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Access to justice, impunity and legal pluralism in Kenya

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The acknowledgement that non-access to justice and impunity are widespread in Kenya is an important motive behind the present judicial reforms undertaken in Kenya. Building upon and further developing Viñuales' distinction between functional and structural aspects of impunity, this article discusses cases of urban mob-justice and conflicts over land in the Southern Rift Valley. It argues that in Kenya's situation of empirical legal pluralism reforms of the judiciary aimed at facilitating access to justice are suitable to address cases of functional impunity if such reforms manage to restore the trust of people in state institutions but that they are likely to fail where the reasons for impunity and its underlying conflicts are structural in nature.

Keywords: access to justice; impunity; Kenya; legal pluralism; land conflicts; Maasai; mob-justice; Ogiek

Introduction

Ending widespread impunity and ensuring that people and communities with legitimate grievances are able to access judicial mechanisms that address their complaints in an efficient and effective manner remain a challenge for many African countries.

In Kenya, the 2010 Constitution explicitly recognizes this challenge by providing that "justice shall be done to all, irrespective of status" and "shall not be delayed" (Art. 159). This provision reflects a widespread dissatisfaction with Kenya's judicial system under the previous Constitution. In 2010, a report found that

> Public confidence in the judicial system has virtually collapsed. Partiality and a lack of independence in the judiciary, judicial corruption and unethical behaviour, inefficiency and delays in court processes, a lack of awareness of court procedures and operations, and the financial cost associated with accessing the court system have, amongst other factors, all served to perpetuate a widely held belief among ordinary Kenyans that formal justice is available to only a wealthy and influential few. (ILAC 2010, 7–8).

The present Chief Justice of the Supreme Court, Dr Willy Mutunga (in Republic of Kenya 2012, 2), describes this situation as one of "(c)reeping dysfunctionality, unprofessionalism and corruption".

In order to address these problems, the judiciary under the leadership of the Supreme Court developed a reform agenda entitled "Judiciary Transformation Framework, 2012–2016." The first of four envisaged reform pillars is entitled "People focused delivery of service" and lists as priority no. 1 a series of measures to improve access to justice. These include (1) the establishment of new courts in hitherto under-serviced areas and

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mobile courts in remote locations; (2) the introduction of simplified procedures to reduce costs; (3) the reduction of backlogs and the acceleration of case management; (4) the expansion of legal aid schemes; as well as (5) the promotion and facilitation of alternative forms of dispute resolution (Republic of Kenya 2012, 14, 22−29).

The last point echoes Article 159 of the 2010 Constitution providing that "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted". Like the Judiciary Transformation Framework, the Constitution thus recognizes that even an effective and efficient state judiciary will not have the capacity to properly handle all conflicts and be accessible to all.

Of these alternative forms of dispute resolution, traditional mechanisms are of particular interest as Kenya is a country with a high degree of legal pluralism: formal state law and authorities compete with a multitude of non-formal sets of norms and non-state institutions at local and ethnic levels. In some parts of the country, state presence is very weak and the judiciary largely absent so that people have to turn to traditional institutions of dispute settlement. Both the Constitution as well as the Judiciary Transformation Framework thus seems to assume that traditional dispute settlement mechanisms do provide a valuable alternative to justice at the state level.

Traditional mechanisms as an alternative to the state judicial system may in fact enhance access to justice as they have distinct advantages. Unlike state courts they are cheap and easily accessible in terms of geographic proximity even in areas where state institutions are largely absent. They follow simple procedures in a language all parties understand; produce decisions in less time than the state judiciary; flexibly apply law that is recognized by parties as relevant and legitimate; and put the emphasis on restorative justice providing for compensation for victims of crimes rather than penal sanctions for the perpetrator that victims may regard as an insufficient kind of moral satisfaction (Kane, Oloka-Onyango, and Tejan-Cole 2005, 9−11).

At the same time, traditional mechanisms possess distinct weaknesses: the fact that their status is often ill-defined may make them susceptible to manipulation by elites; decision-makers may lack adequate training and supervision; such institutions may replicate and reinforce pre-existing patterns of discrimination, including of women; and they may not be able to deal with trans-community issues, i.e. conflicts between parties not belonging to the same community (Kane, Oloka-Onyango, and Tejan-Cole 2005, 11−15).

