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“COMMUNITY LAND” IN KENYA: POLICY MAKING, SOCIAL MOBILIZATION, AND STRUGGLE OVER LEGAL ENTITLEMENT

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“COMMUNITY LAND” IN KENYA: POLICY MAKING, SOCIAL MOBILIZATION, AND
STRUGGLE OVER LEGAL ENTITLEMENT

by

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ABSTRACT

Stemming from colonial legacy, independent Kenya failed to recognize customary interests in land as possessing force as statutory derived rights. This lies at the heart of the so-called “land question” in Kenya. Moreover, issues related to land rights are perceived as the root causes of conflicts occurring in the 1990s and 2000s. As a result of a crisis recovery process, the 2010 Constitution has embodied the fundamentals of land reforms; it has acknowledged “communities” as legally entitled to hold land. The present paper studies decision-making processes via a socio-anthropological approach showing how it contributes to understanding the issues at stake in the reform of Kenya's land tenure system, and the politics surrounding the design of new legislation around “community land”. Through the analysis of interlocking of scales of governance, the paper documents the manner in which local actors participate in, interpret, divert, or exploit policy debates undergoing at the national level.

Community – land reform – Kenya – policy process – actors agency – land politics

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INTRODUCTION

‘The land question for this country is one that has touched all communities and therefore is one that has to be dealt with, decisively and properly’ (CKRC, 2003: p.13).

During the land chapter discussions at Kenya's national constitutional conference, Prof. H. W. O. Okoth-Ogendo, eminent Kenyan and African land expert, stressed that, stemming from the colonial legacy, Kenya had failed to recognize customary interests in land as possessing force as statutory derived rights. This lies at the heart of the so-called “land question”¹, which has constituted one of the principal tenets of the struggle for constitutional reform in Kenya. Land was one of the major stakes in the independence struggle, in the negotiations between the British and the early Kenyan elites for the making of the first Constitution of 1963. As American political scientist suggests in his seminal work on the first land reform in the 1950s, the “land-question” had actually been (and still is, if I may add) at the heart of the nation building in Kenya (Harbeson, 1973).

The Constitution of Kenya Review Commission (CKRC) was appointed in 2000 by the then President of the Republic, Daniel arap Moi. The reform of the land sector and the revision of Kenya's Constitution have been entangled, although they progressed at different speeds. The very first draft of the new constitution, published in 2002 and called “the people's choice” (CKRC, 2002) because it was informed by the views of the *wananchi* (“citizens” in Kiswahili) that were collected countrywide, contained legal and institutional innovations for the acknowledgement of customary tenure. Transition from the model of trusteeship to community ownership of land (*see infra*) was also provided for, following along recommendations of the 2002 Njonjo Commission.

The Njonjo Commission was appointed in the wake of the conflicts occurring in the Rift Valley and at the Coast in the 1990s. Successive reports inquiring into the causes and the unfolding of the violent land-related clashes (Kiliku and Akiwumi Reports) had acknowledged that the origins of inter-communitarian tensions lay in the ethnicisation of distributive politics around land (Kameri-Mbote, 2008). President Moi appointed a Commission of Inquiry into the Land Law System of Kenya, called Njonjo after its chairman, Charles Njonjo. The Njonjo Report was the first official governmental document arguing for the need to overhaul the national land administration system, and land regimes. It set important precedents: first of all, echoing the seminal work of Okoth-Ogendo, it acknowledged the history of the tragedy of African commons, along with their expropriation, suppression and subversion by the colonial regime (RoK, 2002). Secondly, as a way forward to address these injustices, a reform of the categorization of land tenure was proposed. Most significantly, the then-“Trust lands” were to be renamed as Commons, and to be held under customary tenure (*Idem*). Kenya's 2010 Constitution, overwhelmingly supported by Kenyans via referendum, endorsed these principles, thus acknowledging “communities” as juridical persons, legally entitled to hold the land they reside upon and use. The Parliament was entrusted with the mandate of enacting legislation to give effect to the Constitutional provisions (Art.63 (5), RoK, 2010).

This paper is part of a PhD project that focuses on land tenure reform. It takes arenas of land-related policy-making as a site for observing and deciphering structures and relations of

¹ The Truth, Justice and Reconciliation Commission (TJRC, 2013) deals with land issues in Kenya by placing them in their historical and political context. It explains that “colonial policies, laws and practices, as well as the negative impacts that they engendered, collectively generated a land question embodying various land issues arising during colonialism, which became a key motivation for the formation of various local political groups pressing for Kenya's independence” (p.199). Furthermore, “[f]rom the advent of colonialism, Kenya has grappled with the land question, which subsequent regimes have been unable or unwilling to resolve” (p.157); this is part of the reason why the “land question” is described as “a potential trigger of conflict, owing to its peculiar historical and legal origins and the impact dispossession has had on the economic fortunes of locals” (p.103).

power that are embedded in the functioning of one East African state. Decision-making processes are explored via a socio-anthropological approach that draws from the social science of policy analysis and from development anthropology.² In brief, the socio-anthropology of public policy is an approach based on in-depth fieldwork and close empirical observation of the processes of negotiation that result in policy-formulation. It pays particular attention to transnational networks of actors, as well as to the policy beliefs and models that they put forward in the dynamic negotiation of norms and power relations.³ This approach argues for studying public action through the analysis of interlocking of scales of governance, thus documenting and questioning the manner in which local actors participate in, interpret, divert, or exploit policy debates and policy instruments that are designed at the national or international level. This multi-sited approach makes it possible to grasp the ways in which localized struggles, as well as institutional, legal, or organizational innovation at the local level, can influence national policies (Valette *et al.*, 2015). Ultimately, this analytic strategy makes it possible to come to grips with the complexity of the politics of land in its local, national, and international dimensions.

The present paper employs this actor-centered approach to the policy process,⁴ showing how it contributes substantially to understanding the issues at stake in the reform of Kenya's land tenure system, and especially to understanding the politics surrounding the design of new legislation around "community land." It is structured as follows. The first section of the paper lays out some background to the legal category of community land in Kenya. It identifies some elements of the process by which Kenya, a country with historical and ideological commitments to private property, came to acknowledge community ownership of land. Advocates for the acknowledgement of community land rights, and in some cases indigenous land rights, were active in this process. The second section focuses on politics around the drafting of Kenya's Community Land Law. The third section explores how the new constitutional and legislative provisions have been interpreted and used by cultural entrepreneurs⁵ belonging to a particular "community" in western Kenya in order to advance their specific land claims. The focus is on the case of Ogiek land rights. The grievances of this hunter-gatherer group in the Rift Valley serve as an example of community mobilization around land rights. This analytic focus makes it possible to examine a particular set of actors and processes aimed at building up neo-traditional claims to ancestral land. I seek to trace how cultural entrepreneurs have worked to bring community claims to land to the highest levels of the national political system in order to influence decision-making processes.

² See Valette *et al.*, 2015 for a discussion of the transferability of analytical tools molded on Western countries to aid-dependent countries, and for a comparison and contrast of different heuristic paradigms for the study of public action (i.e. political science and anthropology). The concept of "public action" comes from the French school of policy analysis, which strives to bring sociological approaches to the study of public policy and to transcend standard state-centered approaches (see Thoenig, 1998; Lascoumes and La Galès, 2007).

³ For further elaboration, see Lavigne Delville, 2011; 2016.

⁴ The actor-centered approach draws upon eminent sociology schools, such as the Manchester School and Interactionism (see Bierschenk *et al.*, 2000, p.14), which challenge the classical structural-functionalist anthropological paradigm. It stresses that social actors are not mere implementers of norms; they are seen as able to create "room for manoeuvre" (p.16), especially at the interstices or "interfaces" of normative systems and power structures.

⁵ Following anthropology of development approaches (see Beirschenk *et al.*, op. cit.), I designate these particular actors as "cultural entrepreneurs" (or "activists"). I borrow from Beirschenk *et al.*'s concept of "*courtiers locaux en développement*," which they define as "social actors who are embedded in local arenas (where they play political roles, more or less overtly)" and who act as intermediaries to bring resources coming from the aid system to the locality (p.7). This definition seems to me particularly appropriate to describe the role that a number of activists from the area under study in this paper *have come* to play.

1. Community Lands under Colonial Regime: the Roots of the Trusteeship Model

Under colonial regime, what was then called “native lands” or “tribal lands” progressively became to be legally framed by a system of trusteeship which, during that period, was devised to meet the requirements of a segregationist system minimizing any interaction between the market economy of the white settlers and the “traditional” African tenures.

AT THE ROOTS OF THE TRUSTEESHIP MODEL

Between 1895 and 1897, the British government legally extended the *Land Acquisition Act* to the East Africa Protectorate: all lands that according to European understanding were wasted and unoccupied were declared *Crown lands*⁶ (Sorrenson, 1968; Okoth-Ogendo, 1991). At this stage, the rhetoric of the policy to protect African land rights translated into the interdiction of alienating the land actually occupied by the natives. However, the settlers’ land hunger and their dissatisfaction for the legal restrictions on natives’ lands instigated a tug-of-war with the Foreign Office (Hughes, 2006) where the battlefield lodged in the formulation of laws and ordinances, elaborated to regulate the tenure regimes. The settlers, and the colonial administration which was backing them, progressively obtained the Africans’ disfranchisement and the neutralization of Africans’ legal entitlement to land⁷. Moreover, amendments to the *Crown Lands Ordinance*, in 1915, formally lifted the interdiction to alienated village land, or land farmed by Africans, and this by extending the definition of *Crown lands* to the reserves. The latter was formalized by the 1926’s *Native Areas Ordinance*, which acknowledged what on the ground was a fait accompli.

In 1932, the Carter Commission was appointed by the British government to assess the Africans’ land claims as well as their present and future needs. The Commission was expected to recommend a proper redress of the claims by suggesting whether the extension of the reserves was desirable and feasible so to compensate the Africans for the “lost land” alienated to white settlers (Great Britain, Colonial Office, 1933). For so doing, the Carter Commission undertook a review of the land questions across the whole territory today known as Kenya, to say from then Colony (Western and Central Districts), to the Coastal strip protectorate, and to the Northern Frontier comprising the arid and semi-arid territories of the North⁸ (see Map No 1).

The most important conclusion of the Commission was its definition of African rights to land as amounting only to usufruct rights, hence minimizing (or undercutting) the possibility of entitlement (titling) of these rights. This legitimized land alienation to the settlers, and derisory levels of (monetary) compensation to Kenyan land holders (when compensation occurred). Any rights that Africans could have claimed outside the reserves were abolished.

