

# DEVOLUTION AND THE POLITICS OF COMMUNAL TENURE REFORM IN KENYA

GARGULE A. ACHIBA , MONICA N. LENGIOIBONI\*

## ABSTRACT

Increased legal access and the devolution of natural resource administration are generally seen as sources of power for local communities and their institutions. However, beyond this widely held expectation, the politics of land reform suggest that legal recognition of rights and devolution is not the only issue with implications for communal tenure reforms. Misconceptions about communal tenure, which are rooted in history, and their appropriation by local elites in the processes of communal tenure reform are characteristic of both colonial and post-colonial governments in Kenya. Although typically articulated and promulgated to enhance political representation and to devolve control over resources to the local level, unresolved issues in the reform process have worked to undermine the legitimacy of communal land rights in contemporary Kenyan society. A case study of the post-2010 community land legislation process demonstrates the continuing relevance of historically conditioned political and ideological representations of communal tenure built during the colonial period and reproduced in policy in independent Kenya. This paper offers reflections on the centrality of sustained communal tenure misconceptions, fetishization of formal governance institutions, and the institutional and power configurations that primarily benefit powerful stakeholders as sources of the current breakdown in the implementation of community land law.

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\*Gargule A. Achiba (agargule@hotmail.co.uk) works at the Frontier Counties Development Council, Woodlands Office Park, Nairobi, Kenya. Monica Lengioiboni (m.n.lengioiboni@utwente.nl) is an Assistant Professor of Land Policy and Land Management at the Department of Urban and Regional Planning and Geo-Information Management, Faculty of Geo-Information Science and Earth Observation (ITC) at the Faculty ITC, University of Twente, 7500 AE Enschede, The Netherlands. This paper was written during a research fellowship awarded to Gargule and supported by the Swiss National Science Foundation Research Commission, University of Bern. Mobility Fellowship (grant number P1BEP1\_175227) at the ITC, based on research conducted as part of a Ph.D. in Geography at the Centre for Development and Environment, University of Bern, Mittelstrasse 43, CH-3012 Bern, Switzerland. The field research for this article benefitted from financial support for the research project ‘*Decentralized, Democratic Land Management in Kenya: Implications for Land Inequality, Land Security, Land Markets*’ funded by the LSE International Inequalities Institute. The authors are very grateful for the valuable comments and suggestions by the editors of *African Affairs* and three anonymous reviewers that significantly helped improve an earlier draft of this paper.

In Kenya's 2010 constitution, devolution presented considerable optimism for improving land relations, which had been a 'key fault line'<sup>1</sup> in Kenya's politics, through new land laws intended to end violent conflicts and the inherent inequalities associated with existing land relations. The constitution created 47 counties and empowered them over key aspects of land administration, including the management of community land which "shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest".<sup>2</sup> In principle, devolution was premised on the significant promise of achieving national unity through power sharing, creating more centres of decision-making and development, and increasing responsiveness and accountability to local communities, amongst other reasons.<sup>3</sup> In practice, however, initial expectations that devolution would improve the prospects of resolving longstanding grievances related to land in Kenya have been dampened by contestation, the veto powers of the national government and delayed implementation of the key institutional creation needed for the implementation of devolved land governance,<sup>4</sup> including lack of meaningful opportunities for the citizenry to express its views of the impending changes.<sup>5</sup> In the wake of Kenya's land reforms enshrined in the 2010 constitution, many analyses have sought to make sense of the economic and political consequences of this restructuring.<sup>6</sup> Devolution became an arresting metaphor to provide meaning and understanding to a raft of new policies and laws aimed at resolving complex land issues. Going by the characterization of good 'devolution', which represents distinct and independent power sharing, the 2010 constitution created two levels of political authority: national and county governments. The devolved political authorities include elected county governments composed of governors as the executive authority of

1. Charles Hornsby, *Kenya: A history since independence* (IB Tauris, New York, 2013, 787).

2. Government of Kenya, *The Constitution of Kenya* (2010), art. 63 (1).

3. Yash Ghai, 'Devolution: Restructuring the Kenyan state', *Journal of Eastern African Studies* 2, 2 (2008), pp. 211–226.

4. For a comprehensive review land governance under devolution see Catherine Boone, Alex Dyzenhaus, Ambreena Manji, Catherine W Gateri, Seth Ouma, James Kabugu Owino, Achiba Gargule and Jacqueline M Klopp, 'Land politics under Kenya's new constitution: Counties, devolution, and the National Land Commission' (Working Paper Series 16–178, Department of International Development, London School of Economics and Political Science, 2016); Jacqueline M Klopp and Odenda Lumumba, 'Reform and counter-reform in Kenya's land governance', *Review of African Political Economy* 44, 154 (2017), pp. 577–594; Patricia Kameri-Mbote, Collins Odote, Celestine Musembi and Wilson Kamande, *Ours by right: Law, politics, and realities of community property in Kenya* (Strathmore University Press, Nairobi, 2013); Collins Odote, 'The dawn of Uhuru? Implications of constitutional recognition of communal land rights in pastoral areas of Kenya', *Nomadic Peoples* 17, 1 (2013), pp. 87–105.

5. Ambreena Manji, 'The politics of land reform in Kenya 2012', *African Studies Review* 57, 1 (2014), pp. 115–130.

6. Klopp and Lumumba, 'Reform and counter-reform in Kenya's land governance'; Boone *et al.* 'Land politics under Kenya's new constitution'; Kameri-Mbote *et al.* 'Ours by right'.

the county and county assemblies as the legislative arm. The devolved units preside over reassigned service delivery tasks, including the function of land administration, providing room for an improved focus on local priorities in land rights and land administration. Further, separation of powers, with the aim of ending the central government's arbitrary authority over land, places oversight and regulatory authority in an independent National Land Commission (NLC) and vests new powers over untitled land in the NLC and county governments.<sup>7</sup> The constitutional recognition of community land as a distinct land tenure regime and devolution of its administration to the local county level created an environment for reform that is particularly significant for the arid and semi-arid lands (ASALs), which are held communally, and the rights of access and use determined on the basis of non-statutory local institutions and rules, many of which are derived from customary practice.<sup>8</sup> Furthermore, devolution of land administration enhances the scope of self-governance and self-management and potentially provides alternative checks and balances on the contentious politics of reform and institutional building that have characterized decentralization in the African context.

However, translating the rights and interests of groups such as pastoralists requires awareness and appreciation for the colonial socio-institutional discourse and dynamics that characterized colonial and post-independence conceptions of property rights. The colonial attitude towards communal tenure was influenced by the European conception of property and deeply entrenched in cultural preconceptions that set private property rights as superior to communal tenure<sup>9</sup> and greatly enhanced the frailty of communal land rights to date.<sup>10</sup> In defining the concept of property rights in their colonies, the European colonizers inevitably entrenched some of the popular misconceptions about communal land tenure, influenced in part by their ignorance of African land use systems, such as shifting cultivation and transhumance, and in part by the desire to entrench their philosophies and systems of government in their new colonies. The groups of misconceptions of communal land tenure and their institutional rationales fall into three broad groups. First, there is a tendency by government planners to represent any unoccupied land as 'vacant' and open to alternative appropriation;<sup>11</sup> to believe that communal ownership impedes agricultural

7. Boone *et al.* 'Land politics under Kenya's new constitution'.

8. Michael O. Odhiambo, 'Securing community land rights in the Kenyan ASALs: Available legal options' (ADA Consortium, Nairobi, 2015).

9. Pauline E Peters, 'Challenges in land tenure and land reform in Africa: Anthropological contributions', *World Development* 37, 8 (2009), pp. 1317–1325.

10. Liz Alden Wily, 'The law is to blame': The vulnerable status of common property rights in sub-Saharan Africa', *Development and Change* 42, 3 (2011), pp. 733–757.

11. Raymond Noronha, 'Land tenure in sub-Saharan Africa', in Allen Maunder and Alberto Valdes (eds.) *Agriculture and governments in an interdependent World. Proceedings of the 20th International Conference of Agricultural Economists* (Aldershot, Dartmond 1989), pp. 782–799.

development; and to think that private property reflects ‘evolutionary progression’.<sup>12</sup> These representations present the notion of secure tenure as equivalent to the formal registration of rights in land and the demarcation of boundaries mirroring private property rights. Second, communal tenure is believed to entail the domination of group rights and the absence of individual rights. Consequently, government planners present tenure reform instrumentally with a tendency to depict communities as homogeneous groups and communal tenure reform as a single monolithic problem which decrees commodification and individualization of claims in land through the introduction of land titles to bring about its transformation, which Pauline Peters called ‘informal formalization’.<sup>13</sup> This presentation is accompanied by a perception that the rights of communities with similar identities are the only basis for both the allocation and the demarcation of land rights. Third, there is a belief that customary rules of tenure are unable to regulate resource use and manage overexploitation of common pool resources and that centralized regulation or privatization is the only way to arrest ‘the tragedy of the commons’.<sup>14</sup> Although the ‘tragedy of the commons’ paradigm was popularized by Gareth Hardin in his 1968 work, the concept is much older and was featured in the colonial discourse.<sup>15</sup> For this reason, communal tenure reform is presented by government planners as a process in which existing institutions—particularly customary institutions—must give way to formal government institutions that are presumed to better address commons governance—an extension of the tragedy of the commons thesis.

In this article, we examine the historically conditioned misconceptions of collective land tenure in Kenya and their reproduction in the implementation of devolved governance of community land. Within devolved land governance, we examine the processes and outcomes of community land law, focusing on the narratives and contestations surrounding the registration of community land, as well as the roles of regional inequalities and patronage networks of powerful stakeholders in the legitimization of communal tenure misconceptions. The implementation of communal land legislation provides a rare opportunity to examine how much institutional choices and preferences for community land legislation are embedded in historical institutional change processes, as well as providing a basis for evaluating the feasibility of proposed collective tenure reform and

12. Ann Whitehead and Dzodzi Tsikata, ‘Policy discourses on women’s land rights in sub-Saharan Africa: The implications of the re-turn to the customary’, *Journal of Agrarian Change* 3, 1–2 (2003), pp. 67–112.