In the following, we argue that beyond these well-documented weaknesses of traditional dispute-settlement mechanisms, the very existence of legal pluralism prevailing in Kenya undermines, in specific situations, access to justice and significantly contributes to impunity and thus may jeopardize the ultimate goal of the envisaged judicial reforms to strengthen the rule of law in Kenya.

We first clarify the key notions of access to justice, impunity and legal pluralism and then provide a short overview on the most important state and non-state judicial institutions in Kenya. This is followed by an examination of two types of conflict − crimes such as theft and murder in urban areas, as well as land conflicts − where, despite the existence of both state and non-state institutions of dispute settlement, aggrieved individuals and communities remain without access to courts or may have such access in formal terms but will not be able to get what they regard as justice. As we will show, in the case of crime in urban areas, the dysfunctionalities of the judicial system are the main cause why victims resort to mob justice as a form of non-state dispute settlement rather than turn to judicial reforms. In contrast, our research indicates that affected individuals and communities cannot get justice in conflicts over land, where traditional concepts of land law and

state law are incompatible with each other and state courts thus for structural reasons are unable to reconcile the two bodies of law. This means that in Kenya's situation of empirical legal pluralism reforms of the judiciary aimed at facilitating access to justice are suitable to address cases of functional impunity if such reforms manage to restore the trust of people in state institutions but that they are likely to fail where the reasons for impunity and its underlying conflicts are structural in nature.

This article draws not only from a literature review and expert interviews but also from field research carried out between 2010 and 2012 in Narok, the multi-ethnic capital town of Narok County (Southern Rift Valley), in several villages inhabited by Maasai and Ogiek, Kikuyu and Kipsigi farmers and herd-owners in the Mau Forest complex (Nakuru County, Southern Rift Valley) and in several Turkana settlements in the vicinity of Lodwar and Kibish (Turkana County, Northern Rift Valley).

Access to justice, impunity and legal pluralism – a complex relationship

Access to justice

Access to justice for everyone with a legitimate legal claim, including the poor, the vulnerable and the marginalized in a society, is a necessary element of any system of governance based on the rule of law. Access to justice understood in this way is broader than a traditional understanding that highlights the right of everyone to gain access to courts and assumes that this right is automatically safeguarded as long as authorities do not interfere with it (on this concept see Cappelletti 1976, 670f). Since the 1970s, a broader concept of access to justice focusing on its *effectiveness* has become prominent. It insists on the existence of a positive duty of authorities to take measures removing legal as well as factual obstacles where justice mechanisms are unavailable to certain categories of persons (Cappelletti 1976, 671f). The cost of litigation, the lengths of proceedings, the lack of knowledge and ability to pursue claims (Cappelletti 1976, 674–680), and the absence of justice institutions are the main obstacles have been identified as the main elements undermining access to justice. For Kenya, in line with this approach, it has been noted that

> [m]any Kenyans remain unaware of their basic rights. This lack of knowledge of rights remains a major hindrance to accessing justice, especially among poor, vulnerable and uneducated people. Court fees are very high for an ordinary citizen and hence most litigants shy away from going to court due to these costs. In addition, the courts are structured in a way that does not facilitate equal access to justice for all. Most of the courts are found in urban areas, as opposed to the rural areas where the majority of Kenyans reside. Thus, many people are compelled to travel long distances to access the courts. For many, legal services are also unaffordable. [...] Provision of legal aid is limited and does not cover all people who cannot afford legal services. (Mbote and Akech 2011, 156)

The limitation of "justice" to formal courts is also increasingly recognized as being too narrow. The United Nations Development Programme (UNDP) defines access to justice more broadly as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards" (UNDP 2005, 5). This definition expands the notion of "justice" beyond state institutions to include traditional community-based and other non-state mechanisms providing a remedy for violations at the local level. It thus recognizes the relevance of access to justice in situations of legal pluralism.