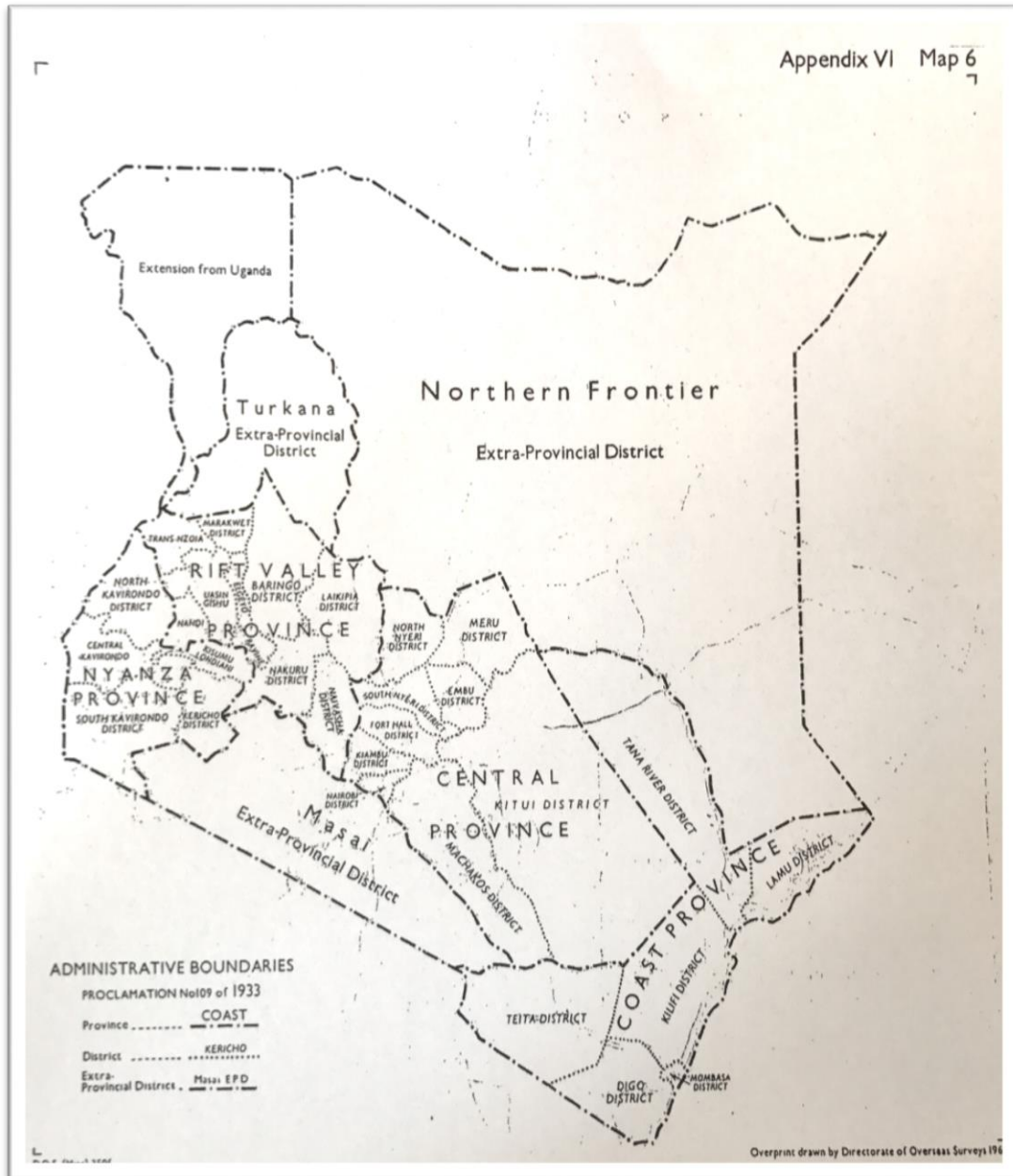
⁶ The High Commissioner for the British Protectorate was delegated the authority to allocate those lands to the white settlers.

⁷ The Anglo-Maasai Agreements of 1904 and 1911 inaugurated a new face of the rhetoric of the protection of African lands, instating the segregationist system of the reserves, where the Africans were supposed to be protected from dispossession. However, by moving the Maasai from the Rift Valley southwards, the colonial administration freed space for the settlers by curtailing it from the Africans, who were moved to a circumscribed territory whose boundaries were never really surveyed because de facto subjected to variation according to settlers land hunger (Okoth-Ogendo, *Ibidem*).

⁸ With regards to the latter, for instance, the recommendations advised against the subdivision of the territory in reserves, because of the ecologic nature of the environment (consisting of very little arable land), but also because of the livelihood system of the “natives” of the North, nomadic pastoralism: it was deemed in the best interest of the pastoralists to leave them the right to circulate (*Idem*). This is part of the reason why this region has remained virtually untouched since long after Independence.

The Commission's recommendations were implemented through a long series of laws and regulations. Among these is the 1938 *Native Land Trust Ordinance*, which converted land in the reserves from *Crown lands* to *Trust lands*, so called because entrusted in the *Native Land Trust Boards*. The legal implication of the *trusteeship model* is that Africans only retain use rights, whereby they can manage the land in the reserves according to their customary practices. However, the ultimate administrator of the land is the trustee, who is the interface or intermediary between the statutory system established by the colonial administration and the "natives." Natives are considered to be unfit or unable to interface directly with either the state or the market.

At Independence, the *Trusteeship* system was maintained. Responsibility for *Trust lands* was conferred upon local authorities, the county councils, which were legal administrators on behalf of native communities until the promulgation of the new Constitution in 2010. These councils were delegated the power to lending/leasing concessions on Trust lands to individuals or companies, to sanction land alienation and privatization, as well as to adjudicate land rights. Given these sweeping and critical powers, administration of Trust lands (as well as Public lands) has remained a domain of public action that is subject to extensive political interference. Indeed, centralisation of power in the executive has led to extensive "land grabbing" profiting the national political and economic elites. The so-called Ndung'u Report, issued from a Commission of Inquiry into Irregular and Illegal Land Transactions that was appointed in 2002, revealed the many abuses of the *trusteeship model* (RoK, 2004).



Map No 1, from Boundary Commission, 1962 (Appendix VI)

THE ADJUDICATION OF TRUST LANDS

Another significant element of continuity between colonial and post-Independence regimes has been the policy of adjudication of the Trust lands, which started under a comprehensive program of land reform in the 50s (Swynnerton Plan, 1954), which targeted the central districts, chosen for political reasons that cannot be treated in this paper, but that have largely been studied in the literature (*cf.* Sorrenson, 1967; Harbeson, *Ibidem*; Okoth-Ogendo, *Ibidem*). The *Trust Land Act* (Chapter 299 of 1970), the *Land Adjudication Act* (Chapter 284 of 1968), and the *Land Consolidation Act* (Chapter 283 of 1977) are among the colonial laws maintained at Independence and still applied in order to convert Trust lands in individualised plots.

The adjudication process was designed to enable the ascertainment and recording of rights and interests in Trust lands so to promote the individualization of the tenure, and eventually the issuance of titles, so to also possibly access credit thus improving land exploitation. The process has been ongoing since the 50s, though the statute of Trust land is still significant especially in the semi-arid North of Kenya (the yellow in Map No 2 is savanna and grassland). Trust land is actually the most extensive land tenure category in the country (67%), although it has become very marginal in the areas at high agricultural potential (especially croplands: brown in the Map No 2).

As noted earlier, the adjudication process started in the Central Region in the 1950s and was then extended to other highly populated areas of the Kenya highlands⁹ (Médard, 1999). In west and central Kenya, the category of "unregistered community lands" is usually limited to forests, parks, and urban centers.

The process of adjudication and registration was extended to all high potential agricultural lands, and eventually also to pastoral areas. In the west, the adjudication process was considered complete in 1970. In the Rift Valley, the former Kalenjin¹⁰ reserves, located in the regions with high agricultural potential (Kericho, Bomet, Nandi) have all experienced the adjudication and registration process (*Idem*). In Nyanza Province, a significant proportion of the land was adjudicated after independence¹¹.

In the 1980s, the adjudication process moved to the less populated districts of the Rift Valley and Eastern Province. In these provinces, 20-30% of the territory was adjudicated in the 1980s (*Idem*). On the coast, complicating factors impinged on the adjudication process, such as the heritage of the great Arab land domains and the problem of squatters -- both factors have played a huge role in slowing down adjudication¹². Nevertheless, the districts of Kwale and Kilifi have been targets of recent adjudication and it seems that this process has gone far¹³. Lastly, almost the totality of the North and North West (Turkana), comprised of arid and semi-arid lands, is not adjudicated¹⁴.

⁹ Without going in further details, it has to be noted that the first adjudication process of land claims in Kenya actually took place as early as in the 1910s, at the coast when the British colonial authorities sought to define the domain of Arab families, through application of the Land Titles Ordinance of 1908 in order to delineate the Crown land domain, up to alienation.

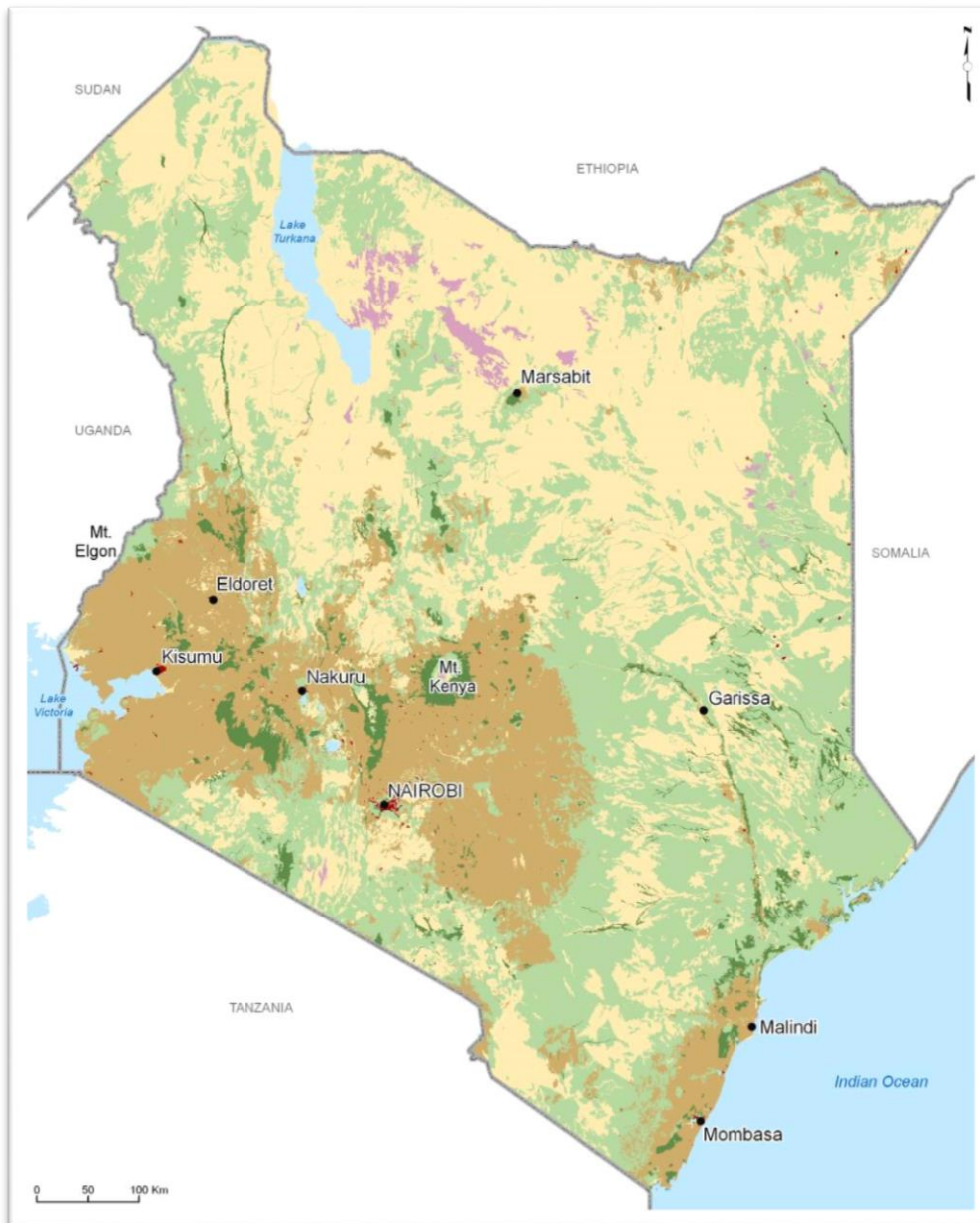
¹⁰ The ethnonym "Kalenjin" was forged during colonization; it comprises a number of pastoralist groups inhabiting the Rift Valley and its surroundings, without necessarily implying the homogeneity and contiguity of pre-colonial settlement.