13. Peters, ‘Challenges in land tenure and land reform in Africa’, pg. 1319.

14. Garrett Hardin, ‘The tragedy of the commons’, *Science* 162, 3859 (1968), pp. 1243–1248.

15. Tobias Haller, *The contested floodplain: Institutional change of the commons in the Kafue flats, Zambia* (Lexington Books, Plymouth, 2013).

the implications that these reforms have for communal tenure security. Much recent scholarship inspired by common pool resources theory has focused on the capacity of local communities to draw from decentralization policies and govern resource areas, including the inadequacy of formal institutions to manage collective action problems.<sup>16</sup> This scholarship highlights the strength of devolution policies in securing decision-making for local resource users, efficient management of resources, and efficient achievement of social aspirations.<sup>17</sup>

In contrast, our analysis emphasizes the structural opportunities in communal land reform that favour private property rights over communal rights through the introduction of fixed territorial boundaries and stricter regulation of commons, in which common property regimes are the norm, and there are drastic consequences of land tenure reforms for the sustainable management of commons. We argue that such reform processes mirror the colonial strategy of imposing private property rights on highly fluid and mobile communities, consequently undermining the prevailing customary rights to land.<sup>18</sup> The pursuit of such strategies also caused a great deal of transformation in the control and use of natural resources resulting from the incorporation of customary property regimes into the apparatus of the colonial state and the reorganizing of communal tenure components under substantive laws.<sup>19</sup> Whilst devolution's greater emphasis on public participation and democratization of land governance has provided impetus for communal land reform, the process and actual outcomes have been prone to the reproduction of longstanding misconceptions and ideational biases related to communal land rights.

Second, our analysis of devolved institutions at the local level leads us to agree with some recent interpretations challenging the redistributive potential of Kenya's devolved land reforms<sup>20</sup> and interpretations emphasizing the potential of devolution to disempower or inhibit reform in the context of communal land tenure.<sup>21</sup> The intrigues of land reform in Kenya and community land legislation in particular have emphasized the power of

16. Elinor Ostrom, *Governing the commons: The evolution of institutions for collective action* (Cambridge University Press, New York, 1990).

17. Jean-Marie Baland and Jean-Philippe Platteau, *Halting degradation of natural resources: Is there a role for rural Communities?* (Clarendon Press, Oxford, 1996); John Clark, 'The state, popular participation and the voluntary sector', *World Development* 23, 4 (1995), pp. 593–601.

18. Charles H Ambler, *Kenyan communities in the age of imperialism: Central region in the late nineteenth century* (Yale University Press, New Haven, 1988).

19. Trond Vedeld, 'Enabling local institution-building: reinventing or enclosing the commons in the Sahel', in Henrik S. Marcussen (ed.), *Improved natural resource management—The role of formal organizations and informal networks and institutions* (Occasional Paper Vol. 17, International Development Studies, Roskilde University), pp. 135–189.

20. Catherine Boone, 'Land conflict and distributive politics in Kenya', *African Studies Review* 55, 1 (2012), pp. 75–103; Ambreena Manji, *The politics of land reform in Africa: From communal tenure to free markets* (Zed Books, London, 2006).

21. Odote, 'The dawn of Uhuru?'

historical and institutional configurations that primarily benefit powerful stakeholders and local elites, highlighting the importance of these forces in the reproduction of blockages to community land reform. In Kenya, the preference for commons privatization by the state and networks of local elites is intimately associated with dispossession and disempowerment of commons. These findings complement the literature emphasizing the role of power relations and the magnitude of the impacts of inequality that play out in land reform implementation.<sup>22</sup>

The research for this article is based on 12 months of fieldwork in Kenya, conducted mainly from January to June 2016 and then for shorter timeframes between January and June 2017. At the time of the fieldwork, the community land reform drafting process, which began in 2014, had yielded several draft bills with differing modifications relating to the protection and registration of community land rights. These processes were also largely led by the Kenya National Assembly (Parliament and the Senate), and whilst not entirely representative of the entire process of community land reform, the draft bills best captured rationales for alterations and positions of key actors regarding the protection and registration of community land rights. In addition, due to the importance of constitutional duty of the Parliament to promulgate community land law and the competing interest driven by national institutions such as the Ministry of Lands and other political actors,<sup>23</sup> national legislation best captured the political and ideological rationales of key actors in the community land reform process. In the context of community land legislation, we used data obtained through content analysis of successive drafts of Community Land Bills as well as interviews with national and local political elites.

To obtain a more grounded insight into the community land reform process, field research for this paper sought out local level political elites, non-state actors and customary institutions in Isiolo County in northern Kenya. These were typically key actors involved in the community land legislation through public and communities' consultation processes. The field research included 21 in-depth interviews with representatives of the county government in Isiolo County and the National Land Commission (NLC), customary institutions of communal land and resource governance amongst the Boran community (*the dedha* council) in Garba Tula, and civil society organizations engaged in the process of the Community Land Bill, as well as participating in a number of meetings and in commu-

22. Jacqueline Klopp and Odenda Lumumba, 'Kenya and the global "land grab": A view from below', in Mayke Kaag and Annelies Zoomers (eds.), *The global land grab: Beyond the hype* (Zed Books, London, 2014), pp 54–70.

23. See for example, Catherine Boone, Alex Dyzenhaus, Ambreena Manji, Catherine W Gateri, Seth Ouma, James Kabugu Owino, Achiba Gargule and Jacqueline M Klopp, 'Land law reform in Kenya: Devolution, veto players, and the limits of an institutional fix', *African Affairs* 118, 471 (2019), pp. 215–237.

nity engagement in relation to the draft Community Land Bill 2015/16. The interview schedules covered topics pertaining to historical challenges of customary land tenure, politics surrounding community land registration process and devolved institutional architecture vis-à-vis customary institutions of community land governance. Alongside these topics, interviews focused on strategies used by local and national elites to renegotiate or maintain the balance of power in the community land reform debates and process. The empirical data from local elites and political actors at national and local levels were analysed for commonalities and contrasts with respects to questions of preconceptions about communal tenure, protection and registration of community land rights and institutional aspects of community land governance in order to grasp the ways in which historical preconceptions about communal tenure are reproduced in the reform process.

This article is structured as follows. After this introductory section, the article is divided into four sections organized chronologically and linking theory to the empirical study to demonstrate the linkages of breakdowns in post-2010 communal tenure reform in Kenya with the colonial representations of communal tenure and their post-colonial reproduction. The next section begins with a brief theoretical outline of decentralization in the context of commons and establishes the relationship between devolution of commons governance and sustainable management of commons. The second section of the article proceeds by laying out a diagnostic historical profile of the communal tenure breakdowns in Kenya with a focus on colonial and post-colonial constructions promulgated by interests generated by the state and local elites in land reform. The third section starts with a brief background on decentralization in the Kenyan context prior to and since the start of the devolution following the promulgation of the 2010 constitution. From this grounded perspective, the article examines the outcomes of the legal recognition and devolution of community land administration at both the national and local levels with a focus on how the nature and content of community land reform are shaped and constrained by historical representations of communal tenure that effectively constitute breakdowns in the realization of secure communal tenure. The final section presents a summary of the key arguments and concludes with a discussion of the role of historical representations of communal tenure in post-2010 communal tenure breakdowns and the implications of these breakdowns for community land rights.

#### *Devolution and sustainable management of commons*

Throughout the wide-ranging and long tradition of commons scholarship, there has been a common tendency to link institutions and the sustainable

management of common pool resources. Institutions provide incentives for groups and individual users of Common Pool Resources (CPR), as well as structuring human action and interaction in sustainable resource use.<sup>24</sup> Institutions for resource governance are believed to be embedded in cultures of the state or local communities that develop them as regulations and laws.<sup>25</sup> Hence, control and responsibility for resource management are not only important for ensuring access rights to dependent communities but also for ensuring security from their overuse.

Devolving powers of resource governance through decentralization policies were proposed as a possible approach to the governance of CPRs in the mid-1980s, when the problems of natural resource overexploitation and their negative effects on human welfare were the main concerns. Decentralization policies have re-emerged as a valued political and economic goal during this period, following decades of policies influenced by the Hardin's *tragedy of the commons* paradigm, which advocated for the transfer of the management of natural resources from customary institutions to state or federal agencies as the only way to nurture the commons and prevent overexploitation and degradation.<sup>26</sup> Hardin's argument erroneously presumed that all commons were open access and that governance regimes associated with them are unable to create rules for resource use regulation, leading to overuse and eventual destruction. Hardin's ideas prominently featured in the policies and legislation of governments in Africa as a justification for eliminating common property regimes and centralizing resource governance, typically involving taking rights and responsibilities related to resources out of the hands of local groups.<sup>27</sup> Following decades of dominance of Hardin's *tragedy of the commons* paradigm, the commons scholarship developed both theoretically and empirically. During this time, many development scholars disputed the proposition that centralized governance of natural resources is efficient, with empirical evidence of effective community-based governance making the case for decentralized decision-making and related policies.<sup>28</sup> Devolution policies were thus seen

24. Haller, *The Contested Floodplain*.

25. Douglass C North, *Institutions, institutional change and economic performance* (Cambridge University Press, Cambridge, 1990); Ostrom, *Governing the Commons*; Jean Ensminger, *Making a market: The institutional transformation of an African society* (Cambridge University Press, Cambridge, 1996).

26. Hardin, 'The tragedy of the commons'.

27. Haller, *The contested floodplain*; Margaret McKean and Elinor Ostrom, 'Common property regimes in the forest: Just a relic from the past,' *Unasylva* 46, 180 (1995), pp. 3–15.

28. Ostrom, *Governing the commons*; Arun Agrawal and Clark C Gibson, 'Enchantment and disenchantment: The role of community in natural resource conservation', *World Development* 27, 4 (1999), pp. 629–649.



as necessary strategies to achieve the CPR management goals of equity, justice, and efficiency.<sup>29</sup>

There are different definitions of devolution in the context of natural resource governance,<sup>30</sup> all involving some form of transfer of responsibilities and authority from centralized control to local user groups, conceptualized by Tond Vedeld as “rolling back the boundaries of the state”.<sup>31</sup> Devolution, sometimes used interchangeably with decentralization,<sup>32</sup> has been used to denote policy reforms that aim to transfer rights to and responsibilities for natural resource governance to localized institutions. However, whilst both terms denote representation in participatory management, devolution is defined as the “transfer of rights and responsibilities to local user groups, organizations and local-level governments that have autonomous discretionary decision-making powers”.<sup>33</sup> Decentralization, in contrast, has been defined as “any act in which a central government formally cedes powers to actors and institutions at lower levels in a political-administrative and territorial hierarchy”.<sup>34</sup> Following Cecile Brugere<sup>35</sup> and Jesse Ribot,<sup>36</sup> this paper adapts an understanding of devolution that involves “the transfer of rights and responsibilities to local level administrative units and resource users’ groups,”<sup>37</sup> emphasizing central authorities ceding powers to local-level institutions accountable to resource users in the context of a combination of property regimes. Devolved governance has been distinctively associated with contexts in which a previously unitary state transfers powers and responsibility from the centre to lower-level units created by a national

29. Arun Agrawal and Elinor Ostrom, ‘Collective action, property rights, and decentralization in resource use in India and Nepal’, *Politics & Society* 29, 4 (2001) pp. 485–514; Jesse Ribot, *Democratic decentralization of natural resources: Institutionalizing popular participation* (World Resources Institute, Washington DC, 2002); Krister P Andersson, Clark C Gibson, and Fabrice Lehoucq, ‘The politics of decentralized natural resource governance’, *Political Science & Politics* 37, 3 (2004), pp. 421–426.