Access to justice therefore contains two elements: in *formal* terms, it comprises legal and de facto access to courts and other state institutions as well as to traditional or other

non-formal mechanisms of conflict resolution. In *substantive* terms, it means that institutions must not only be accessible to people in a formal sense but also available to adjudicate on their grievances and be effective in providing redress to "injustices [on] the basis of rules or principles of state law, religious law or customary law" (Bedner and Vel 2010, 7), whatever the source of that law.

Impunity

Non-access to justice and impunity are not identical but closely related. Where the state does not take action against perpetrators of illegal acts because their victims cannot access judicial institutions or get adequate redress from them, impunity prevails. Although the effects of impunity on individuals, communities and society at large are little understood, its negative impacts are increasingly recognized. Impunity undermines the legitimacy of the state and the government, and undercuts good governance. Unaddressed grievances may contribute to the prolongation and intensification of conflicts among communities or between communities and the state. Where relevant institutions are unable or unwilling to impose the state's monopoly of force, impunity may be a sign of a failed state.

Impunity can be defined as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings—[...]" (United Nations 2005). In this broad sense, impunity should be understood as comprising the absence of penal sanctions against people having committed a crime (see Viñuales 2007, 116–118) as well as of other forms of reparation for violations, such as compensation for torts. In other words, impunity exists where nobody is held accountable for breaches of the law. Such norms may be encoded in state (formal) law or non-state (informal) normative orders recognized by specific groups, such as ethnic or religious communities.

For the purposes of identifying instances of impunity from an empirical perspective, Viñuales' (2007) two-dimensional concept of impunity with causes and conditions as a first dimension and actors as a second dimension is particularly useful for our purposes. The first dimension of this concept

> is divided into structural and functional aspects. The expression *structural aspects* refers to all institutional and legal measures that would need to be taken in order to increase accountability [...]. The expression *functional aspects* is used to cover those cases where all institutional/legal structures are in place but they are simply not used, [...]. (Viñuales 2007, 125–126)

From the perspective of judicial reform, functional aspects of impunity can be addressed through measures, such as capacity building of staff, better monitoring of their performance, steps to combat corruption effectively and other actions to ensure that judicial institutions function effectively and in accordance with the law. Such reforms are usually possible within existing legal frameworks and institutional arrangements, but they require strong political will to change things and sufficient resources to do so.

In contrast, addressing structural aspects of impunity necessitate far-reaching changes of the law and the creation of new or substantial reorganization of existing institutions.

The second dimension of the concept of impunity "relates to the status of the authors of the alleged acts. Here, the basic distinction is between *state* and *non-state* actors" (Viñuales 2007, 126f.). Impunity for state actors means that they remain unaccountable

whereas impunity for non-state actors protects them from being sanctioned or otherwise held to account for their wrong-doings.

Taken together these two dimensions lead to four categories of impunity: (A) impunity for state *actors* due to *structural* (institutional/legal) obstacles; (B) impunity *for state actors* due to *functional* obstacles (inertia); (C) impunity for *non-state actors* due to *structural* obstacles and (D) impunity for *non-state actors* due to *functional* obstacles (inertia) (Viñuales 2007, 127).

In all these forms of impunity, state organs do not take action against those who have infringed formal law. In a system of legal pluralism, however, we have to add a third dimension, namely the distinction between *formal (state)* institutions of justice and *informal (non-state)* justice institutions that remain passive, due to either structural or functional reasons when non-state actors commit prohibited acts. This adds two more scenarios, namely (E) impunity for *non-state actors* due to *structural* obstacles at the level of *informal* justice institutions; and (F) impunity for *non-state actors* due to *functional* obstacles at the level of *informal* justice institutions.

Impunity in formal systems for:	State actors	Non-state actors	Impunity in informal systems for:	Non-state actors
Due to structural aspects	A	C		E
Due to functional aspects	B	D		F

These scenarios are useful to analyze and assess the conflicts below. They also help to identify the underlying causes of non-access to justice.