¹¹ From interview with land adjudication officer (Nairobi, 17 June 2016).

¹² The northern part of the coast (Lamu and Tana) do not seem to have extensive Trust lands, mainly because "native reserve lands" were never converted in Trust land. (They remained Crown lands, later converted to "Government land.") As a result, adjudication process has not been extended to these areas.

¹³ Interview, *Ibidem*.

¹⁴ *Idem*.



Map No 2, from Department of resource Survey and Remote Sensing.
Ministry of Environment and Natural Resources (Kenya)

2. The Process of Reforming the Land Sector in Kenya

The colonial legacy, combined with the perpetuation of a politicized system of land governance has had far-reaching consequences in Kenya. In fact, all government leaders have used their powers to set up a system of distributive politics centered on land: land allocations have been used strategically to build and consolidate political constituencies (Boone, 2012). This post-colonial continuity contributed to the amplification of inequalities in land distribution, widening “historical injustices” (TJRC, *Ibidem*), and ethicizing land allocations (Médard, 2008). These are by and large, the motivations driving agenda setting for land law reform in Kenya¹⁵. A full analysis of all the endogenous and exogenous forces shaping the reform agenda is beyond the scope of this paper. Here, the focus is on how norms governing community lands have been negotiated. The goal is to characterize the debate on community lands and define the positioning of different actors. Before going into the in-depth analysis of the elaboration of the *Community Land Law*, I wish to briefly place the making of this particular law in the wider frame of the implementation of the constitutional principles underlying land law reforms in Kenya.

To start with, it is important to recall that the approval of the Sessional Paper n°3 on National Land Policy of 2009 (RoK, 2009a) as well as the 2010 Constitution (Rok, 2010) were the products of a crisis recovery process. The need for constitutional reform became urgent after the Presidential election of 2007 engulfed the country in civil conflict following the denunciation of a flawed vote count¹⁶. The need to reform land institutions was mentioned in the framework of the Kenya National Dialogue Reconciliation Agreement of 2008, which gave the Truth, Justice and Reconciliation Commission a mandate to examine historical land injustices, especially as these related to violence (Wakhungu *et al.*, 2008). The trauma of the violence produced a coalition government, the post-crisis National Alliance Rainbow Coalition (NaRC), which embarked in an ambitious race for reform. The NLP was approved by the government cabinet in 2009, while the new Constitution was (re)drafted in less than two years and adopted in August 2010 through a referendum with a voter turnout that was unprecedented in Kenyan history (72%).

The processes of formulation of both the NLP and of the constitutional chapter on land were spread over many years (almost two decades in the case of the constitution-making). During this time, the debate around the institutional, legal and ideological changes to apply to land administration and to land tenure regimes involved almost all segments of the Kenyan society, especially the urban elite of both the private, governmental and non-governmental sectors. Bilateral and multi-lateral donors also played a considerable role in the policy process (Di Matteo, *forthcoming*).

The Fifth Schedule of the Constitution concerned the legislation to be enacted by Parliament so to implement constitutional reforms. Chapter Five dealt with Land and Environment. It provided for a set of laws to be enacted in order to effect the provisions on land. The Constitution gave Parliament 18 months from the Constitution's ratification to promulgate laws regulating the domains of public and private lands in application of article 68 (RoK, 2010), and then, five years to enact a community land law (article 63: see Appendix 1) and a law on land use (article 66: RoK, 2010).

The vicissitudes of the first three land laws enacted are relevant here as the elaboration of what today is known as the Land Registration Act (N°3 of 2012), the National Land

¹⁵ On the very politicized process of setting the land reform agenda in Kenya, see Di Matteo, *forthcoming*.

¹⁶ Violence erupted in December 2007, swiftly activating the international community response. The violence quieted down in February 2008, having resulted in the death of 1200 Kenyans, in addition to internally displacing 500 000 people. The Paris' Club took this political crisis quite seriously exerting significant pressure on Kenyan political leaders in order to get them effectively committed to the process of governance restructuring.

Commission Act (N°5 of 2012), and the Land Act (N°6 of 2012) (hereafter, the Land laws) was subject to a number controversies, starting from its initial drafting. The legal consultant hired by the Ministry of Lands was accused by concerned non-governmental organizations NGOs of having conducted the drafting work unprofessionally by “copying-pasting” the content of the Tanzanian legislation on land¹⁷. The bills were nonetheless introduced to Parliament on 10 February 2012, and thus very close to the constitutional deadline of 27 February 2012 (which then had to be extended). Kenya NGOs protested the lack of public participation in this process¹⁸. A 60-day extension was voted and accorded (LDGI, 2012). Eventually, the Land laws were enacted before the new deadline. No sooner were the land laws promulgated that a task force was put in place to revise them, apparently because it was acknowledged that the time allotted for deliberation had not been sufficient: therefore, the choice had been to respect the constitutional deadline, enact the Land laws, knowing that they still needed to be harmonized with one another and with the constitutional provisions¹⁹. This was an intriguing solution and definitely a political one: enacting the Land laws only in view of amending them later on.

The Land (Amendments) Law was only published and gazetted in 2015. At the same time, redefinition of the roles and functions of land governance institutions had emerged as very political issue in Kenya. The most debated issues had to do with renewal of leases, the issuance of titles, and the investigation of irregular and illegal allocations of land. The amendment law came to be known as “Omnibus Bill” since it comprised amendments to all three-Land laws. Once in Parliament the Omnibus continued to create controversy. In fact, along with the Community Land Bill, it was rejected by the Senate, and was only approved later by a Mediation Committee. Both laws were promulgated in August 2016.

This brief summary points to the high political stakes of the legislation-making process around land in Kenya. The new laws involved a (re)definition of functions, mandates and powers of institutions such as the Ministry of Lands. The reforms sought to challenge its powers through devolving (to local governments) and decentralizing (to alternative institutions) its disproportionate prerogatives. This set in motion a complex interplay of competing interests driven by sectorial, economic, and also personal agendas. The next section focuses on the high stakes of reforming laws around community land.

3. Community Land Rights under the New Order

This paper focuses on the concept of “community land” and the making of the Community Land Law in Kenya. The first state-led forum where the proposition of recognizing customary land tenure was discussed was the constitutional conference held at the Bomas of Kenya from 2001 to 2005. Kenyan law professor H. O. Okoth-Ogendo chaired the working-group on the Land and Environment Chapter. As far as community land is concerned, the result of this long deliberative process was Article 63 of the 2010 Constitution (see *Appendix 1*).

¹⁷ From interview with land surveyor (Nairobi, 29 May 2014).

¹⁸ From interview with land surveyor (Nairobi, 21 May 2015). According to the 2010 Kenyan Constitution “public participation” (although never defined) becomes an essential feature of governance, included among the national values (article 10: RoK, 2010). As a result, at the legislative level (article 118:Idem), involving the citizens in the decision-making is deemed a constitutional duty of the Parliament. The accusation that the public participation was insufficient is contested by the special unit of the Ministry of Lands (Land Reform and Transformation Unit) that spearheaded the process by maintaining that consultation at the regional level was indeed conducted (from interview with Ministry of Lands’ officer: Nairobi, 22 April 2016), probably without the consultation’s inputs being taken into account by the legal consultant when drafting the laws.

¹⁹ Gazette Notice N°7503 of 2013. From interview with the legal drafter (Nairobi, 3 November 2015).

From the reading of this Article's clauses, the Constitution acknowledges "community" as a legal entity that may be constituted on the basis of basically two features: ethnicity and culture. The "community of interests" suggested by the Constitution can be interpreted either as commonality rooted in cultural practices, or, in *sensu lato*, as commonality of interests in land (as in the case of estates residents who share common areas). The Parliament is thus given a mandate to enact community land provisions.

In article 63(2) of the Constitution, the designation of community land is wide-ranging and ambivalent. The clause (2)(a) clearly refers to the Land (Group Representatives) Act (Chapter 278, 1970), which concerned unregistered pastoral lands, and led to their registration as ranches. This particular process of adjudication of community land eventually floundered, as the management structure of the ranches was not inclusive and transparent. As a result, most of the ranches were subdivided among shareholders, leading to the ultimate individualization of the ranch land.²⁰ Even so, a number of ranches remain collective entities. According to the Constitution, these are eligible for conversion from ranch land to community land.

A number of scenarios are suggested for land that may be conferred to the new legal entity, the community. Processes of attribution by the law are envisaged by clauses (2)(b) and (c), and these may include the conversion of tenures. Clause (2)(d) identifies community land in forests registered as Trust lands (community forest), grazing areas (pastoral commons), sacred sites, ancestral land²¹ of hunter-gatherers, and all the Trust lands. Clause (3) reveals a certain ambiguity in that it reproduces the trusteeship model by conferring unregistered community land to the county governments (the lowest devolved entity created by the 2010 Constitution) until registration. Clause (4) dilutes this continuity by interdicting any disposal of land entrusted in the county executive²².

The following sections describe the drafting process and its contextual background, and propose an analysis of the political economy of the drafting of the community land law. This helps explain the respective positions, visions, and agendas of the actors involved in the development of the law.

DRAFTING OF THE COMMUNITY LAND LAW

The first attempt at establishment of an institutional framework for acknowledging community land rights was the work of the USAID-funded SECURE project²³. The SECURE project began in September 2009. At this time, Kenya's National Land Policy draft was already out (since 2007), but still awaiting approval from the Parliament (which happened in December 2009). The draft of the new Constitution had been released by a Committee of experts, following the rejection by referendum of the so-called Wako draft in 2005. Both these legal documents proposed a transition in the conceptualization of land tenure in Kenya, from the model of trusteeship to a model of community ownership. This constituted the legal basis upon which the SECURE project sought to develop the Community Land Rights Recognition (CLRR) Model.