30. There is a wide literature on decentralization reforms in relation to common pool resources. For a summary of these discussions see Arun Agrawal and Jesse Ribot, ‘Accountability in decentralization: A framework with South Asian and West African cases’, *The Journal of Developing Areas* 33, 4 (1999); pp. 473–502.

31. Vedeld, ‘Enabling local institution building’.

32. Anna Knox and Ruth Meinzen-Dick, ‘Collective action, property rights, and devolution of natural resource management: Exchange of knowledge and implications for policy’ (CAPRI Working Paper No. 11, International Food Policy Research Institute, Washington DC, 2001).

33. Fikret Berkes, ‘Devolution of environment and resources governance: Trends and future’, *Environmental Conservation* 37, 4 (2010), pp. 489–500.

34. Jesse C Ribot, ‘Integral local development: “accommodating multiple interests” through entrustment and accountable representation’, *International Journal of Agricultural Resources, Governance and Ecology* 1, 3/4 (2001), pp. 327–350.

35. Cécile Brugere, ‘Can integrated coastal management solve agriculture-fisheries-aquaculture conflicts at the land-water interface?’ in Chu Hoanh, To Tuong, John Gowing and Bill Hardy (eds), *Environment and livelihoods in tropical coastal zones: Managing agriculture-fishery-aquaculture conflicts* (CAB International, Oxon, 2006); pp. 258–273.

36. Ribot, ‘Democratic decentralization of natural resources’.

37. Brugere, ‘Can integrated coastal management solve agriculture-fisheries-aquaculture conflicts at the land-water interface?’.

constitution. Where this devolution is the case, greater priority is attached to ensuring greater participation by rural stakeholders in the decisions and actions affecting them,<sup>38</sup> whereby a lower-level actor can exercise some autonomy.<sup>39</sup> However, whilst devolved systems might feature well-defined powers of policy, central governments can exert substantial control over outcomes related to specific areas, such as financial reporting or compliance requirements.<sup>40</sup>

Many commons scholars have asserted that devolution of CPR governance offers marked advantages over the limited effectiveness of centralized control, including giving rise to efficiency outcomes by enhancing participation and democratization. Devolved governance lies at the heart of the belief that resource users are capable of developing effective institutions of governance that achieve sustainable resource use.<sup>41</sup> The positive correlation between decentralization policies and good governance outcomes is premised on the ability to resolve two of the most enduring barriers to effective decentralization: resource users' ability to acquire and exercise effective control over resources<sup>42</sup> and the establishment of institutional mechanisms required for enhanced quality of public services.<sup>43</sup> Inclusive decision-making in the context of natural resource governance has long been touted by commons scholars to catalyse rules adapted to the local context and hence to respond better to the needs of local resource users.<sup>44</sup>

However, in contrast to the claims of its proponents, decentralization policies by no means adequately address all of the problems of resource governance posed by current levels of multi-scalar contestations, climate change, and ecological degradation. A focus on the technocratic issue of institutions often leaves unchallenged the question of power intrinsic to social systems in which institutional decisions are exercised. Whilst in

38. JE Michael Arnold, 'Devolution of control of common pool resources to local communities: Experiences in forestry,' in Alain de Janvry, Gustavo Gordillo, Elisabeth Sadoulet, and Jean-Philippe Platteau (eds), *Access to land, rural poverty, and public action* (Oxford University Press, Oxford, 2001), pp. 163–195.

39. Ribot, 'Integral local development'.

40. Keith Carlisle and Rebecca L Gruby, 'Polycentric systems of governance: A theoretical model for the commons', *Policy Studies Journal* 47, 4 (2019); pp. 927–952.

41. Thomas Dietz, Elinor Ostrom, and Paul C Stern, 'The struggle to govern the commons', *Science* 302, 5652 (2003); pp. 1907–1912; Ostrom, *Governing the commons*; Fikret Berkes, David Feeny, Bonnie J. McCay & James M. Acheson, 'The benefits of the commons' *Nature* 340, 6229 (1989), pp. 91–93.

42. Krister P Andersson and Elinor Ostrom, 'Analyzing decentralized resource regimes from a polycentric perspective', *Policy Sciences* 41, 1 (2008), pp. 71–93; Agrawal and Ribot, 'Accountability in decentralization'.

43. Jean Paul Faguet, *Decentralization and popular democracy: Governance from below in Bolivia* (University of Michigan Press, Ann Arbor, 2012).

44. Harold Alderman, 'Do local officials know something we do not? Decentralization of targeted transfers in Albania', *Journal of Public Economics* 83, 3 (2002); pp. 375–404; Dennis A. Rondinelli, John R. Nellis and G. Shabbir Cheema, 'Decentralization in developing countries: A review of recent experience' (World Bank Staff Working Papers No. 581 Management and Development Series No. 8, The World Bank, Washington, D.C., 1983).

theory, independent centres of decision-making are a desirable feature of decentralized policies, their failure and the choice to transfer discretionary power to local institutions can undermine their roles in resource governance and instead concentrate power in the executive branch of a devolved system.<sup>45</sup> Hence, the political cost of implementing decentralization policies can imperil these centres' democratization. Implicitly, decentralization theorists assume that all reforms are grounded in public interest; regulators understand how ecological systems work and can craft institutions to induce socially optimal behaviours.<sup>46</sup> Another forefront problem associated with most decentralization policies is the possibility of local elite capture and thus the perpetuation of the inequalities that these policies are attempting to solve in the first place. Luckham et al<sup>47</sup> noted that it is doubtful that the introduction of democratic principles on its own will enable the overcoming of historical and cultural factors perpetuating political inequality.

Despite the momentum of decentralization in Africa, mostly involving natural resource management,<sup>48</sup> there is considerable evidence that decentralization not only can fail to guarantee the democratic and economic benefits associated with them, but they can also risk reinforcing central authority at the expense of local institutions. Existing institutions and structures can channel the decisions of actors along an established policy path that is less readily available or more or less implausible.<sup>49</sup> This tendency demonstrates the difficulty in implementing decentralization in the context of underlying continuing historical processes, such as colonialism, pervasive patron-client relations, inequalities, and corruption. Previous analyses have demonstrated that Africa's colonial legacy continues to have profound impacts on its contemporary democratic practices,<sup>50</sup> whereby pervasive patronage, corruption and negative ethnicity<sup>51</sup> continue to undermine reforms. The interplay between the underlying historical processes that reinforce political expediency and contests over power and resources—

45. Jesse C Ribot, 'Democratic decentralisation of natural resources: Institutional choice and discretionary power transfers in sub-Saharan Africa', *Public Administration and Development* 23, 1 (2003), pp. 53–65.

46. David Feeny, Susan Hanna, and Arthur F McEvoy, 'Questioning the assumptions of the "tragedy of the commons" model of fisheries', *Land Economics* 72, 2 (1996), pp. 187–205.

47. Robin Luckham, Mary Kaldor, and Anne-Marie Goetz, 'Democratic institutions and politics in contexts of inequality, poverty, and conflict: A conceptual framework' (IDS Working Paper 104, Brighton, 2000).

48. Ribot, 'Democratic decentralisation of natural resources'.

49. David Wilsford, 'Path dependency, or why history makes it difficult but not impossible to reform health care systems in a big way', *Journal of Public Policy* 14, 3 (1994), pp. 251–283.

50. Marie Lechler and Lachlan McNamee, 'Decentralized despotism? Indirect colonial rule undermines contemporary democratic attitudes' (Munich Discussion Paper No. 2017-7, Department of Economics, University of Munich, 2017).

51. Bruce J Berman, 'Ethnicity, patronage and the African state: The politics of uncivil nationalism', *African Affairs* 97, 388 (1998), pp. 305–341.

characterized by corruption and inequalities cast in ethnic terms—provides the context in which decentralization occurs.

*The legacy of history: a diagnosis of historical communal tenure breakdowns in Kenya*

The colonialization of Kenya has caused the rapid and often sweeping transformation of communal rights in land associated with the privatization of land rights—colonial thinking that sought to improve and modernize land relations. The grand colonial narrative about communal tenure involved controlling the peasantry as a strategic vector for the colonial project. The convergence of colonial conquest and misconceptions about communal land rights in Kenya derive invariably from colonial encounters with rangeland territories (particularly Maasai), which colonial administrators perceived to be “vast unoccupied land”.<sup>52</sup> Even more importantly, colonial administrators’ perspectives towards communal land tenure were derived from the British cultural preconception that private ownership is superior to collective forms of tenure.<sup>53</sup> As a result, as long as the land was “waste and unoccupied,” the colonial government could declare it as belonging to the Crown and grant it to individuals.<sup>54</sup> In colonial Kenya, these misconceptions justified dispossession and annexation of communal land, setting the pace for what would become conventional wisdom in administering customary land rights. From this point forward, the quality of communal land legislation and policy decreased, based on the premise that customary tenure did not provide the necessary security and productivity required for social progress.<sup>55</sup> The vast literature on communal land has revealed a number of indicators of breakdowns that shaped the way in which colonial construction of community land rights was reproduced to legitimize and enforce dispossession by post-colonial Kenyan regimes.

More significantly, the disempowering post-colonial government policy agenda against communal resource utilization prolonged isolation and underinvestment, which in turn produced a long history of marginalization. Kenya’s ASALs have never enjoyed policy attention relevant to their unique capacities and challenges.<sup>56</sup> Instead, most post-independence policies in Kenya have been muddled by a flawed conceptual understanding of communal appropriation with land adjudication strategies aimed at creating

52. Esther Mwangi, ‘The footprints of history: Path dependence in the transformation of property rights in Kenya’s Maasailand’, *Journal of Institutional Economics* 2, 2 (2006), pp. 157–180.

