a propensity to flooding and diseases of overcrowding. They are the so-called “septic fringe”.

CONCLUSION: TOWNSHIPS AND THE “HAUNTOLOGY” OF COLONIALISM

Derrida, evoking the spectre of Marx still haunting Europe after the fall of communism, coined the word “hauntology” to suggest that that the present exists only with respect to the past and a psychology of fear. Thus the spectres of colonialism and the dual mandate still haunt Kenya’s urban landscapes. Independent Kenya’s politicians may have consigned oppressive and racist township rules to “the dustbin of history” (to deploy Trotsky’s phrase) when the Local Government Act 1963 repealed the accumulated Townships and Municipalities Ordinances and their associated rules. Yet the ghost of the township still survives in the urban form of Kenyan towns, and can perhaps be seen in Kisumu more clearly than in Nairobi and Mombasa. The “Old Town” is still sometimes used to describe the former European residential area where large plots for the high-income groups exist near the central business district, while beyond the defunct township boundaries still lies the “septic fringe” of crowded, poorly planned and largely unserviced housing for the masses.

84 Similar methods were used during the enclosures movement in Britain for landowners to enlarge or engross their holdings. See J Neeson Commoners: Common Right, Enclosure and Social Change in England, 1700–1820 (1994, Cambridge, University Press).
85 Situation Analysis of Informal Settlements in Kisumu (2005, UN-Habitat) at 15.
Perhaps the most powerful legacy of colonial rule for Kenya’s towns and cities results from the land tenure system and controls created by the dual mandate. Within the former township boundaries are leasehold plots on government land, while outside those areas is registered freehold land in the former trust lands, with the former remaining more closely regulated than the latter. After independence, under-resourced urban authorities have proved ill-equipped to manage the consequences of the huge expansion of municipal boundaries, and the land tenure structures inherited from the colonial era continue to create problems of unplanned urban growth and corrupt land allocations and disputes.

In the wider African context, land law reform has become a high priority for post-colonial nation states, although disentangling the complexities of colonial laws is no easy matter. Post-apartheid South Africa is perhaps the leading example in attempting transformative change through constitutional reform. Kenya has experienced relentless population growth (from eight million at independence to over 40 million now, adding a million mouths a year in the first decade of the 21st century) and its towns and cities have grown even faster. The complex land laws inherited from colonial times remain largely untouched, at least until the new constitution of 2010. This adopts a three-fold classification of land: public land (including land held “in trust for the people resident in the county”, the successor to the former trust lands); community land (defined on the basis of “ethnicity, culture or similar community of interest”); and private land (with non-citizens only allowed a maximum 99 year lease). The constitution commits Parliament to “revise, consolidate and rationalise existing land laws” and empowers a new National Land Commission to conduct “investigations, on its own initiative or on a complaint, into present or historical land injustices”. This offers some hope that the hauntology of colonialism can be overcome. Or, to quote the words of an English judge on a different matter: “[w]hen these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred.”

88 See A Van Der Walt Property in the Margins (2009, Hart).
90 Id, sec 68(a).
91 Id, sec 67(2)(e).
92 United Australia Ltd v Barclays Bank Ltd [1941] AC 1 at 29.