²⁰ For further details on the subdivision of these commons, see inter alia Rutten, 1992, Mwangi, 2005.

²¹ As I shall demonstrate below, "ancestrality" of a claim is difficult to translate into a clearly delimited "property" claim. This is mostly because the territories concerned are embedded in the social matrices of "communities" which are themselves the product of long historical and political processes.

²² As we shall see, this ambiguity in the formulation of constitutional dispositions and "safeguards" against power abuses became the object of intense debate.

²³ A.k.a. Securing Rights to Land and Natural Resources for Biodiversity and Livelihoods in the Kiunga, Boni, and Dadori Reserves and Surrounding Areas in North Coastal Kenya.

The project targeted Lamu County in the far northeast of Kenya, which borders Somalia²⁴. The rationale of the project was to pick a fragile ecosystem, decree the need for improving conservation management, and posit (in line with international standards and paradigms) that the approach to natural resource management be community-based, and that “communities” shall be involved in conservation by ensuring that they have a more formal and legal stake in holding the land to be conserved²⁵.

The project sought to develop a model (or protocol) for the process of recognition and formalization of community rights -- this was to be instrumental in securing community land tenure through elaborating a cadastral survey map and issuing title deeds²⁶. The projects targeted 4 villages that were visited over the course of 4 weeks. A multi-stakeholder team of about 20-25 people comprising state actors (from the Ministry of Lands of Nairobi and Lamu, as well as conservation agencies), along with non-state-actors (national and local NGOs) carried out the first step of the project, centered on documenting community land rights. In September 2011, the study was complete, and the model had been finalized. It was presented in a forum held in Malindi, and it eventually received endorsement from the then-Minister of Lands, James Orengo (see *Appendix 2*, for an extract of the Ministry’s speech in Malindi)

Technical steps envisaged by the Model will not be tackled here, given our focus on the long process that led to Kenyan government’s new legislation on community land. Notwithstanding the support that the SECURE Project seemed to enjoy from the establishment, public lands in Lamu County were never converted to community land, and the Model was never piloted. From the Malindi forum in September 2011 to the end of the SECURE project in September 2012, no activities were conducted in Lamu. USAID did not grant any extension for the project²⁷.

Meanwhile, on the legislative side of the process, in 2011 the first drafts of the new land laws were released for discussion. This also contributed to a shift in land stakeholders’ attention from the CLRR Model to the legislative process.

In July 2010, the Ministry hired a consultant from a Kenyan law firm. According to the Contract Agreement between the Ministry and the firm, the lawyer had been assigned the task of writing what I have called the Land laws of 2012. There were no provisions about the Community Land Law in the contract. However, the consultant went ahead and drafted the bill (on the basis of desk-research only), then-called Zero Draft, and published in October 2011.

An analysis of the Zero Draft was commissioned to a number of land experts within the

²⁴ Lamu was considered an ideal pilot area because it was targeted for one of the governments Vision 2030 mega-projects: the construction of the Lamu Port Southern Sudan-Ethiopia Transport corridor (LAPSSET), which USAID was welcoming while seemingly being concerned about how the corridor construction would affect community lands rights in the area: from interview with SECURE chief of project (Nairobi, 14 February, 2015)

²⁵ See Agrawal and Gibson (1999) for a critical reading of community-based conservationist paradigm.

²⁶ These were tools that were deemed to be needed by communities when facing investors coming to build the port (*Idem*). The project sought to create demand for title deeds, demand that may have not preexisted. Eventually, the project aimed at building capacity for individuals to negotiate with investors and developers so that communities could gain from leasing out their land and from participating in the stipulation of investments conditions..

²⁷ Different narratives speculate about the reasons for the closure of the project even before it was piloted. The USAID pullout was said to be political, firstly because of the US presidential election bringing new priorities, and secondly, because of the up-coming Kenyan election that made USAID nervous about intervening in land matters in such a highly politicized environment (*Idem*; and from interview with international organization’s officer: Nairobi, 17 February 2015). Furthermore, both at the national and local level, the project appeared unwanted by both Ministry of Lands’ officer and also by local NGOs that found that American leadership in the handling of the community land question was not appropriate (from interview with SECURE’s chief of project, *Ibidem*; and interview with Kenyan NGO’s officer: Nakuru, 13 May 2014).

framework of the SECURE project, (Freudenberger *et. al.*, 2012); they extensively criticized the bill. The latter was said to be not properly focused on the recognition of customary land, and also, in numerous articles to contradict constitutional and national land policy requirements. It was stated that this draft did not allow for the discovery of existing customary land institutions by pre-determining what customary rights consist of. And finally, it allowed extensive government control over the specification of land use and allocation of such land.

Not only the content, but also the drafting process was deemed inappropriate: national legislation, as envisaged in the Constitution (art.10) must be informed by public participation, whereby citizens' view must be properly harmonized by a team of experts in a *Issues and Recommendations Report*. These steps, as mentioned earlier on, were never followed by the consultant who drafted the Zero Draft, as well as the Land laws.

To overcome these shortcomings, on 21 September 2012, almost one year after the publishing of the Zero Draft, the then Minister of Lands appointed a Taskforce on Formulation of Community Lands and Evictions and Resettlement Bill (Gazette Notice No.13557, September 2012) with the mandate of formulating these draft bills through a consultative process. The Taskforce had an initial mandate of two months for two bills. However, the terms of reference were revised, hence splitting the elaboration of the two bills. For the Community Land Law, the time frame was also extended from two months to two years so as to allow wide public and communities consultation.

On the work of the Taskforce, there are several points to highlight. First, the Taskforce had a very variegated composition: twenty people composed the group, among which professional from relevant sectors²⁸ (plus three joint secretaries). Second, all steps of consultation were followed²⁹ (that is why the process was quite lengthy). Taskforce members went around the country: the communities gave very raw information and suggestions, for instance, on the institutional framework for management at the local level, and also on how to link it with the national³⁰. Although I do not possess full documentation on the consultation process, accounts from Taskforce members as well as other actors depict the making of the Taskforce Bill as “fully participatory” (and also fully funded by the Kenyan government)³¹.

When the Community Land Bill drafted by the Taskforce was handed over to the Ministry of Lands in February 2014, no action was taken. In December 2013, the government changed (as a result of an election), as did the Cabinet Secretary for the Ministry of Lands. The Taskforce Bill was never published in the official gazette, and never forwarded to Parliament for debate. Meanwhile, in November 2013, another Community Land Bill was introduced into the Senate by the Senate Majority Leader, Prof. Kithure Kindiki. The Kindiki Bill was said to be “a minor version of the Taskforce Bill” that a Taskforce member had “sneaked out” and passed over to the Senator, who claimed to only want to fast track the process³².

For almost a year, a state of limbo dominated the scene whereby the Ministry of Lands

²⁸ Including lawyers, land economists, land surveyors, land administrators, legislator drafters, government officials, civil society representatives, anthropologists, historians, and representatives of professional bodies

²⁹ Those include: literature review to ensure that the law drafted is not in conflict with other legislation; identification of the main issues (what is a community, what is community land, how is it actually managed); then, the issues were taken to the public for preliminary public consultation.

³⁰ From interview with Taskforce's member (advocate), (Nairobi, 27 May, 2015).

³¹ *Idem*; Interview with another Taskforce's member (land surveyor), (Nairobi, 25 February 2015).

³² From interviews respectively with Kenyan NGO officer (Nakuru, 8 July 2014); and, interview with a Taskforce member (advocate: *Ibidem*).

shelved the Taskforce Bill. The Senate proceeded with the readings of the Kindiki Bill.³³ Then, in August 2015, the Majority Leader of the National Assembly introduced another modified version of the Taskforce bill in the Kenyan Parliament³⁴. This originated from the Ministry of Lands (here-after, the "Cabinet Secretary Bill"). When the Cabinet Secretary Bill entered the National Assembly the 19 August 2015, a number of parliamentarians moved a "Special Motion" for a one-year "extension of period in respect of legislation with constitutional timeline of 27 August 2015"³⁵. They argued that "given the very nature of the issues", such as definition, management, and registration of community land -- all defined as "quite weighty, and controversial" -- the Community Land Bill was deemed as "not amendable to easy consensus"³⁶. Menacingly, a Member of Parliament (hereafter, MP) said: "If we don't extend, MPs will be shooting themselves under the foot"³⁷. Another fear related to potential dissolution of the Parliament in case the latter failed to meet the Constitutional deadline: Kenyan citizens could have seized the High Court to blame the Parliament for non-fulfillment of the Constitutional provisions, MPs feared. The extension was hence accepted.

In order to further comply with Constitutional provisions, the Departmental Committee on Land and Natural Resources of the National Assembly organized the consultation of selected stakeholders. In September 2015, a Parliamentary Retreat was held in Mombasa in order to discuss three land bills, including the Community Land Bill³⁸. In Mombasa, the views of stakeholders were aired (see *infra*) and the Committee compiled a report along with the amendments to be proposed on the floor of the National Assembly.

The Cabinet Secretary Bill was tabled in parliament between April and May 2016. Almost all the amendments proposed by the Committee were approved (see *infra*). However, when the Bill was passed over to the Senate, where it was tabled the 15 June 2016, the Senators rejected the Community Land Bill. A Mediation Committee was established, and public participation was called upon again. A Report was finally issued by the Mediation Committee, along with an agreed version of the law, which was eventually adopted by both the Chambers of Parliament in early August, just in time to meet the Constitutional deadline. The President of the Republic of Kenya, Uhuru Kenyatta, assented to the Community Land Law the 31 August 2016³⁹.

THE POLITICAL ECONOMY OF THE DRAFTING

The analysis above focuses on legislation-making and the factors that informed and affected it. A number of drafts emerged from this complex and iterative elaboration process. The environment of land laws reform is highly-politicized, and significant changes were introduced with successive versions of the bill. Important modifications affected the recognition, protection, and registration of community land rights.

This section identifies and examines possible rationales for successive alterations, and analyzes the positioning of some key actors. The analysis goes from the Taskforce Bill, to the

³³ Later on, the Commission for the Implementation of the Constitution (CIC) pointed out that there had been no public participation in the making of the Kindiki Bill, as required by the Constitution. The Speaker of the Senate was then asked to withdraw the Bill (Daily Nation, 6th December 2013).

³⁴ Dated 11th August 2015 (The National Assembly Bill N° 45 of 2015)

³⁵ From Official Report, Hansards of National Assembly, 19 August 2015 at 2.30pm. As the Honourable Members pointed out, the current Parliament (the 11th), being a bicameral one (unlike the 10th, previous to the enactment of the 2010 Constitution), bills could no longer be passed in an expeditious manner, and more time was needed.

³⁶ From the Hansard of the National Assembly, *Ibidem*.

³⁷ *Idem*.

³⁸ The remnant bills are the "Omnibus Bill" and the Land Use Bill.

³⁹ The Act n°27 of 2016 has been published in the Kenya Gazette Supplement the 7th September 2016, by the Government Printer (with date of commencement, the 21st September 2016).