53. Peters, ‘Challenges in land tenure and land reform in Africa’.

54. Klopp and Lumumba, ‘Reform and counter-reform in Kenya’s land governance’.

55. Pauline E Peters, ‘Inequality and social conflict over land in Africa’, *Journal of Agrarian Change* 4,3 (2004), pp. 269–314.

56. Mohamed Elmi and Izzy Birch, ‘Creating policy space for pastoralism in Kenya’ (Future Agricultures Working Paper 68, University of Sussex, Brighton, 2013).

freehold titles to land with the expectation that pastoralists adjust through changes in herd strategies and destocking.<sup>57</sup> In independent Kenya, development policy continued under the disempowering parameters set by the colonial administration. In 1965, shortly after independence, Kenya's economic blueprint, Sessional Paper No. 10 of 1965 on *African Socialism and its Application to Planning in Kenya*, argued that government planners should abandon what it called "less developed provinces" and instead that "development money should be invested where it will yield the largest increase in net output [...] areas having abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development".<sup>58</sup> Five decades later, the consequences of this deliberate policy choice are clear: the arid and semi-arid lands (ASALs) that form a large part of the "less developed provinces" are visibly poor, lack physical and social infrastructure and are isolated from the national economy. The post-independence Kenyan policy has been to undertake prolific yet selective projects, marginalizing and alienating sections of Kenyan society and remaining visibly committed to areas perceived to yield the largest increase in net output of government investments. As part of the government political enterprise, one of the deliberate policy directions was to institute land reforms for private tenure and the issuance of individual title deeds as a route towards securing property rights,<sup>59</sup> with deliberate efforts to quash communal ownership of land, which is an essential aspect of most rural livelihoods.

The destruction of commons through the establishment of private property rights was not limited to the actions of governments during the colonial period and in immediate post-colonial Kenya; similar processes were promulgated by interests generated by local elites in post-colonial land reform that have prevailed since independence in early 1960s.<sup>60</sup> In post-colonial Kenya, the most dominant elites were government planners concerned with maintaining the underlying political and institutional relations, which affected the distribution and productivity of commons. State agencies promoted the dispossession of commons not only through coercive means but also, more importantly, by utilizing political and market mechanisms. In addition to policy-induced elements of distributional inequalities, Thompson and Homewood<sup>61</sup> reported the existence of powerful local

57. Mwangi, 'The footprints of history'.

58. Government of Kenya, 'African socialism and its Application to planning in Kenya' (Government of Kenya, Nairobi, 1965).

59. Patricia Kameri-Mbote and Kithure Kindiki, 'Trouble in Eden: How and why unresolved land issues landed 'peaceful Kenya' in trouble in 2008', *Forum for Development Studies* 35, 2 (2008), pp. 167–193.

60. Boone, 'Land conflict and distributive politics in Kenya'.

61. Michael Thompson and Katherine Homewood, 'Entrepreneurs, elites, and exclusion in Maasailand: Trends in wildlife conservation and pastoralist development', *Human Ecology* 30, 1 (2002); pp. 107–138.

elites and entrepreneurs controlling patterns of benefit flows through established social networks. In the wake of Kenya's independence, the most common elite strategies were focused on commercial privatization schemes reinforced by state policy, in which large tracts of communally owned land were appropriated for commercial ranching, considered necessary for growth.<sup>62</sup> A similar pattern developed across communal lands in Kenya during this period, in which large tracts of land were converted into protected areas for wildlife conservation. Pastoral communities, such as the Maasai, had to move away from ecologically favourable areas, facing increased vulnerability to drought, livestock diseases, and conflict.<sup>63</sup>

*Decentralization and the devolution of commons governance in Kenya*

Kenya had a significantly decentralized public sector history with a well-established local government system dating back to the colonial period.<sup>64</sup> Kenya's local government system, popularly known as the "Provincial Administration" (PA), consisted of Municipalities (cities and larger towns), Town Councils (small towns), and County Councils (rural authorities).<sup>65</sup> The Provincial Administration system, the role of which included representation of government authority and the coordination of government activities at the local level, has the Office of the President at its apex, supported hierarchically by the Provincial Commissioners (PCs), District Commissioners (DCs), Divisional Officers, and Chiefs and their assistants.<sup>66</sup> The modus operandi of the PA in post-independent Kenya was much like that of its colonial predecessor, negating public accountability and becoming a coercive institution of the political elite.<sup>67</sup> The consolidation of powers by Kenyan political elites entrenched through the PA

62. Alden Wily, 'Looking back to see forward: The legal niceties of land theft in land rushes', *The Journal of Peasant Studies* 39, 3–4 (2012), pp. 751–775.

63. Marinus Mattheus Eduard Maria Rutten, *Selling wealth to buy poverty: The process of the individualization of landownership among the Maasai pastoralists of Kajiado District, Kenya, 1890–1990* (Catholic University of Nijmegen, unpublished PhD dissertation, 1992); David Western and Manzollilo-Nightingale D.L., 'Environmental change and the vulnerability of pastoralists to drought: A case study of the Maasai in Amboseli, Kenya', in United Nations Environment Programme (eds), *Africa environment outlook case studies: Human vulnerability to environmental change* (Earthprint, Nairobi, 2004).

64. David Ndi, 'Decentralization in Kenya: Background Note' September 2010, [http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1335471959878/Decentralization\\_in\\_Kenya\\_Background\\_Note.pdf](http://siteresources.worldbank.org/INTAFRICA/Resources/257994-1335471959878/Decentralization_in_Kenya_Background_Note.pdf) (ignorespacesp.ignorespaces3 (25 July 2017)).

65. World Bank, 'Devolution without disruption: Pathways to a successful New Kenya' (The World Bank, Nairobi, 2012).

66. Joel D Barkan and Michael Chege, 'Decentralising the state: District focus and the politics of reallocation in Kenya', *The Journal of Modern African Studies* 27, 3 (1989), 431–453.

67. James Obuya Bagaka, 'Restructuring the provincial administration: An insider's view', (Society for International Development (SID), Regional Office for East & Southern Africa, 2011).

has been blamed for the massive corruption and low ethical standards of the public service, suppression of political opposition and improper influence over the allocation of land.<sup>68</sup> The PA's institutional structure did little to increase the efficiency of development planning at the local level and address the limitations of centralized administration. Two other, later decentralization structures are of importance in Kenya's quest for decentralized governance. First, the District Focus, launched in 1982 to achieve "decentralization reform", established three important structures at the local level, namely, the District Development Committees (DDCs), District Development Officers (DDOs) and the Rural Development Fund (RDF).<sup>69</sup> Second, devolved funds, most notably the Local Authority Transfer Fund (LATF) and Constituencies Development Fund (CDF), were established with community or local entity control and participation as the main features and with skewed distribution to marginalized areas.<sup>70</sup> These institutional structures, despite being in place for decades, did not facilitate any meaningful resource mobilization at the local level or improve service delivery in the most marginalized areas of Kenya.

In the land domain, most land laws were enacted in colonial times and had significant overlap in geographical and subject jurisdiction terms. In the constitutional review negotiations, there was a need identified for legal harmonization, with strong recommendations for new, harmonized land laws.<sup>71</sup> Most of the commons land was governed by the Trust Lands Act, which empowered local authorities (County Councils) to hold these lands in trust for communities. The Act also set procedures for the setting apart of trust lands and the payment of compensation to communities affected by such transfers.

Hence, the 2010 constitutional provisions relating to communal land rights clearly represent significant gains for communal tenure through legal and policy choices that establish not only the legal basis for collective interests in land but also the framework for their devolved governance. However, the critical questions are the following. Has the devolution of authority to local institutional structures initiated following the 2010 constitution become sufficiently institutionalized at the local level? What factors explain the outcomes of Kenya's record in implementing community land rights reforms? Answering these questions illustrates the feasibility of secure communal tenure under Kenya's 2010 constitution and how the interplay between the legacy of colonialism, reinforced in the post-colonial legal and

68. Government of Kenya, 'Report of the commission of inquiry into the illegal/irregular allocation of public land' (Government of Kenya, Nairobi, 2004).

69. Barkan and Chege, 'Decentralising the state'.

70. Ndi, 'Decentralization in Kenya'.

71. Liz A. Wily 'Governance and land relations: A review of decentralization of land administration and management in Africa' (International Institute for Environment and Development, London, 2003).

policy choices of the Kenyan government, and inequalities and corruption has shaped the communal tenure reform process to date.

*Devolution and community land reform at the national level*

Following the promulgation of the 2010 Kenyan constitution, attention shifted to implementation, including the institutional and legislative infrastructure required for the implementation of the constitution. One area that attracted substantial attention was the land sector. In pursuance of this goal, the first attempt at establishing the legislative mechanisms to actualize the constitutional provisions relating to community land rights occurred in October 2011, when the first Community Land Bill 2011, popularly known as the “Zero Draft,” was published. The main features of the Zero Draft included provisions related to the allocation, management and administration of community land, the functions and powers of the Community Land Boards and the powers of the county governments in relation to unregistered community land.<sup>72</sup> The immediate response to the Zero Draft was that it was fundamentally flawed because it did not follow the constitutionally guaranteed public consultation process, including the failure of the consultants who drafted the bill to include the views of diverse stakeholders. The Zero Draft was regarded to have deviated substantially from the requirements and intent of the constitution and the NLP, mainly because of its insufficient provisions for the discovery of existing customary land institutions and its inconsistency with accepted best practices for recognizing customary land rights.<sup>73</sup> The bill was not able to follow either constitutionally guaranteed public participation procedures and or the processes for incorporating stakeholders’ views into the final draft.

Despite these shortcomings, the Zero Draft led to the appointment of a special task force mandated to formulate a new Community Land Bill in September 2012. In a Gazette Notice dated 21 December 2012, the Minister of Lands mandated that the Task Force, in close consultation with key stakeholders, including the Ministry of Lands, discuss and understand community lands based on the recognition of rights and the administration and management of community land, including identifying best practices from within and from other countries that have statutorily recognized community land rights to inform the development of the Community Land Bill. The task force reported extensive consultation with key stakeholders, mainly composed of civil society organizations, although public

72. Community Land Bill (September 2011) was introduced to give effect to the provisions of Article 63 of the Constitution relating to requirements for the allocation, management and administration of community land including provisions related to the powers of County Governments in relation to unregistered community land.