Legal pluralism

The complexities of impunity and non-access to justice are further compounded by the fact that legal pluralism is in itself a complex phenomenon. According to a classical definition, legal pluralism denotes "the presence in a social field of more than one legal order" (Griffiths 1986, 1; see also Galanter 1981; Woodman 2004). Griffith (39) specifies that a "situation of legal pluralism [...] is one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities" of different social fields. This understanding of legal pluralism acknowledges that not only the state but also communities may develop and implement "law", i.e. norms that are binding and enforceable through institutions entrusted with managing and solving conflicts. Whereas in state law, court decisions focus on the identification of the applicable legal norms and their application to a specific case, in non-state settings, the emphasis is often not so much on "the norm but on how to [...] settle the conflict with the emphasis on recognising differences and the best mode to resolve any particular conflict" (Narokobi 1989, 4).

There is another dimension to the term legal pluralism, which is highly pertinent in our context. According to Griffiths (2004, 8650), legal pluralism can be either "juridical", or "empirical". In the case of juridical legal pluralism, state law provides or recognizes "distinct rules and procedures for specific groups (indigenous peoples, ethnic and religious groups, local communities, merchants and other economic groups, etc.)" in a manner that aims at clearly determining which set of legal rules and procedures applies to a given dispute. Thus, "in the case of juridical legal pluralism there are different legal rules for different situations, but only one rule for a given actor in a particular situation" (id.).

In contrast, "'[e]mpirical legal pluralism' refers to a social state of affairs in which an actor is confronted by different and possibly conflicting behavioural expectations [and options] (as when the norms among the participants in a particular economic activity differ from the applicable legal norms)" (id.). In empirical legal pluralism, an actor can refer to more than one set of norms and resort to more than one institution. While empirical legal pluralism does not as such "entail juridical legal pluralism, since the competing systems may themselves be monistic" (id.), juridical legal pluralism attempts to reduce the tensions between the different legal systems by providing each legal order with its own, clearly defined scope of application.

Justice, impunity and legal pluralism

The relationship between access to justice, impunity and legal pluralism is complex. On the one hand, legal pluralism enhances access to justice and reduces impunity as the traditional dispute settlement mechanisms can be operative where state institutions fail.

While juridical legal pluralism attempts to clearly determine the powers and competences of traditional mechanisms, empirical legal pluralism may, on the other hand, create obstacles to those seeking access to justice. One prominent feature of such pluralism is the occurrence of forum-shopping, i.e. the possibility it creates for strategic choices to take disputes to the one among several available dispute-settlement forums that is most likely to render a positive decision (von Benda-Beckmann 1981, 117). Access to justice is hampered and the risk of impunity more prominent where parties to a conflict cannot agree on where to take their dispute because each of them identifies a different institution as being more likely to decide in its favor. This is particularly acute where formal and non-formal norms do not complement but contradict each other with state law favoring one party and non-state law the other.

Conflict resolution mechanisms in Kenya

Overview

Kenya's legal system is hybrid in several regards. The state is heavily influenced by its past as a British colony until independence in 1963 and its continued membership in the British Commonwealth. However, common law as unwritten law created by judges is overlaid and often replaced by a dense net of written laws adopted by the Parliament that are based on a constitution. The present Constitution of Kenya, adopted in 2010 and replacing Kenya's Independence Constitution of 1963, follows in terms of structure and content the model of many contemporary constitutions.

Kenya's state judicial system is relatively simple: Kenya has a three tier judicial system with the Supreme Court as the apex court deciding cases raising constitutional issues or matters "of general public importance" (Art. 163 Constitution). Below it, the Court of Appeals hears appeals from the High Court or special tribunals set up by an act of parliament (e.g. labor or land courts) (Art. 164 Constitution). The High Court has original jurisdiction in criminal and civil matters except those of minor importance, decides constitutional cases and hears appeals from the subordinate courts (Art. 165 Constitution). The High Court sits continuously in Nairobi, Mombasa, Nakuru and Kisumu, and periodically in Eldoret, Kakamega, Kitale, Kisii, Meru and several other locations. Minor matters start at the level of subordinate courts, which include the Magistrates courts at the district level and the Kadhis' courts (Article 169 Constitution). The Magistrates courts

handle civil and criminal cases of minor importance and are presided over by resident magistrates and district magistrates, while the Kadhis' courts (Art. 170 Constitution) determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and choose to submit their case to such court.