Kindiki Bill, to the Cabinet Secretary Bill⁴⁰. It then looks at the parliamentary debate and the amended version that the National Assembly passed to the Senate. I will call this amended version the Committee Bill, since it incorporated almost all the amendments proposed by the Departmental Committee on Land and Natural Resources of the National Assembly.

A quote from an Honorable Member of the Kenyan National Assembly underscores the stakes of the Community Bill:

The challenge of the CLB is that of clashing of cultures. On one hand you have a community that owns a piece of land from ancestry, but on the other hand you have a capitalist system coming in where land is highly valued in terms of monetary gain [...]. There is a serious juxtaposition of a conflict of value systems⁴¹.

Many MPs defined the “issue of community land” as a sensitive one, mainly because of the violent clashes affecting parts the country in the 1990s and 2000s, which were largely due to unaddressed or instrumentalised “community land issues” (Lynch, 2011).

A recurrent concern during the debates was the clarification of what “community” is. This appears at the core of the Bill. It is important because it delineates who is entitled to claim community land. The Constitutional definition (Art.63.1, see Appendix 1) is the basis upon which the Bill would have to rest. The Taskforce Bill expounded the Constitution’s definition, and, notwithstanding small changes, this was maintained⁴². Among the changes, for instance, the Cabinet Secretary Bill struck out the reference to ethnicity (one among the attributes that a group can put forward as the basis of groupness). Debates on this issue were intense, both in Mombasa, when the Committee held a retreat where “stakeholders” were invited to help finding loopholes and debate visions, and also in the National Assembly.

The dilemma was whether to leave out ethnicity, and include “migrant communities” in the definition of the kind of group entitled to community land rights, or to define “community” in ethnic terms, thus excluding the “migrants communities” residing in a geographical space deemed as traditionally belonging to an “indigene community.” The fear, clearly stated, had to do with fuelling ethnic conflicts. Eventually, ethnicity was reinstated at the third reading of the bill. In the National Assembly, a number of MPs opposed this reinstatement, arguing that looking at communities in terms of “tribes” would risk the further tribalization of society. Eventually it was noted that “the word” was in the Constitution itself. Finally its reinsertion was accepted⁴³.

Another very key area of discussion has revolved around the process of registering community land rights, and the management structure for administering such land. The Taskforce Bill required that every community with an interest in community land constitute itself into a registered legal entity, and also provided for a three tier-system of governance⁴⁴.

The Kindiki Bill, by contrast, did not require community to register, but only to form a Committee, comprised of “members of the community” (hence vaguely defined) that would identify the boundaries of their land in order for the registrar to issue a Certificate of Title,

⁴⁰ From this review, I will exclude the CLRR Model and the Zero Draft Bill since they were never seriously taken into consideration by the legislator for regulating community lands.

⁴¹ From Official Report, Hansards of National Assembly, 3 March 2016 at 2.30 p.m.

⁴² See Appendix 3 for the ultimate definition of “community” by the Community Land Act (Rok, 2016).

⁴³ The historical reality of community land in Kenya has been shaped by many layers of administrative intervention since colonisation. Given this, whichever word or words are used will necessarily eventually imply, in practice, attempts to disentangle these complex histories.

⁴⁴ This includes the “Community Assembly,” “Community Committee,” and “Community Board,” all conceived as an inverted pyramid with the Assembly (comprised of virtually all the members of the community) endowed with ultimate decision-making power, the Committee as the executive entity, and with the Board as a supervising body. See clause 15 to 30 for dispositions on the management structure (MoL, 2014).

before adjudication takes place⁴⁵. This bill also envisioned that decisions about disposing of community land should be ratified by a resolution of “the members of the community” in a meeting convened for that purpose⁴⁶. The scope, intention, and wording of the Kindiki Bill already appear very different from the Taskforce’s, less precise at least. What is even more striking is that according to the Kindiki bill, the county government would be able to transact and manage land that is unregistered, convert community land to private land (subject to the approval of the Committee) as well as to set aside part of it for public purposes⁴⁷.

Finally the Cabinet Secretary Bill, on one side, did require community to register, but in accordance to the law relating to societies, thus letting the registered community administer and manage the land; while, on the other side, did not require any structure or community institutions, and eventually gives the Cabinet Secretary the power to prescribe the procedure for the registration of community land⁴⁸.

From this outline, it appears that the complex inverted pyramid devised by the Taskforce, which was to ensure a maximum of checks and balances in the administration of community land, was lowered, if not dismantled by the subsequent versions of the bill.

On the Kindiki Bill, the re-centralization of power in local authorities is puzzling because under the previous regime, the local authorities holding the land in trust for communities, the then-called county councils hugely abused their power, which is well documented in the so-called Ndung’u Report (RoK, 2004: see *above*). With the transition to a decentralized system of governance, the democratization of the local government (with an elected Governor and county assembly) does not seem to have enhanced the administration of unregistered lands. In fact, during the parliamentary debates, quite a number of MPs (transcending the political wing they belong to) pointed at the laxity of Governors and county’ executives in managing community lands in them entrusted since 2010. Therefore, MPs were asking for more precision on the interdiction for county governments to transact on unregistered land; as well as more precision on the transitional clauses regulating the land alienated or leased under the previous administration. Of particular interest for the MPs were the procedures regulating the renewal of the leases in community land: some of them were demanding, first, to make sure that once the lease expires, land shall revert back to the community, second, that the royalties obtained from the leases shall not be held in trust by the county government, but be directly passed over communities. At the third reading of the bill on the floor of the National Assembly, MPs demanded more safeguards. Accordingly, a number of sub-clauses were inserted as amendments⁴⁹.

On the Cabinet Secretary Bill proposals for community registration as a society, the rationale for such a suggestion can be inferred from the discourse of the Ministry of Lands’ representative at the Mombasa retreat. The officer explained that the communities of Kenya are variegated: they have different ways of functioning and governing themselves, hence there is no need to constrain them to one type of structure (or even to tell them how to organize themselves). Second, it was too expensive to provide for those local structures, which may easily be subject to elite capture. Finally, in the words of the Ministry officer, “the Ministry of

⁴⁵ See Clause 15.2 of the Kindiki bill (RoK, 2014).

⁴⁶ See Clause 20 (*Idem*).

⁴⁷ See Clauses 38 and 39 (*Idem*).

⁴⁸ See Clause 7 on the provision about the registration of community as a society, and clauses 15 and 16 on the management (RoK, 2015).

⁴⁹ These basically say that even though the county government was to hold any monies in trust to communities, those were to be deposited in a special interest earning account (Clause 6.4) and, of course, released to the community upon registration (Clause 6.3). Finally, beside the interdiction for county governments to dispose of any unregistered land, the text added interdiction to sell, transfer, convert for private purposes or in any other way dispose (Clause 6.7: Rok, 2016)

Lands registers land, not communities!”⁵⁰ However, almost all parties at Mombasa opposed these arguments. The representatives of the Commission for the Implementation of the Constitution recommended that the Honorable Members of the Committee amend this section, and compel the communities to register because, in the Commissioner words, “one must deal with an entity”⁵¹, this goes beyond the specificity of how community manages itself. The National Land Commission’s representative also opposed such a claim, pointing out that the problem was actually in forcing communities to register as a society and eventually concluding that since communities were already being forced to come to statutory form, best thing to do was to leave it to communities to determine their jurisdictional form. Civil society organizations also urged the “Taskforce system” to be reinstated.

Interestingly enough, when the bill reached the National Assembly, the management structure devised by the Taskforce was actually reintroduced. Credit for the Committee's concern for “safeguards” for the protection of community land should probably go to the Pastoralist Parliamentary Group (PPG). As an MP noted during the debate, “I have observed very keenly that Members have extreme interest in the Bill, particularly the Members from pastoralist areas”⁵². In fact, a record number of Members (55) intervened at the stage of the second reading. The PPG seems to have been more influential than the MPs from the other areas. For example, when discussing the definition of “community land”, one MP argued that, “I strongly support the Chairman of the Departmental Committee on Lands. As the Pastoralists Parliamentary Group, we are a caucus of about 84 Members of Parliament. We are the ones who came up with this definition”⁵³.

The polarization of the Chamber was more evident in discussion of the mechanism for setting apart land for investments on community land⁵⁴. There were two camps, one comprising the parliamentarians seeking for 100% security (i.e., all the members of the community should approve the decisions on land management), and the more liberal ones who thought that the threshold should be lower because they did not want to make the investments criteria impossible to meet. (They also felt that the CLB was a transitional arrangement, because at the end of the day, everyone would want individual ownership.) Finally, the MPs agreed upon a threshold for decision-making that was deemed high, but appropriate: 2/3 of the Community Assembly (made up of all registered community members) sitting in a baraza (“meeting” in Kiswahili) whereby the major transactions (alienation, leasing etc.) will be discussed and voted upon. It appears that credit for these safeguards should go to an alliance of Coastal and Pastoralist MPs -- representing regions with most of Kenya's community land, and also normally representing opposition parties -- and other opposition MPs. They ganged up, as an MP asserted.

A sort of compromise was reached whereby these safeguards were not made retroactive. This is meant to protect investors who had already invested in community land. In fact, all past deals in the former Trust lands are “condoned”⁵⁵. One MP questioned why the Chairman of the Committee had not amended this article -- in her view, the Clause 46.1 constituted a negation of the essence of the entire Act.

⁵⁰ From notes taken at the Mombasa Retreat, Travellers Beach Resort and Club Hotel, Mombasa, 17 September 2015.

⁵¹ *Idem*.

⁵² From the Official Report, Hansards of the National Assembly, 2 March 2016 at 2.30 p.m.

⁵³ From the Official Report, Hansards of the National Assembly, 20 April 2016 at 2.30 p.m.

⁵⁴ This is according to an MP interviewed the 16 June 2016, in Nairobi.

⁵⁵ Clause 46.1 (Rok, 2016) says that “[...] any rights, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall be deemed to have been acquired under this Act”.

Already from the contextual analysis one could infer the high stake of this law. Proposed drafts are advanced by different sector of the governing class: among them, the highest ranks of the Ministry of Lands are the uncontested protagonists seeking to pull the strings from the center-scene, but also from the sidelines; however, we have seen that international actors have not hesitated to take part in the process, and the Kenyan NGOs have equally sought to make their opinion count by pressurizing the law-makers⁵⁶, who for their part, once the ball has fallen in their camp have seized it, and indeed run with it. All sectors of the Kenyan society have felt concerned with the issue of “community land”, which appears as the last portion of unregistered land in the country, but also as the cultural heritage of Kenyans.

From the political economy of the drafting, one may conclude that the national arenas of debate are quite polarized with one pole taking up the economist rationale, thus seeing those unregistered lands as “dead capital to unlock”, to quote the famous de Soto’s assumption (de Soto, 2000), and another pole promoting the protection of the cultural aspect enshrined in these community lands, which should be shielded from investors. However, the argument that I will seek to illustrate in the next and last section of this paper is that in local arenas, from where the claims to community land originate, the real issues at stake are less polarized, yet far more complex than this simplistic equation. Investigating the making of a “community claim” helps us grasping the multifaceted nature of community land.