73. John Letai, ‘Kenya’s land reform agenda: Pastoralism within the current land debate’ (Policy Brief No. 73, Future Agricultures Consortium, University of Sussex, Brighton, 2014).



participation proceedings for all of the affected counties were never made public. The task force submitted its report in February 2014, developing what were considered ‘far-reaching’ proposals in the final Draft Community Land Bill, guided by principles that included “vesting community land in the communities; affording equal status and recognition of title to community land with any other title; empowering members of the community to determine the management and administration of their land; affording equal rights to all members of the community; and elimination of all forms of discrimination”.<sup>74</sup> The institutional framework for the community land administration remained a heavily contested issue. Lacking guidance from the NLC, which would not fulfil its advisory role by exercising veto power with the executive intensified,<sup>75</sup> and having little support from the Ministry of Lands and the National Assembly, the contents of reforms proposed in the Community Land Bill 2011 was largely influenced by bureaucratic *interference* and hence lacked serious consultation with key stakeholders. This turn of events did not go without contestation from civil society organizations and, more importantly, from the Pastoral Parliamentary Group (PPG).<sup>76</sup>

Amongst the major contestations at this point are, first, the scope and limits of powers of the various national and devolved institutions regarding the management and registration of community land, whilst the constitution clearly provided for community land to be registered and managed by communities in accordance with the procedures to be established by a “Community Land Bill”. For instance, proposals contained in the Community Land Bill 2015 (which originated from the Ministry of Lands—MoL) contravened these provisions and instead proposed transferring control of land information back to the Ministry, effectively defying the constitutional powers of the NLC and undermining the work already undertaken by the NLC in the establishment of Community Land Management Boards (CLMBs) in the counties.<sup>77</sup> Section 8(2) of the Community Land Bill 2015 attempted to retain powers to prescribe the procedures for the registration of community land with the Cabinet Secretary in the MoL. Another important contestation relating to the Community Land Bill 2015 was the apparent lack of constitutionally guaranteed public participation in the drafting process. These legal challenges were not only inconsistent with the constitutional principles relating to community land but were also against

74. Economic and Social Rights Centre, ‘Realizing land tenure reforms in Kenya: A popular version of the Community Land Bill’ *Hakijamii* April 2014, <<https://land.igad.int/index.php/documents-1/countries/kenya/rural-development-3/813-realizing-land-tenure-reforms-in-kenya/file>> (15 January 2018).

75. Boone *et al.*, ‘Land politics under Kenya’s new constitution’.

76. Pastoralist Parliamentary Group (PPG) is an informal legislative advocacy group that works on issues of pastoralism within and outside Parliament.

77. Boone *et al.*, ‘Land politics under Kenya’s new constitution’.

the spirit of the separation of powers that sought to extinguish presidential powers to allocate land, as well as the oversight and regulatory authority of the NLC.<sup>78</sup> However, the most important question at this point was how these contestations and counter-contestations had effects on the practical implementation of community land law.

In the highly contested context of Kenyan land reform, the quest for community land legislation was thus a highly politicized exercise. When the successive Community Land Bills failed to pass the houses of Parliament, with the constitutionally mandated deadline for the passage of this enabling legislation looming, there was an apparent need and request for the extension of discussions about community land, which were deemed ‘quite weighty’, ‘controversial’ and ‘sensitive’ and required ‘consensus of all stakeholders’.<sup>79</sup> With the extension successfully passed in Parliament, the Departmental Committee on Natural Resources of the Kenya National Assembly met to consider the community land legislation. The first task of the Committee was to organize a retreat for members to discuss three bills, including the Community Land Bill and to establish a road map to iron out contentious issues. Having received the backing of the ruling Jubilee coalition, the revised Community Land Bill was tabled in Parliament in May 2016 with proposed amendments. The Majority Leader of the National Assembly, backed by the PPG, moved vigorously to have the proposed amendments approved in the National Assembly. With extensive donor and civil society support, the PPG—with substantial representation by legislators from northern Kenya, where most land is designated as community land—greatly raised the stakes of the Community Land Bill 2016. However, even with such considerable support and devotion from the PPG, the Senate rejected the amended bill, citing irregularities in the public participation process. The outcome of this impasse was the establishment of a mediation committee for contentious issues, a road map for public consultations and the presentation of a version of the bill with proposed amendments. The mediation committee issued a report, along with the proposed amendments, which were eventually adopted by both houses of Parliament in early August 2016, just in time for the extended constitutional deadline. The Community Land Act was assented to by the President on 31 August 2016.

*Devolution and communal tenure reform at the local level*

Despite the clarity of the Kenyan constitution on the separation of powers and institutional structures related to land rights and land administration,

78. *Ibid.*

79. Quote by Hon. Njoroge Baiya contributing to the debate on extension of period in respect of community land legislation beyond the constitutional timeline of 27th August 2015. *Hansard* (The Kenya National Assembly), 19 August 2015, 2.30 pm, pg. 10.

there was confusion in the first 5 years in the implementation of the constitution and especially in the provisions relating to land. At the local level, devolution created new avenues of representation in the form of elected governors and members of the County Assemblies, in addition to the national-level representative positions of senators and women representatives. The goals of devolution were relatively straightforward: bringing government closer to the people and providing democratic development gains, as well as giving previously marginalized communities an increased political stake.<sup>80</sup> In 2013, general elections were held for the very first time under the new constitution, and the first set of governors (the executive) and MCAs (the legislature) entered their posts, representing the largest political transformation since Kenya's independence. In the land domain, the county government functions include holding public land and unregistered community land in trust on behalf of the people, with administrative authority resting with the NLC. As a result, Community Land Management Boards (CLMBs) serve the function of the NLC at the county level. In addition, the County Assemblies play a legislative role to give effect to Acts of Parliament or national legislation. According to Cheeseman et al.,<sup>81</sup> the considerable economic and political authority vested in devolved positions has affected the legitimation of authority and has polarized relations in the counties along party and ethnic lines. At the local level, devolution has been characterized by competition for control of resources,<sup>82</sup> political patronage and corruption<sup>83</sup> and incompatible expectations characterized by elite capture.<sup>84</sup> In Kenya's ASALs, these challenges were compounded by a history of marginalization and underdevelopment. However, modest progress was also made. In the land administration domain, for instance, the NLC managed to establish CLMBs in 41 of the 47 counties within the first 5 years.

The pastoral rangelands are of major importance to pastoralist groups, especially with regard to negotiated rights of access and seasonal herd movements governed by social factors such as kinship, ethnicity, status, and residence.<sup>85</sup> Pastoralists in Isiolo have traditionally used the rangelands resources communally, as do many pastoralist groups in the region, and they have a rich heritage of customary institutions to regulate communal

80. Nic Cheeseman, Gabrielle Lynch, and Justin Willis, 'Decentralisation in Kenya: The governance of governors', *The Journal of Modern African Studies* 54, 1 (2016), pp. 1–35.

81. *Ibid.*

82. *Ibid.*

83. Michelle D'Arcy and Agnes Cornell, 'Devolution and corruption in Kenya: Everyone's turn to eat?', *African Affairs* 115, 459 (2016), pp. 246–273.

84. Ngala Chome, "'Devolution is only for development'? Decentralization and elite vulnerability on the Kenyan Coast', *Critical African Studies* 7, 3 (2015), pp. 299–316.

85. Ced Hesse and Pippa Trench, 'Who's managing the commons? Inclusive management for a sustainable future', (Working Paper Securing the Commons No.1, SOS Sahel and IIED, London, 2000).

control of the rangelands.<sup>86</sup> However, the present territorial boundaries of Isiolo rangelands, similar to other northern rangelands, have been altered considerably by three historical processes that have characterized land politics in northern Kenya: state policies that undermined pastoralists' economies and led to an inappropriate land tenure system for common pastoral lands;<sup>87</sup> recurrent drought emergencies and associated challenges to pastoralists' livelihoods;<sup>88</sup> and state-led development visions with a focus on large-scale infrastructure and energy projects aimed at bringing transformative change.<sup>89</sup> The results of these processes include erosion of common land rights and economic and political competition over territory, manifested in inter-ethnic conflicts.<sup>90</sup> Fundamentally, the policy goals accompanying these processes not only undermined communal utilization of the rangelands and led to deterioration of pastoralist livelihoods, but they also presented considerable obstacles to the implementation of meaningful communal tenure reform.

In Isiolo County, the repertoire of action of the county executive has evolved through progressive policy development, primarily through its County Integrated Development Plan (CIDP). However, whilst the county executive paid lip service to the acknowledgement of customary tenure and its importance to local livelihoods, the practical implementation of policy produced a series of potential breakdowns. First, there is a straightforward preference for alternative, sometimes contradictory, investment in community land.<sup>91</sup> The most influential economic vision for the frontier counties of northern Kenya, notably Isiolo County, is derived from *Kenya Vision 2030*, emphasizing industrialization of, modernization of and large scale

86. Jean Ensminger, 'Co-opting the elders: The political economy of state incorporation in Africa', *American Anthropologist* 92, 3 (1990), pp. 662–675.

87. Paul M Syagga, 'Land ownership and use in Kenya: Policy prescriptions from an inequality perspective', in Society for International Development East Africa (eds), *Readings on inequality in Kenya. Sectoral dynamics and perspectives*, (Society for International Development Eastern Africa Regional Office, Nairobi, 2006).

88. Debbie Hillier and Benedict Dempsey, 'A dangerous delay: The cost of late response to early warnings in the 2011 drought in the Horn of Africa' *Joint Oxfam International & Save the Children (UK) Briefing Paper*, 18 January 2012, < <https://oxfamlibrary.openrepository.com/bitstream/handle/10546/203389/bp-dangerous-delay-horn-africa-drought-180112-en.pdf;jsessionid=6AC06E5EECC66A12C91F8683BCCBB7FD?sequence=8>> (29 July 2016).

89. Jason Mosley and Elizabeth E Watson, 'Frontier transformations: Development visions, spaces and processes in northern Kenya and southern Ethiopia', *Journal of Eastern African Studies* 10, 3 (2016), pp. 452–475. Gargule Achiba, 'Navigating contested winds: Development visions and anti-politics of wind energy in Northern Kenya', *Land* 8, 1 (2019), pp. 7–36.

90. Hannah Elliott, 'Planning, property and plots at the gateway to Kenya's "new frontier"', *Journal of Eastern African Studies* 10, 3 (2016), pp. 511–529.