The next section of this paper aims at analyzing the complexity and intrigues of “community land claims,” showing that these can really only be understood when placed in historical and political context.

4. The Political Agency of a Marginalized Community from the Mau Forest of Kenya

The choice of adding another scale to the analysis of the debate on community land in Kenya has been methodological, arising from the wish of combining the analysis of the policy process with a more grounded-insight into the studied phenomena. The significance of such an approach has been corroborated by the empirical experience that has showed to what extent the two levels (the national and the local) are intertwined, connected in a twofold way, from top-to-down through the government action, but also from bottom-up through the action of “entrepreneurs” who spin their webs in order to achieve their ideals and interests⁵⁷. Moreover, during my empirical study of the making of land reforms, at the national level, it has become apparent that mainstreaming international concepts, such as “participation”, “civil society”, “grass-root”, “minority/marginalized group”, “conservation” as well as “community”, have served as entry points for cultural entrepreneurs to put forward very localized agendas.

Said that, my interest into the mobilization of a group of activists representing a “community” of forest dwellers from the west of the country has been triggered by their outstanding participation into the policy process and more particularly in the national arenas of debate for land reforms. The means and the rationale of this participation will be highlighted first, thus showing the multi-scale nature of the policy process, as well as the

⁵⁶ The strategies of lobbying and advocacy, and also the attempts of coordination undertaken by the non-governmental sector in Kenya around land reforms, and especially of the Community Land Law, have been of great interest for my research. However, given space limitations, I do not to delve into this aspect of my research here.

⁵⁷ Following the methodological precautions outlined by Bierschenk *et al.* (*op. cit.*), I wish to refrain from both a “positive” view of these actors as emanating from a “civil society” that emerges in confrontation with the state, and a “negative” view of the same actors as profiteers of poorly-managed aid flows (pp.7-8).

internationalization of the repertoire of action of “community-mobilization”. I will also let emerge the grievances and claims of this particular group, for then calling attention on the historicity of these same claims, and also their politicization, to eventually stress the difficulty of identifying a single and unequivocal “community”, let alone “community land”.

THE MOBILIZATION OF A HUNTER-GATHERER “COMMUNITY”

To start from the policy process, in view of the constitutional review process, the International Labour Organization, which has been engaging in the battle for indigenous and tribal peoples’ rights since the 1920s⁵⁸, granted funding to a Kenyan NGO called Centre for Minority Rights International (CEMIRIDE). The latter embarked on building a network of representatives of indigenous/marginalised/minority communities to voice out their grievances as part of the legal and constitutional reform processes. The lobby committee was called the Pastoralist and Hunter-Gatherers Ethnic Minority Network, and its mission revolved around the organization of workshop meetings to disseminate information on minority group issues, and influence the legislative process. Although the Network realized some of its goals, its lifetime was fairly short: it did not survive the constitutional review process. The organizational and contextual hindrances that this Network encountered fall outside the scope of this paper, however, it is important to underline that one of the key cultural entrepreneurs fomenting the mobilization I investigate below was part of this lobbying team that within this forum of debate and consultation gained visibility.

Against this background, the “Ogiek community” is presented as composed of hunter-gatherers inhabiting the Mau forest in the Rift Valley of western Kenya⁵⁹. Under the banner of the Ogiek Welfare Council (OWC), a number of activists also took part in deliberations on the National Land Policy. Along with the Ogiek People Development Program (OPDP), the OWC became a regular “stakeholder” in the consultative processes engaged in elaboration of Kenya’s new Land laws. The OWC came about in the wake of the legal action undertaken by some community leaders in the late 90s (see *infra*): it attracted funds and support from national and international NGOs, though has remained a loosely organised body, which eventually fell in decay due to lack of transparency and accountability mechanisms.

The OPDP came about more or less during the same period, though initially representing a different geographic area (the Narok-side of the Mau forest, opposed to the Nakuru constituency where OWC was based and used to operate): however, as OWC lost ground, the OPDP expanded in terms of professionalization and also in scope of action until purportedly attaining coverage of the entire “Mau Complex”⁶⁰ (see *infra*), ultimately supplanting the OWC. The latter formally ceased operating, yet its coordinator is still involved in lobbying activities sometimes in conjunction with OPDP, sometimes not⁶¹. In sum, via these organizations, activists professedly representing the interests of “the Ogiek of Mau”, have participated in nearly all government-led processes and civil society advocacy actions pertaining to land reforms in Kenya since the mid-2000s.

Also, it has to be noted that this group claim takes shape in the wider context of ethno-political mobilization. By surfing the wave of the globalized indigenous people movement, the grievances put forward by these cultural entrepreneurs has come to assert a unique ethnic identity, thus dissociating from the larger Kalenjin grouping of the Rift Valley of Kenya. Gabrielle Lynch (*op. cit.*) has construed those mobilizations as forms of ethno-nationalism

⁵⁸ <http://www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm>

⁵⁹ Another hunter-gatherers community also named Ogiek is found in the farthest West of Kenya on the slopes of Mount Elgon.

⁶⁰ From interview with OPDP’s officer (Nakuru, 15 June 2015).

⁶¹ From interview with OWC’s activist (Nakuru, 27 June 2016).

that use opportunistic (re)branding or positioning (Li, 2000) in attempt to get traction and put forward their demand before the Kenyan government at the national level, as well as at the international. This has contributed to give remarkable visibility to their cause, and has in turn led to the internationalization, and further politicization of the “Ogiek struggle”. Against this background, I have sought to analyze the catalysts of Ogiek mobilization.

THE REPERTOIRE OF ACTION

What gave rise to this marginalization of the hunter-gatherers’ communities, and of the “Ogiek community” among them? Activists perceive that they have been neglected by the central administration (colonial and postcolonial), which never set aside a “reserved forestland” for them to enjoy as their exclusive domain. On the contrary, under colonialism, the Mau and other forested lands were gazetted as government land, and put under the authority of the Forest Department (today known as Kenya Forest Service). The leitmotiv of today's activist discourse is that theirs is a fight for self-determination against the authorities' design to assimilate the Ogiek into Kenya's dominant ethnic groups. For Ogiek activists, preservation of their identity and culture is only possible through the conservation of their “original” habitat, the forest, which allows for the maintenance of certain socio-cultural activities, including traditional beekeeping. These cultural entrepreneurs have felt that their ancestral rights to forest access have been violated when, following conservationists' recommendations (see *infra*), they have been urged to leave the forest and to convert to mixed farming on settlement schemes.

Components of the “Ogiek community” have rallied to action, both individually and as a group. In 1997, the eastern sides of the Mau Forest (then inhabited by these hunter-gatherers) were excised to be converted into settlements schemes. Individuals sued the local and national governments to block evictions (including a case before the High Court of Kenya) and protested the irregular, even illegal settlement of “outsider communities” on their ancestral land⁶². The evictions were deemed to have resulted in the Applicants being unfairly prevented from living in accordance with their culture as farmers, hunters and gatherers in the forests. The High Court ruled in favor of the applicants' cause and directed the National Land Commission (NLC), custodian of all public lands in Kenya since 2012, to identify and open a register of members of the Ogiek Community, as well as to identify land for the settlement of the said Ogiek members. Yet as we shall see, no action has been taken to implement the Court ruling. The reasons for this inaction are manifold, but may reside in part in the confrontational stance that Ogiek activists have assumed against successive governments.

Since 1997, the repertoire of action of this group (which is more heterogeneous than this brief account may suggest) has evolved through the progressive internationalization of its leaders. For instance, the mobilization has led to the development of the Ogiek Peoples Ancestral Territories Atlas (OPAC), participatory 3D mapping conducted by a Kenyan NGO. The maps show that the territory the Ogiek claim actually covers the entire South-Eastern Escarpment. These same maps have been used as a proof of the Ogiek claim, notably in the Ogiek case filed against the Kenyan government before the African Court for Human and Peoples Rights against the Kenyan government on 12 July 2012⁶³. Minority Rights Group

⁶² The most famous court case is Joseph Letuya & 21 others vs Attorney General & 5 others, filed on the 25 June 1997, which was finally addressed by the Land and Environment Court (established by homonymous Act of Parliament of 2011) in 2014.

⁶³ The Ogiek case [is] the first case of indigenous people’s rights to be considered by the African Court (ESCR-Net, article online, 26-02-2014). The case was lodged on behalf of the Ogiek people in 2009 on the ground of violations of the Ogiek's rights to property, natural resources, development, religion, culture and non-discrimination under the African Charter on Human and Peoples' Rights. (Idem)

International, the OPDP, and CEMIRIDE are the three applicants⁶⁴. The case was heard the 27 and 28 November 2014. However, the African Court has only delivered its judgment on 26 May 2017, which is in favor of the “Ogiek claim” hence acknowledging the dispossession they endured⁶⁵.

At the African court, two different interpretations of the conservationist paradigm were mobilized by the applicants and the respondent, respectively. On the one side, the Kenyan government's argument is that over the years, changes in Ogiek livelihood activities have occurred. In the 90s, over 77% of Ogiek owned cattle. Cultivation was first recorded in 1942. By the early 90s, it was estimated that each household was cultivating an average of 10 acres of land. These activities are not compatible with conservation. On the other side, activist discourse held that although the Ogiek have experienced an agro-pastoral transition, their profound socio-cultural ties with the forestland remain unchanged. Therefore, because of their attachment to (no longer dependence upon) the forest, their land rights actually coincide with conservation demands. Their policy suggestion is the conversion of the land tenure of the forest, from public land to community land, thus upgrading the management style of the forest (community-based management).

Does the Kenyan legal framework on land and property enable ‘communities’ to claim ownership of forests? Not surprisingly, in spite of Art. 63.2 (d) (i) & (ii) (see Appendix 1), just a comma before, at Article 62 (g), government forests and water catchments areas are deemed to be public land. Therefore, in terms of legal feasibility of the claim before the African Court, the matter seems to fall into the domain of competence of the NLC, which is, in virtue of Clause 24 of the Community Land Act (Rok, 2016), the only institution entitled to convert public land to community land by allocation (on a case by case basis). The Chairman of NLC, Prof. Mohamed Swazuri, interviewed the 4 April 2016, seemed well aware of the “Ogiek case”, and the historical injustices that groups previously living in the Mau Forest as hunter-gatherers had experienced. While being empathetic, he also displayed great caution because of the “sensitivity” of the area, and the fear that intervention may raise more conflict. The next section attempts to explain the motives of the fears of the NLC chairman.

THE ORIGINS AND PERVERSE IMPACT OF THE MAU FOREST'S SETTLEMENT SCHEMES

Since the Carter Commission of 1933, the forested areas of Kenya have been gazetted (ie., declared government land), and communities' access to them has been regulated by the state. Following in the footsteps of the colonial regime, independent governments ruled out recognition of usufruct rights on public land, planning to “accommodate” affected communities through land demarcation and the issuing of title deeds. The Mau Forest hunter-gatherers' problems started when the government of Daniel arap Moi undertook to “regularize” their situation.

What is referred to as the “Mau Forest Complex” (see Map No 3) it is located at the heart of Rift Valley's highlands. It is the biggest forest ecosystem in Kenya (18 forests, 400,000 hectares), and is the most important water catchment area of the country (feeding 12 rivers and 5 lakes). Despite the ecological and environmental importance of these forests, massive deforestation affected the Complex from the 1990s onward, due to the creation of settlement schemes (hereafter, SSs). The official aim of the SSs was to settle the forest dwellers, the

⁶⁴ Their demands before the ACHPR are the following: 1) to halt eviction and interference with community's lifestyle; 2) to recognize Ogiek's ancestral land -- ie. the land mapped out in the Atlas (see fn), which is gazetted as a forest reserve, ie. public land managed by Kenya Forest Service, by issuing titles; 3) to pay compensation for the losses, both material and immaterial.

⁶⁵ https://www.youtube.com/watch?v=y4VJ0Lz0i_U

hunter-gatherers, by providing them with “developmental tools”: farming plots to develop. Due to procedural irregularities, these SSs led to the loss of 25% of the Mau Forest Complex (equal to 107,000 hectares). The social and ecological repercussions of the would-be conservation project help us understanding the drivers of the mobilization.

The origin of these SSs can be actually tracked back to the wish of President Moi (1978-2002) to carry out a road-creation project to link areas of South West Mau Forest (SW Mau) and the Trans Mara to the towns of Kericho and Nakuru. Moi's government engaged the British Cooperation, which agreed to fund the project. This required an environmental assessment. A project for forest conservation emerged from this: the so-called KIFCON Project.

Studies were commissioned for the KIFCON project, and a team of scientists, including an anthropologist, was sent to SW Mau. The team “discovered” the hunter-gatherers partially living in the Tinet forest of the SW Mau⁶⁶. Hunter-gatherers were also living in camps alongside forest stations, due to repeated evictions conducted by the Kenya Forest Department (which worked to ensure that no individuals inhabited forests that were supposed to be conserved)⁶⁷. The anthropologist recommended a halt to the evictions and proposed that the forest dwellers be settled near their ancestral territory in Tinet forest, thus allowing them to preserve their cultural practices and identity. Moi rejected the settlement plan suggested by the KIFCON project, and eventually the project was closed-down. Moi did not tolerate interference in the management of a process as sensitive as land allocation -- Kenya turned to multiparty democracy in 1991 and the creation of a settlement scheme represented nothing but the creation of a political constituency, a vote reservoir. As Jaqueline Klopp and Job Kipkosgei Sang argued:

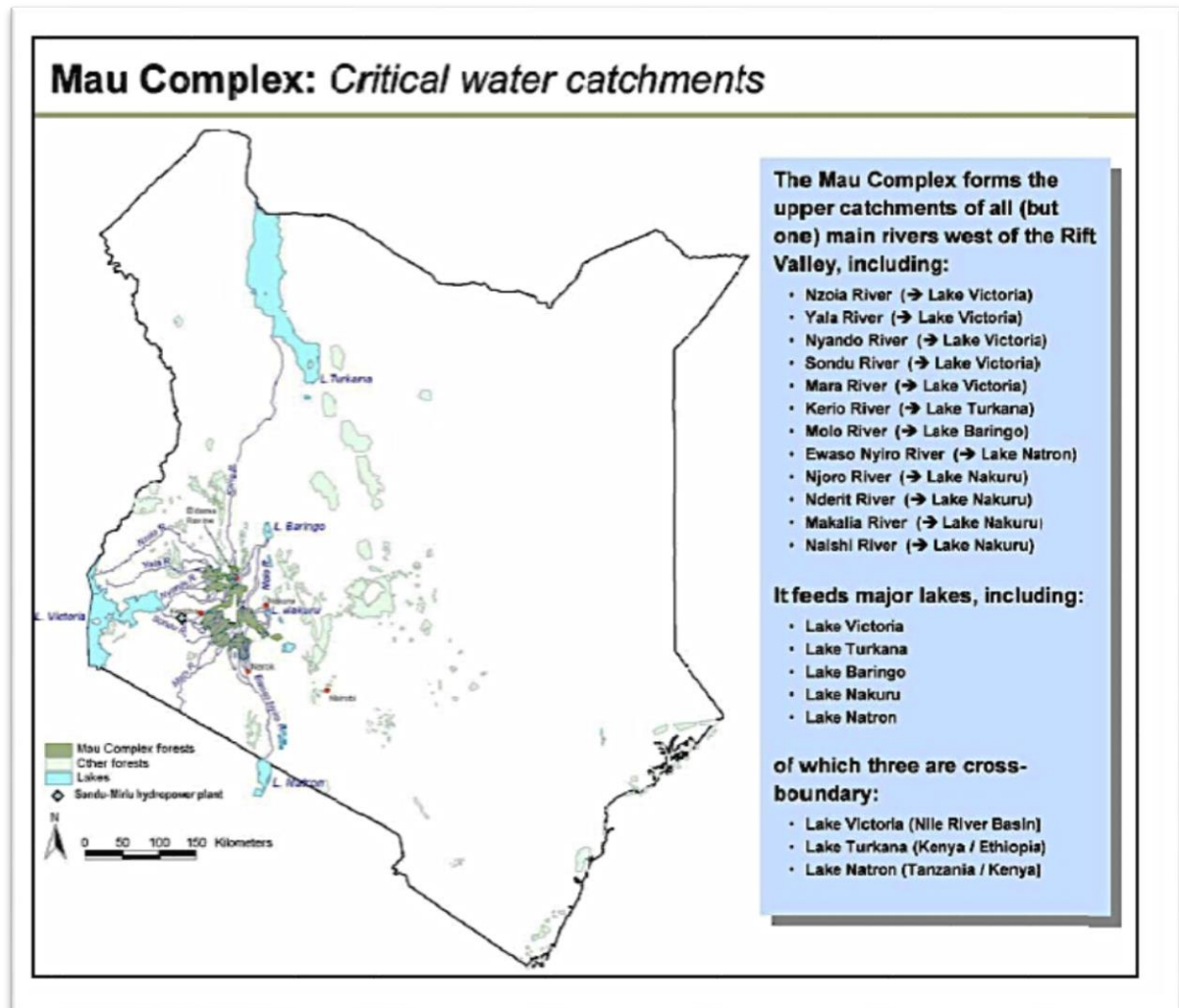
Failing to understand the complex politics around power and land in Kenya, KIFCON made a recommendation that would legitimize settlement in the forest: Ogiek settlement-scheme became a cover for massive and irregular appropriation. Predictably then, the “Ogiek settlement scheme” became a site of land accumulation and patronage politics by those in power, producing exclusion, conflict, and environmental destruction (Klopp and Sang, 2011)

KIFCON had embarked in the tricky task of listing the names of the Ogiek people to be (re)settled. The forest had never been the exclusive domain of hunter-gatherers, but following the displacements of the colonial era, different scattered groups had chosen it as a safe place of refuge and asylum. As Klopp and Sang note, “[g]iven the complexity of this task, which involved highly mobile and elusive people, even those working for KIFCON doubted the accuracy of the list. [...] [T]he list grew as it moved through the corridor of power down to the local provincial administration” (pp. 129-130). From the 1,800 families in the initial KIFCON estimate, when the settlement scheme of 25,000 hectares was initiated in 1996, the number of families being allocated land had reached 9,000 (p.130).

Even though KIFCON was terminated, the Moi government went on to settle “forest dwellers” by taking them from the west to the east of the Mau Complex. In addition to the “original” forest dwellers, landless people drawn from Chepalungu location (in the highly populated area of Bomet) were brought into the scheme, which was called MauCHE (Mau + Chepalungu). Due to the increased number of the beneficiaries, the deforested territory in East Mau turned out to be insufficient. The overflow population was brought back to SW Mau, where other SSs were created, deforesting even more land.

⁶⁶ From interview with the anthropologist of the team (Nairobi, 27 November 2015).

⁶⁷ Evictions of hunter-gatherers from the SW Mau had actually started in the 40s, and became even more brutal after Independence.



Map No 3, from UNEP Report “Mau Complex and Marmanet forests. Environmental and economic contributions. Current state and trends. 20 May 2008: p.6

Ill-effects of these poorly-conceived SSs are many. The process aimed at using land allocations as political gifts intended to create patronage ties between scheme beneficiaries and the regime. Many irregularities arose. Some happened in the allocation procedure itself. Land surveys, for example, were often conducted in illegal ways (RoK, 2004). Planners and surveyors sent out by the Ministry of Lands did not hesitate to survey and demarcate and parcel out water catchment areas and other conservation hot spots (RoK, 2009b). To add insult to injury, many of the same state officers became illegal beneficiaries of land allocations in the Mau.

In the early 1990s, two more SSs were initiated in the Eastern Mau Escarpment: the Nessuit and Mariashoni SSs. These are also the home locations of some of the Ogiek activists. Unlike the schemes discussed above, which emerged from a state-led process, these were demand-driven. Inhabitants asked the government⁶⁸ to provide the hunter-gatherers with the development tools -- access to school health care and farming tools -- which their brothers from the west had also been blessed with⁶⁹. When the forest was cleared and the land subdivided into individual plots, some members of these communities opposed the process of individualization, and demanded that they be allocated a "reserve." They demanded a community title instead of the individual titles provided through the SS.

Some local opposition to the SSs thus emerged. It came from the realization that the SSs were opening their homeland to "foreigners" -- that is, to landless people from highly populated areas in Bomet and Kericho. This opposition was ignored and land adjudication and parceling was eventually completed. While titles were being issued in 1997, a group of activists mobilized residents to sue the government before the High Court of Kenya. The court case interrupted the process of issuance of titles, not only for the Eastern Mau Escarpment but also for all the SSs in the Mau Forest Complex. By the time the authorities stopped the registration process, titles had already been issued in MauCHE. This was not the case for the SSs in the southwest. These were not issued until 2005, prior to the constitutional referendum, when Mwai Kibaki (then-President) was seeking electoral support in the area.

The perverse nexus between elections and forest destruction in Mau reached a climax under the Moi regime in 2001. Prior to another important election, another forest excision was carried out. 61,586 hectares of forest were cleared, allegedly to settle "the Ogiek."

"INVENTION" OF WATER TOWER AS A DEPOLITICIZING NARRATIVE⁷⁰

Over the decade 1995-2006, encroachments and degradation of the Mau Forest had occurred as a result of relentless waves of migrant communities settling and irregularly expanding the farmland perimeter. Sustained public outcry brought the case to national and international concern. The situation became explosive. The then Prime Minister, Raila Odinga set up a Taskforce to investigate the causes of the ongoing destruction of the Mau Complex.

⁶⁸ Through leaders appointed on the basis of their degree of literacy.

⁶⁹ From interviews with a chief of location (Nessuit, 12 May 2016); and with a former community leader (Nessuit, 26 June 2016).