91. The first Isiolo County Integrated Development Plan (CIDP) proposes investments in tourism and wildlife conservation that have been instrumental in curtailing mobility of pastoral herds in the past.

investment in (crop) agriculture and large-scale infrastructure.<sup>92</sup> The very promotion of large-scale investments in infrastructure, wildlife conservation and tourism investments, most notably the Lamu Port-South Sudan-Ethiopia Transport (LAPSSET) project, have had real consequences for communal tenure and have been prone to anticipatory and speculative responses that heighten conflict over resources.<sup>93</sup> In addition, development visions and associated projects bring with them new spatial patterns involving enclosures with “designated use and user; other uses are prohibited and other users are excluded”.<sup>94</sup> The contractual relationships established for large-scale investments in land have the potential to extinguish customary tenure arrangements, as well as exacerbating pre-existing social inequalities.<sup>95</sup> There are already a number of disputes related to large-scale land acquisition and communal land rights regarding the illegal acquisition of grazing land,<sup>96</sup> revenue-sharing arrangements,<sup>97</sup> and the impacts of projects on livelihoods.<sup>98</sup>

Second, the devolved functions of land administration aimed at imposing the elements of democratic control at the local level have often proved to be ineffective in practice. For instance, civil society organizations in Isiolo pointed out that the appointment of individuals to the CLMBs by the NLC was heavily influenced by local politicians, who were keen on establishing ‘balanced ethnic representation’<sup>99</sup> and who threatened to use the County Assembly (CA) to reject the nominees. The 7- to 9-member CLMBs are appointed by the NLC but are subject to approval by the CAs. However, local politicians and county executives stepped forward as interlocutors for their communities, instead of supporting progressive restructuring of devolved institutions with the aim of bringing land administration under the rule of law.<sup>100</sup> In addition, by influencing the composition of CLMBs, local politicians (particularly governors) exerted their patronage and the promo-

92. Isiolo County Integrated Development Plan (2018–2022) identifies agricultural intensification, infrastructure and tourism as its most strategic growth sectors even though livestock production happens to be its main comparative advantage.

93. Ken Menkhaus, ‘Conflict assessment: Northern Kenya and Somaliland’ (Danish Demining Group, Nairobi, 2015).

94. Mosley and Watson, ‘Frontier transformations’, pg. 463.

95. Patrick Bottazzi, Adam Goguen, and Stephan Rist, ‘Conflicts of customary land tenure in rural Africa: Is large-scale land acquisition a driver of “institutional innovation”?’ *The Journal of Peasant Studies* 43, 5 (2016), pp. 971–988.

96. Githae Wanjohi, ‘High court to make ruling about Marsabit wind power project’, *Daily Nation*, 15 October 2016, <<https://www.nation.co.ke/news/high-court-make-ruling-marsabit-wind-power-project/1056-3418184-4ixklq/index.html>> (21 March 2017).

97. Lutta Sammy, ‘Turkana residents block oil trucks over rising insecurity’, *Daily Nation*, 28 June 2018, <<https://www.nation.co.ke/counties/turkana/Residents-block-oil-trucks-over-insecurity/1183330-4634856-31umw6z/index.html>> (1 July 2018).

98. Browne, Adrian J. ‘LAPSSET: The history and politics of an eastern African megaproject’ (Rift Valley Institute, London, 2015).

99. Interview, Red Cross Kenya Official, Isiolo, Kenya, 12 May 2016.

100. Boone *et al.*, ‘Land politics under Kenya’s new constitution’.

tion of communal interests to strengthen their own positions. According to a local politician, this practice included ensuring ‘having someone on the inside to be our eyes and our ears’.<sup>101</sup> The same is true for CLMB members, who will not hesitate to use their legal authority to overrule decisions that do not favour their ethnic groups. A member of the CLMB for Isiolo interviewed for this study invoked the historical claims of one ethnic group to the land in ‘the whole of Isiolo’ and explained that, under his watch, ‘we will always be in control’ and that they were appointed to ensure that ‘we do not lose’ Isiolo to ‘outsiders’.<sup>102</sup>

Similarly, land reform at the local level has faced challenges stemming not only from land scarcity but also from resistance to the formalization of communal land rights as a result of (ethnic) inequality in land holdings. Often linked to ethnicity and traditional authority over communal resources, distributional inequalities have persisted and have been described as a direct cause of resource-based conflicts.<sup>103</sup> In its current form, with the proposed land reforms—and community land tenure reform in particular—there are two distinct problems related to land scarcity and inequality: the constitutional definition of ‘community’ in community land; and disregard for the existing customary authorities for natural resources governance. The Constitution and the Community Land Act 2016 offer no special protection or provisions for governing mobility or for sharing grazing rights with mobile pastoralists. Given the abundance of research on the mobility of pastoralists and the experience of conflict over scarce natural resources in pastoralist areas, the provisions to guarantee communal land rights based on ethnicity are puzzling. Migrant pastoralists often rely on governance of mobility and reciprocal rights to pastures in territories outside their control for negotiations of customary institutions in an unpredictable environment.<sup>104</sup> It poses the danger of conflict between different ethnic groups to threaten defined, fixed boundaries without the involvement of customary institutions, causing conflict in the past.

As these outcomes at the local level suggest, the envisaged reforms—however well planned—have the potential to reorganize local land relations in the absence of clarity regarding communal land rights and institutions of land administration. The constitutional recognition and devolution of communal land administration worked in favour of the political class that

101. Interview, Isiolo Member of Parliament (MP), Isiolo Kenya, 30 April 2016.

102. Interview, CLMB Member, Isiolo Kenya, 23 May 2016; Participant, stakeholders workshop, Isiolo Kenya, 19 April 2016.

103. Tidiane Ngaido and Nancy McCarthy, ‘Institutional options for managing rangelands’, (2020 vision briefs 11 No. 9, International Food Policy Research Institute, 2004). Michele Nori, ‘Mobile livelihoods, patchy resources and shifting rights: Approaching pastoral territories’ (An Issue Paper, International Land Coalition, Rome, 2007).

104. Lorenzo Cotula (ed.), ‘Land and water rights in the Sahel: Tenure challenges of improving access to water for agriculture’ (Issue Paper No. 139, Institute for Environment and Development (IIED), London, 2006).

successfully positioned itself as the interlocutors for their communities and equated political authority with the authority to ‘govern land’<sup>105</sup> for their respective communities, including the authority to sanction off land for alternative investments and for economic growth discourse. As a result, these practices caused the goal of devolution to become subordinate to the strategic vision of ‘growth’ in the new administrative hierarchy.<sup>106</sup> These claims of devolution to secure communal tenure underwent few changes in the prevailing socio-political context.

*Negotiating private rights for communities: informality, ethnicity, and institutions*

The reproduction of colonial misconceptions about communal tenure and the influence of historical, institutional, and power configurations that primarily benefit powerful stakeholders and local elites were enduring features in the community land legislation process. Community land reform was shaped and constrained by at least three historical representations of communal tenure that defined the nature and content of reform and effectively constituted breakdowns in the realization of secure communal tenure.

First, community land legislation has been accompanied by debate surrounding creating ‘private rights’ for communities through the issuance of titles to community land.<sup>107</sup> This process has reinforced a tendency to conceive of land reform generally, and communal tenure reform in particular, as an exercise in managing ‘informality’ through the issuance of title deeds. Titling is presented as the recourse to land reform to address the “informality”<sup>108</sup> of customary land rights. Whilst there are obvious political reasons for appropriating and securing institutions embodied by title deeds, such as an efficient taxation base, the reform process<sup>109</sup> empirical assessment of the formalization of land rights in the context of common property systems in Africa does not confirm this expectation.<sup>110</sup> In fact, for highly marginalized groups that lack established forms of

105. Interview, Isiolo County Official, Isiolo, Kenya, 27 March 2016.

106. Interview, a civil society activist on indigenous land issues in ASALs, Nairobi, Kenya, 3 February 2017.

107. Kameri-Mbote Patricia and Collins Odote, ‘Social mapping of land rights as a way of securing tenure for communities in Kenya: Law, culture and politics’ (Paper presented at the 2016 World Bank Conference on Land and Poverty, The World Bank, Washington DC, March 14–18 2016).

108. HWO Okoth-Ogendo, ‘Formalising “informal” property systems: The problem of land rights reform in Africa’, (Commission on Legal Empowerment of the Poor & University of Nairobi, Nairobi, 2014).

109. Jean-Philippe Platteau, ‘The evolutionary theory of land rights as applied to sub-Saharan Africa: A critical assessment’, *Development and Change* 27, 1 (1996), pp. 29–86.

110. Kathryn Firmin-Sellers and Patrick Sellers, ‘Expected failures and unexpected successes of land titling in Africa’, *World Development* 27, 7 (1999), pp. 1115–1128; Okoth-Ogendo, ‘Formalising “informal” property systems’.

collective self-representation, the formalizing of rights may have little effect upon securing tenure.<sup>111</sup> The formalization of land rights in the context of commons is not always able to address the relations of production and the creation of feasible and fair rules of use.<sup>112</sup> The responsibility for sustainable resource use varies across contexts. As a general rule in commons contexts, the nature of social relationships significantly affects the “processes of boundary and user-group definition, negotiation, monitoring, sanctioning, and contestation associated with establishing rights and responsibilities related to resource use and management”.<sup>113</sup> In this respect, reforms have tended to take explicitly ‘de-communalizing’ overtones, framed as a means of addressing the ‘inefficiencies’ of communal tenure, associated with the colonial construction of communal tenure.

The preoccupation with the formalization of customary land tenure through titling has become a caricature of state preference for the individualization of tenure. This formalization was established under the various successive versions of the Community Land Bill, thereby affecting the registration of community land rights. Section 11 of the Community Land Act states that, for the registration of community land, “upon adjudication, the title relating to community land shall be issued by the Registrar in the prescribed form”.<sup>114</sup> Underlying this desire for formal legal rules is the argument that informality is primarily a communal tenure problem and that it is linked to backward and wasteful land uses, the formalization of which stimulates efficient land use. Even more importantly, as Okoth-Ogendo argued, formalization “is an incidence of written rules and principles rather than a system of governance based on norms and values accepted as authoritative and binding in society” and thus is associated with attempts “to liberate dead assets locked up” in communal utilization and convert them into capital for development”.<sup>115</sup> This distinction has been an important one in the post-2010 land reform agenda because it reveals fundamental assumptions in the community land legislation and policy. The legislation process and the final enacted version of the Community Land Act indicate that struggles over the nature and content of reform have been shaped in part by continuities in flawed assumptions about communal tenure that

111. Tim Conway, Caroline Moser, Andy Norton and John Farrington, ‘Rights and livelihoods approaches: Exploring policy dimensions’ (Natural Resource Perspectives 78, The Overseas Development Institute, London, 2002).

112. Deborah Sick, ‘Social contexts and consequences of institutional change in common-pool resource Management’, *Society and Natural Resources* 21, 2 (2008), pp. 94–105.

113. *Ibid.*

114. Government of Kenya, *Community Land Act 2016*.

115. Okoth-Ogendo, ‘Formalising “informal” property systems’, pg. 4.



simultaneously seek to restrict or withhold the communal appropriation of natural resources through the control of land use.

These divergences were clear in the process of community land legislation. Whilst they might be indicative of the highly contested nature of land issues in general, they reflect the longstanding ideological message that a formal system of property is an efficient engine of land reform. A much greater effort and discussion during the process of community land legislation have focused on titling of community land as the basis of communal land reform. Fundamentally, this dominant conceptualization of communal tenure reform stems from an understanding of communal land rights in which the technical exercise of titling is considered to constitute the desired goal of providing private rights to community rights holders.

Second, one of the most surprising facets of the proposed communal land rights and the dominant discourse of community land legislation and policy relates to the representation of ‘community’ and communal tenure in Kenya being a single monolithic problem with a set formula to bring about their transformation. The basis for this view, other than being not empirically supported, “fails to attend to differences within communities and ignores how these differences affect resource management outcomes [...] strategic interactions within communities, as well as the possibility of layered alliances that can span multiple levels of politics”.<sup>116</sup> Empirical evidence in commons governance has shown that, even when groups are aligned in using the same cluster of resources or are even from the same ethnic group, the structure of their social networks and the rules of resource utilization do differ.<sup>117</sup> Further, the common property systems are inherently characterized by high levels of uncertainty and competition over resource use,<sup>118</sup> hence, the central dimensions underlying motivations and strategies for enacting institutions of governance differ at different historical moments.<sup>119</sup> Community in the context of commons can thus be characterized in terms of spatial units, social structures, and shared norms,<sup>120</sup> a combination of which shapes the success of governance practices. As Agarwal and Gibson further argued, the inability of conceptions of community to articulate their effects on resource use renders them a weak foundation upon which to base policy.<sup>121</sup>

In Kenya, ethnicity has been at the centre of distributive politics, amplified through historical injustices featuring ethnicizing the land question and

116. Agrawal and Gibson, ‘Enchantment and disenchantment’, pg. 633.

117. Haller, *The contested floodplain*.

118. Susan S Hanna, ‘The new frontier of American fisheries governance’, *Ecological Economics* 20, 3 (1997), pp. 221–233.

119. Tobias Haller, Greg Acciaioli, and Stephan Rist, ‘Constitutionality: Conditions for crafting local ownership of institution-building processes’, *Society & Natural Resources* 29, 1 (2016), pp. 68–87.

120. Agrawal and Gibson, ‘Enchantment and disenchantment’.

121. *Ibid.*

the dispossession and marginalization of communities at the periphery. In addition, land relations have been characterized by indications of a breakdown in administration regimes, inequalities in land ownership, tenure insecurity and conflict,<sup>122</sup> affecting some sections of Kenyan communities more than others. Land reform, in the minds of its drafters, sought to challenge these disproportionate prerogatives through decentralization, with the expectation that institutional redesign would change accountability relations in land governance.<sup>123</sup> In the 2010 constitution, community land is vested in communities identified on the basis of their ethnicity, culture and community of interest, comprised of land lawfully held by a community, group ranches, grazing areas or shrines, ancestral lands, land occupied by hunter-gatherer communities and land held in trust for communities by county governments, amongst others.<sup>124</sup> The 2009 National Land Policy, preceding the constitution, defined community similarly as a “clearly defined group of users of land, which may, but need not be, a clan or ethnic community”.<sup>125</sup>

Notwithstanding the expansive recognition of community land rights in land, the conception of the meaning and the parameters of identifying a ‘community’ are products of the colonial restructuring and post-colonial reproduction of “instrumentalities of survival”,<sup>126</sup> which lie in the elevation of ethnicity as an attribute of power. A broad range of scholarship has emphasized ethnic-based competition and its various dimensions in Kenya.<sup>127</sup> As a post-colonial phenomenon, it is generally agreed that ethnic elites configure ethnicity into political interest groups that manipulate claims based on resources and power<sup>128</sup> towards a “politics of recognition.”<sup>129</sup> Ethnicization of land in Kenya has been blamed for ethnic clashes related to elections—most notably those in 1992, 1997 and 2007. The links between ethnicity and land conflict featured prominently in the Akimuiwi

122. Kenya Human Rights Commission, ‘Redress for historical land injustices in Kenya: A brief on proposed legislation for historical land injustices’ (Kenya Human Rights Commission, Nairobi, 2015).

123. Boone *et al.*, ‘Land politics under Kenya’s new constitution’.

124. Government of Kenya, *Constitution of Kenya* (2010).

125. Government of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy* (2009:63).

126. Crawford Young, ‘Patterns of social conflict: State, class, and ethnicity’, *Daedalus* 111, 2 (1982), pp. 71–98.

127. Boone, ‘Land conflict and distributive politics in Kenya’; Karuti Kanyinga, ‘The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya’, *Journal of Contemporary African Studies* 27, 3 (2009), pp. 325–344; Jacqueline M Klopp, ‘“Ethnic clashes” and winning elections: The case of Kenya’s electoral despotism’, *Canadian Journal of African Studies* 35, 3 (2001), pp. 473–517; Jacqueline M. Klopp, ‘Can moral ethnicity trump political tribalism? The Struggle for land and nation in Kenya’, *African Studies* 61, 2 (2002); 269–294.

128. Stanley J Tambiah, ‘Ethnic conflict in the world today’, *American Ethnologist* 16, 2 (1989), pp. 335–349.

129. Klopp, ‘Can moral ethnicity trump political tribalism?’.

and Waki Commission of Inquires.<sup>130</sup> The 2009 National Land Policy and the constitution's recognition of community land based on 'ethnicity' are clear demonstrations of longstanding anger over unfair land alienation and ethnicity-based redistribution to certain 'outsider' communities.<sup>131</sup>

The structure of communal land rights—which emphasizes ethnicity—renders a definition of rights in the context of commons especially difficult. The logic of community land derived from this conception fails to attend to heterogeneity within and across communities and assumes that a particular community with claims to land is “a unified, organic whole . . . and ignores how these differences affect resource management outcomes”.<sup>132</sup> In its minimalist form, this conception of community is not only in contradiction with important heterogeneity characteristics within communities in the context of common property resources, but it might also be insufficient to address the inherent socio-ethnic hostilities and exclusionary norms that characterize ethnicized resource boundaries, with negative effects on cooperation and collective action.<sup>133</sup> Further, in line with post-2010 decentralization, which has been accused of largely undermining existing customary institutions,<sup>134</sup> a conception of community based on ethnicity or culture is hopelessly inadequate.<sup>135</sup> The advantages of decentralization are much easier to implement, with economic and political differences that are well articulated and harmonized. Indeed, much of the strength and appeal of decentralization in commons governance are associated with the ease with which decentralized regimes craft governance regimes that help to allocate benefits equitably with limited efficiency losses over long time periods.<sup>136</sup>

From the implementation point of view, conceptualizing communities as homogenous—in terms of their ethnic compositions and rights to communal land and the management strategies of common property resources under their control—might well be unwanted and burdensome. Not only do such perspectives have their origin in the colonial legacy, combined with the

130. Government of Kenya. 'Report of the judicial commission appointed to inquire into tribal clashes in Kenya' (Government of Kenya, Nairobi, 1999).

131. Kameri-Mbote and Kindiki, 'Trouble in Eden'.

132. Agrawal and Gibson, 'Enchantment and disenchantment'.

133. Arun Agrawal, 'Common property institutions and sustainable governance of resources', *World Development* 29, 10 (2001), pp. 1649–1672.

134. USAID, 'Kenya secure project legal review of the draft legislation enabling recognition of community land rights in Kenya', *Tetra Tech ARD* January 2012, <[https://learning.uonbi.ac.ke/courses/GPR203\\_001/document/Property\\_Law\\_GPR216-September\\_2014/Articles/secure\\_legal\\_review\\_of\\_draft\\_community\\_land\\_bill\\_final\\_24\\_jan\\_2012\\_copy.pdf](https://learning.uonbi.ac.ke/courses/GPR203_001/document/Property_Law_GPR216-September_2014/Articles/secure_legal_review_of_draft_community_land_bill_final_24_jan_2012_copy.pdf)>

19 September 2017; Liz Alden Wily, 'The Community Land Act in Kenya opportunities and challenges for communities,' *Land* 7, 1 (2018), pp. 12–37.

135. Interview, NLC Board Member, Nairobi, Kenya, 10 March 2017.

136. Agrawal and Ribot, 'Accountability in decentralization'; Agrawal, 'Common property institutions and sustainable governance of resources'; and, Elinor Ostrom, *Crafting institutions for self-governing irrigation systems* (Institute for Contemporary Studies Press, San Francisco, 1991).

post-colonial perpetuation of ethnicized land redistribution, but they also tend to assume a link between the ethnic conception of the community and equitable reform, often orchestrated by political elites exemplified in “our time to eat”<sup>137</sup> cultures. Hence, instead of attempting to anchor reform to the complex realities of common property resources characterized by heterogeneity, the nature of reform is “held hostage to demands to prioritize and resolve the grievances of particular groups and communities”.<sup>138</sup> In this respect, post-2010 land reforms are hardly different from colonial and post-colonial land policies that sought to benefit certain groups in society at the expense of others,<sup>139</sup> based on their land use practices. However, despite the focus here on the distributive politics of land reform, the continued reliance on flawed historical misconceptions of customary tenure is, in part, due to the perception that the rights of communities with the same ethnic and cultural identities are the basis for both the allocation and the demarcation of community land rights. Such a limited political demarcation of ‘community’ excludes economic and exchange relations in multiple issues, including mutual vulnerabilities.<sup>140</sup> Studies have shown that governance regimes based on shared norms have an independent, positive effect on resource use, but ethnicization breeds contests and conflicts, pitting communities against each other, not to mention generating significant distributional inequalities, especially when there are bargaining power disparities.<sup>141</sup>

Finally, institutional change has been a familiar occurrence in Kenya’s long quest for land reform, during which changes have been both frequent and remarkably ineffective. In post-devolution Kenya, proposals for community land governance in post-2010 reforms have rested on the somewhat ambiguous assumption that overhauling the existing institutional infrastructure would constitute the only logical and painless culmination of the desired reform. Thus, whilst underscoring the importance of appropriate and secure institutions envisaged in the devolved governance, this assumption misses the most essential and dynamic feature of African commons: the ability to create rules of use and institutions to regulate resource use.<sup>142</sup> However, customary institutions have been declining with the proliferation of state institutions in the land sector. The entry of colonialization manifested in the transformation or complete destruction of local rules of use.<sup>143</sup> Many policies attempting to change or align

137. Michela Wrong, *It’s our turn to eat* (Fourth Estate, London, 2009).

138. Boone, ‘Land conflict and distributive politics in Kenya’.

139. John O Oucho, *Undercurrents of ethnic conflicts in Kenya* (Brill, Leiden, 2002).

140. Sara Singleton and Michael Taylor, ‘Common property, collective action and community’, *Journal of Theoretical Politics* 4, 3 (1992), pp. 309–324.