⁷⁰ The analysis on the depoliticizing nature of the "Water Tower's narrative" is drawn from a reflection that I have been jointly carrying on with Gaelle Rouillé-Kielo, PhD candidate in geography (Université Paris Ouest Nanterre). The first two paragraphs of this section are part of a paper that she presented at the French Institute of Research in Africa of Nairobi, the remnant is my own analysis of how the "Water Tower's narrative" applies and impacts the "Mau affair", which I could have not elaborated without exchanging with her. I wish therefore to acknowledge her contribution.

The United Nation Environment Program (UNEP) and Kenyan NGOs played an important role in drawing attention to the degradation of this national asset. The UNEP published several important reports on the high-elevation forests of Kenya. They represented the first attempt to monitor, over a three-years period, the impact of human activities on what had been named “the five main Water Towers” of the country⁷¹. These reports showed that several of the Water Towers were being degraded, and the Mau complex was being destroyed at a very rapid pace. This was attributed essentially to encroachment, in line with a classic neo-Malthusian explanation that links forest encroachment and degradation to the rapid demographic growth in adjacent agricultural areas.

Nothing happened until 2008, when PM Raila Odinga showed interest in the agenda of the UNEP and other international actors and agencies. The new policy narrative revolved around conservation⁷², translated here into the need for forest rehabilitation. Odinga launched the Mau Task Force to assess the extent of forest degradation and recommend action. This new state intervention in Mau sought, at least in principle, to de-politicize the eminently political land question.

The Ndung’u Commission of Inquiry (appointed in 2002: see *above*) had already extensively shown that Kenya's forestlands in the country were endangered. Yet the Ndung'u Commission was less concerned with conservation than with “irregular and illegal allocation of lands.” The Ndung'u Report had framed the problem as being a governance issue: excessive concentration of power, manipulation of redistributive politics, nepotism and corruption on the part of the elite. The TRJC had recommended the initiation of a national process aimed at redressing historical land injustices. These recommendations were never implemented. In these analyzes, destruction of the Mau Forest was attributed to a systemic failure of governance, and understood to be “land grabbing”. The Ndung’u Report recommended the establishment of a Land Tribunal to review the title deeds issued in Mau. The TRJC had recommended the initiation of a national process aimed at redressing historical land injustices. These recommendations were never implemented.

The notion of "Water towers" seems to have filled this vacuum. It justified public intervention in the high-elevation forests of the country, not by focusing on the contentious allocation of lands, but rather by pointing to the importance of the ecological areas. This gave intervention a legitimacy vis-à-vis internationally recognized paradigms, now reformulated as the Sustainable Development Goals. The “Water tower” was the basis of a powerful ecological argument in favor of forest “rehabilitation.” The ecological argument hides the political intricacies of the case: it actually seeks neutrality through high-tech instruments (like remote sensing technologies) that pretend depict the forests objectively. Evictions from forest reserves cannot be challenged when they are framed in terms of ecological necessity.

The mandate of the Taskforce was to provide for the relocation of people residing in the forest, and make recommendations for the restoration of degraded forest and water catchment areas. In March 2009, the so-called Mau Report (RoK, 2009b) was released. It painted a grim picture of the environmental consequences of decade-long destruction of the Mau forest. On land ownership and resettlement, the Mau Task Force recommended the regularization of the SSs’ residents, by first establishing their “bona-fide” -- i.e whether they are Ogiek--, and

⁷¹ The Mau Forest Complex, The Mount Kenya, The Aberdares, The Cherangani Hills and Mt. Elgon.

⁷² As pointed out by political ecology analysts ‘existing and long-term conflicts within and between communities are “ecologized” by changes in conservation or resource development policy’ (Robbins 2012: p.22). “Ecologization” of an existing conflict seems the process at work here, and the link between environmental issues and politics would surely deserve more attention than I am devoting in the current paper, especially in regards to the role played by international actors, such as the UNEP in the Mau Forest, which could also possibly be analyzed through the lenses of the “anti-politics machine” conceptualized by James Ferguson (1990). However, such analysis and debates will not be tackled in the framework of this paper.

secondly to relocate the bona-fide settlers who were issued titles in critical water catchment areas and biodiversity hot spots (p.46).

In May 2009, Ogiek went to Nakuru to voice their opposition to the plan of relocation. For them, “relocation” meant actually “eviction”. In July and September 2009, respectively, the Cabinet and the Parliament adopted the Taskforce Report calling for the removal of all current inhabitants of the Mau. In October 2009, the government issued a thirty-day eviction notice to the Ogiek and other settlers of Mau. This is when the case was filed at the ACHPR to halt the evictions and compel the state to comply with the African Charter’s indigenous peoples’ rights declaration.

In the meanwhile, during the Taskforce’s investigations, the Ministry of Lands had declared a moratorium on all land transaction in the Mau Forest SSs, drastically constraining the residents’ property rights. In the wake of the 2013 elections, these restrictions (so-called caveats) were lifted. They were reinstated in 2014, following filing of ACHPR court case. As a result, beneficiaries of the Mau Forest SSs have found themselves in possession of caveated titles -- i.e. holders of plots that cannot be transferred, alienated, leased or, technically, not even developed.

This situation engenders profound insecurity for peasant’s smallholders. They feel they have no control over the legal and political processes that are going to decide of their future. Even so, as the chief of one of the MAUCHE sub-locations told me “life continues”: residents of the SSs cannot afford to stop farming, and cannot prevent themselves from exploiting the market value of the asset they have been entitled to.

In fact, during my stays, I observed an impressive dynamism of land markets in each and every SS and sub-location I visited (in the SW as well as in the Eastern Escarpment of Mau). The value of the land keeps going up, reaching 400,000 Ksh per acre (\$4,000), notably in some good locations close to the main roads. Renting or selling the plots is the norm and not the exception. This contributes to a certain demographic dynamism, drawing in-migrants from densely populated areas. Migrants outnumber “the Ogiek,” the original inhabitants of the forest, who in certain cases feel oppressed by this “invasion”. This explains intensification of the identity discourse.

Cultural entrepreneurs have managed to ride the wave of the indigenous peoples movement, attracting funding from international organizations, which have supported their case before the African court. These activists not only complain about the flawed processes through which the SSs were put in place, thus destroying their forests, but also rebuke the government for having allowed “strangers” to settle in their territory⁷³. Ultimately, this mobilization has exacerbated inter- (as well as intra-) community tensions because feelings of “otherness” are fueled by claims of indigeneity. This has already led to deadly conflicts, particularly in the Eastern Escarpment of Mau, where the accusations of illegal or irregular land acquisition are confused with accusations of non-indigeneity.

In fact, the policies and politics of land allocations of the 1990s have, either *de facto* or by design, rendered these localities cosmopolitan (multiethnic), and allowed private property relations and the market to penetrate the social and economic practices of resident populations. Sometimes they have adapted unwillingly, or sought to resist the individualization of tenure and the dilution of customary systems of norms via local interactions. These responses have been shaped by the political-economic factors and

⁷³ It should be noticed that in a number of cases, which were brought to my attention, this assertion is not quite correct due to sales of plots that actually took place as soon as the inception of the settlement schemes in the Eastern Mau Escarpment: I was shown an important number of land sales agreements dating 1997.

processes that I have sought to highlight in this paper.

CONCLUDING COMMENTS

By reconstructing the historical processes characterizing the making of land policies since colonial times, I have been able to shed light on the forces that made the management of land and natural resources a central arena of deliberation in Kenya's constitutional deliberations. And by investigating the political debates, and politics surrounding public policy, I have been able to unravel multi-level and multi-stakeholder negotiation processes that have characterized the designing of land laws, and the opening of a window of opportunity for historical land claims to (re)surge, and gain new traction.

The case of “the Ogiek of Mau” shows that customary tenure is not an insulated system of norms that, once acknowledged, can mechanically be recognized by the state through legal formalization. Claims to “ancestral lands” come with layers and layers of socioeconomic and political history that cannot be ignored. When thinking of “the Ogiek of Mau” and their claim to ownership of the whole Eastern Mau Escarpment, how can one ignore the fact that currently “other communities” occupy three-quarters of this territory? This has happened through political allocations (i.e., through irregular land allocations), and market operations over time, namely through the selling of land by a portion of “Ogiek community” (in contradiction to a strategy of political mobilization aimed at repossessing community land).

How does this one peculiar land claim -- geographically, historically and politically situated as it is, and which cannot pretend to be representative of all “community claims” to land in Kenya -- relate to the dispositions of the Community Land Act of 2016?

To what extent can the “Ogiek of Mau” be considered “a consciously distinct and organized group of users of community land” (RoK, 2016: see Appendix 3)?

The concept of “community” was reinstated and valorized in developmental thinking in the 1990s. It has been a critical element in efforts to achieve meaningful local participation, democratization and conservation of natural resources. Yet as Agrawal and Gibson (1999) argued, it presents a number of conceptual and practical problems. In conservation work, these representations invoke “the romantic image of the “Ecologically Noble Savage”” and “ignore the critical interests and processes within communities, and between communities and other social actors” (pp.632, 633). This essentialised representation (or this projection of disenchantment with “states” and “markets,” as Agrawal and Gibson see it) ignores “the differential access of actors within communities to various channels of influence, and the possibility of “layered alliances” spanning multiple levels of politics” (Agrawal and Gibson 1999: 640). This paper has employed a combination of ethnographic, historical, and policy-process approaches to develop and inform the kind of anti-essentialist reading of “community claims” to land and property that scholars like Agrawal and Gibson and others have called for. The analysis suggests a need for caution in the application of prescriptive definitions of communities, especially as a “foundation upon which to base policy” (ibid, p. 633).

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Appendix 1

63. (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

(b) land lawfully transferred to a specific community by any process of law;

(c) any other land declared to be community land by an Act of Parliament; and

(d) land that is—

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

(5) Parliament shall enact legislation to give effect to this

Article. (RoK, 2010: p.44)

Appendix 2

[...]The model is not a legal framework but a sequence of actions to be undertaken by Government in collaboration with communities towards the recognition of their rights to land. Essentially, the Model provides steps and processes that will enable the divestiture of land from public land category to the community land category as per the provisions of the Constitution and the National Land Policy that reclassify all Trust Lands to Community Lands, and the provision in the Policy to convert Public Land (formerly Government Land) in the Coastal strip to Community Land. For the first time in Kenya, the CLRR offers opportunity to take politics out of land administration. [...] In addition, a Cabinet Memorandum be prepared to seek Cabinet approval to convert Public land (formerly Government Land) in Lamu that has not been alienated and registered to community land as we await Parliament to enact legislation that will allow for conversion of land from one category to another (Annex 5, Remarks of the Honorable James Orengo, Minister for Lands, on the occasion of the closing ceremonies for the SECURE Project Workshop at Kaskazi Beach Hotel, 16th September, 2011: USAID, 2011).

Appendix 3

"community" means a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes-

(a) common ancestry;

(b) similar culture or unique mode of livelihood;

(c) socio-economic or other similar common interest;

(d) geographical space;

(e) ecological space; or

(f) ethnicity. (RoK, 2016: p.528)