141. Haller, *The contested floodplain*

142. Ostrom, *Governing the commons*

143. Haller, *The contested floodplain*.

customary institutions have rendered customary institutions less able to address the complexity of commons resource problems. Considered against the evidence of colonial restructuring and the post-colonial reproduction of colonial trends, two things are noteworthy in the current trends in communal tenure implementation in Kenya.

An enduring stereotype linked to Kenya's land reform is the ghettoization of customary institutions with historical roots in colonialization, which involved breaking the traditional institutions and thereby destroying well-established local systems and opening the door to elite control and corruption, all in the name of reform. The foremost impact of post-2010 decentralization was to create a nationwide property system that fails to properly recognize the traditional commons land relations that defined the rules of access to commons.<sup>144</sup> This approach could potentially be detrimental to communal land rights, however. Emerging experiences from reform programmes across African commons have indicated that communities are vulnerable to losing their capacity to withdraw from commons when conditions dictate such a necessity and when they are integrated into a national institutional establishment dominated by the state.<sup>145</sup> Recent experience in Kenya has indicated the failure of statutory institutions to bring about decisive downward accountability and redistribution of power,<sup>146</sup> showing how misleading a narrow focus of reform can be, even when the primary point of reference is customary tenure.

Further, the process of communal tenure reform concerns the logic of simplifying reform by replacing one set of institutions with another and recasting the complexities of common property governance as a function of 'informality'. Historically, these stances were adopted when they served the interests of transferring ownership and management to a centralized state.<sup>147</sup> The net result of these strategies was mainly to set a prescriptive formula for the process of formalization, often involving the replacement of customary institutions with formal state institutions. This formulation is generally problematic because it assumes that customary institutions have no place in formalized governance and that they must inevitably give way to formal institutions, which are believed to better address control of resource use and, by extension, the degradation of resources. Further,

144. USAID, 'Kenya secure project legal review of the draft legislation enabling recognition of community land rights in Kenya'.

145. Ben Cousins and Thembela Kepe, 'Decentralisation when land and resource rights are deeply contested: A case study of the mkambati eco-tourism project on the wild coast of South Africa', *The European Journal of Development Research* 16, 1 (2004), pp. 41–54; Tom Goodfellow and Stefan Lindemann, 'The clash of institutions: Traditional authority, conflict and the failure of "hybridity" in Buganda', *Commonwealth & Comparative Politics* 51, 1 (2013), pp. 3–26.

146. Boone *et al.*, 'Land politics under Kenya's new constitution'.

147. Tom Lavers, 'Patterns of agrarian transformation in Ethiopia: State-mediated commercialisation and the "land grab"', *The Journal of Peasant Studies* 39, 3–4 (2012), pp. 795–822.

this formulation is an indication of the clash between the formal concept of limited and exclusive use property advanced by governments and the communal concept of land as subject to overlapping uses by members of a community.<sup>148</sup> Such tinkering with the contrasts between private and communal property has the unintended effect of presenting reform as an exercise in replacing customary institutions with formal government institutions and, by extension, the triumph of private property over communal aspirations.

### *Conclusion*

The recent wave of legal recognition and devolution of commons administration in Africa reveals a nascent perception that increased legal access to natural resources, and their decentralization have distinct advantages for local communities.<sup>149</sup> However, the emergence of contestations and disregard for legal principles and related reforms are symptomatic of the contemporary challenges to communal tenure reform. The analysis of communal land tenure reform in this paper rests on two arguments made from the beginning: first, that the reproduction of historical colonial misconceptions of communal tenure remain the dominant influence on communal land tenure reform, and second, that the community land law process has shown strong evidence of the process of elite capture and related dynamics that play key roles in both the nature of communal tenure reform and the ability of the reform agenda to deliver secure communal rights in land. Furthermore, the structural patterns of land scarcity and related inequalities in land holdings, as are the case in Kenya's ASALs, shape the way in which communal rights are framed and pursued. As such, the process of implementing legal access to communal land has fed into the history of political and ideological delegitimizations of communal tenure built up during the colonial period and reproduced in policy in post-independence Kenya.

The recent implementation of the 2010 constitutional provisions for community land law in Kenya and the subsequent debates over the nature and content of institutions of decentralized commons governance illustrate this process. The interplay between the reproduction of historical misconceptions of communal tenure and the broader processes of national and

148. Jorge Uquillas and Jean-Carlo Rivera, 'Pueblos indígenas Y desarrollo en América Latina', *Memorias del Segundo Taller Inter-Institucional sobre Pueblos Indígenas y Desarrollo en América Latina*. Washington, DC: Banco Mundial. División del Medio Ambiente. Departamento Técnico. Oficina Regional de América Latina y el Caribe (1993) Quoted in Michael Richards, 'Common property resource institutions and forest management in Latin America', *Development and Change* 28, 1 (1997), pp. 95–117.

149. Shyamsundar, Priya, Eduardo Araral, and Suranjan Weeraratne. 'Devolution of resource rights, poverty, and natural resource management—A review' (The World Bank Environmental Economics Series Working Paper 104, World Bank, Washington DC, 2005).

local politics of elite bargaining that have characterized the community land legislation process are symptomatic of historical disregard for the spatial and temporal aspects of existing usufruct rights.<sup>150</sup> The case study of the community land legislation process in Kenya demonstrates that these influences work to disadvantage communal rights and to support a reform path that dismantles communal land rights and brings community land under the control of the state. In addition, this process creates a self-reinforcing cycle of reform as an exercise in ‘dealing with the informality’<sup>151</sup> of communal tenure, which is ultimately used to justify and legitimize private property rights. Further, this process is largely unconstrained due to inequalities between the centre and the periphery and within and amongst communities.

This article has also shown how the devolution process is influenced by power politics and inherent inequalities between the centre and the periphery. The ensuing contestations and breakdowns in the implementation of communal rights in land can be considered products of vested interests and the balance of power between the centre and devolved institutions and between local elites and local communities. The prospects of strengthened devolved institutions at the local level indicate that local elites and their networks of state institutions can no longer control community land. State institutions and local elites have been at the centre of processes that facilitate the commodification of natural resources—processes that seek to appropriate communal lands for alternative, ‘more productive’ investments. Devolution of communal rights administrations with the heavy influences of state and local elites has therefore placed an inordinate amount of emphasis on achieving a desired political outcome, as opposed to securing communal land rights. The Kenyan case is instructive due to the conditions necessary to achieve devolution of natural resources governance and the limits of societies characterized by enduring historical misconceptions and by dispossession and denial of the proprietary character of commons. The broad contours of the Kenyan experiences with the implementation of legal access to natural resources mirror the experiences of other African countries, such as Zimbabwe, Ethiopia and Ghana.<sup>152</sup> As these other African experiences have demonstrated, contemporary breakdowns in the legal reform of communal tenure have resulted in considerable uncertainty for communal land rights and have been largely exacerbated by

150. Timothy O Williams, ‘Multiple uses of common pool resources in semi-arid west Africa: A survey of existing practices and options for sustainable resource management’ (Natural Resource Perspectives No. 38, The Overseas Development Institute, London, 1998).

151. Okoth-Ogendo, ‘Formalising “informal” property systems’.

152. Manji, *The politics of land reform in Africa*; Admos Chimhowu, ‘The “new” African customary land tenure. Characteristic, features and policy implications of a new paradigm’, *Land Use Policy* 81, (2019), pp. 897–903.

state-led and elite-supported intensification of the commodification of natural resources.

Whilst this article details the historical and contemporary breakdowns in communal tenure and associated reforms, it also proves that, in effect, devolution has far-reaching effects on common pool resources: it reinforces the exploitative relations between local elites and their communities and the associated restructuring of ‘community’ politics at the periphery. The ethnic underpinning of the proposed community land rights in the 2010 Kenyan constitution was dominated by ‘elders’ and ‘community leaders’<sup>153</sup> as the means for accomplishing constitutional thresholds for ‘community consultation’. As a result of inequality in ethnic/gender representation, the decision-making process of these communal organizations could be (and has been) called upon<sup>154</sup> as an instrument to exploit in reforms against minority communities or existing methods of natural resource use. This use is particularly worrying—not least because horizontal inequalities in land holdings are associated with conflicts over land.<sup>155</sup> The mobilization of ethnic capital in elections is not only important for territorial claims by ethnic groups but also for its contemporary caricature in Kenyan politics: ‘our turn to eat’—a manifestation of corruption culture to reiterate Wrong’s insightful observation.<sup>156</sup> As long as the reform process is ‘participatory’ and communities’ interests are represented, these communal organizations and their networks of local elites were content to ignore the implantation of exploitative elite-driven reforms and the consequent disadvantages to constitutional principles in providing secure communal tenure regimes in post-2010 reforms. Despite the many positive attributes of legal recognition and devolution of community land administration, these flaws could provide the foundation on which inequalities, corruption, and land injustice could be laid.

153. ‘Elders’ in the context of most ethnic communities in Kenya consists of only male adults that acts as the focal point for community interests on, but not limited to, land, political offices and elections. See James B Christensen, ‘African political systems: Indirect rule and democratic processes’, *Phylon* 15, 1 (1954), pp. 69–83; Ensminger, ‘Co-opting the elders’.

154. Interview, former Commissioner, The Transitional Authority, 10 February 2017.

155. Judi Wakhungu, Chris Huggins, and Elvin Nyukuri, ‘Land tenure and violent conflict in Kenya’ (African Centre for Technology Studies, Consultative Conference Proceedings, Nairobi, 2008).

156. Wrong, *It’s our turn to eat*.