The Kadhis' courts introduce an element of juridical legal pluralism (Griffiths 2004, 8650) into Kenya's legal system that Forsyth would characterize as "[f]ormal recognition of exclusive jurisdiction [of a non-state justice system] in a defined area" (Forsyth 2007, 89).

At the same time, Article 159 of the Constitution Kenya is cognizant of the de facto existence of non-formal law by stating, in its paragraph 3: "Traditional dispute resolution mechanisms shall not be used in a way that (*a*) contravenes the Bill of Rights; (*b*) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (*c*) is inconsistent with this Constitution or any written law." This implicit acknowledgment of empirical legal pluralism (Griffiths 2004, 8650) corresponds to what Forsyth calls "[l]imited formal recognition by the state of the exercise of jurisdiction by a non-state justice system" (Forsyth 2007, 83). It is a heritage of the amalgam of formal law building on colonial state law and informal law drawing on African legal traditions rooted in Kenya's history: During colonial times, "direct rule" or English law was applied to people of European descent and the Africans who opted for the "European status", while local communities (native populations) lived under the "indirect rule" where customary or traditional laws applied under the supervision of the British colonial authorities (Kane, Oloka-Onyango, and Tejan-Cole 2005, 5). However, unlike in other parts of the British colonial empire where customary tribunals were formally recognized as part of the judicial system, in Kenya "informal customary law tribunals continued to operate at the level of the village and the community, in several forms, including Councils of Elders, clan or family tribunals and village associations" although they were not acknowledged by colonial authorities (Kane, Oloka-Onyango, and Tejan-Cole 2005, 6). Today, this system continues to exist and, as Ebbe (n.d.) observes, helps "to reduce the delays and backlog of cases occurring at the formal [...] courts."

Council of Elders

The key feature of the non-formal justice system in Kenya is the Council of Elders which is a kind of special committee of a particular village. Council of Elders (ekitoe ng'ekeliok in Turkana, in wazee Wa mtaa in the Maasai language) are composed of elders selected either from a village or from various villages to represent the interests of their respective villages. They report to the Chief of a particular area.

Most rural communities of Kenya have a Council of Elders, which is the most important institution charged with managing and resolving conflicts at the local level (also see Krätli and Swift 2008). Councils of Elders do not only exist in villages (normally, a local group consisting of a couple of extended families), but also on a regional/tribal level, dealing with conflicts between clans belonging to the same ethnic group.

The elders are still greatly respected as trustworthy and knowledgeable people and for their expertise in dealing with conflicts in the local and tribal level. Due to their accumulated experience and practical wisdom, they have the legitimate right and duty to make decisions within the framework of traditional law and conceptions of justice. Their primary consideration is to end a conflict and reconcile the conflicting parties, thus restoring and maintaining the peaceful co-existence within a community (Pkalya, Adan, and

Masinde 2004, 47f.). Thus, for example, a survey conducted in the Mau Forest complex among 530 households showed that "64% felt that clan elders are most efficient" for solving conflicts (Deshmukh 2013, 8). This figure was even at 79% (but with fewer respondents) in Kibish, Northern Turkana.[1]

However, Pkalya, Adan, and Masinde (2004, 59) in their study on the Pokot, Turkana, Marakwet and Samburu concluded that although the authority of elders is still well established, it had been weakened, especially as far as conflicts between various clans are concerned (Krätli and Swift 2008, chap. 4). In the same vein, Duffield (1997) noted that

> the elders' authority has been undermined by the introduction of a market economy and the increasing polarization of rich and poor that resulted in labour migration. The youth have found new sources of influence and wealth including the flourishing armed militias of young men and the new income available through banditry (cited in Krätli and Swift 2008, 31).

The authority of elders is and has always been contested – to a certain degree – by young men of the warrior age grade who raided other groups for cattle without the consent of their elders (see Almagor 1979 on the Dassanetch). Urbanization and the increasing migrations of young men to town expose them to other ways of life, strengthen their position and autonomy vis-à-vis their fathers and uncles and, thus, make them contest the authority of their elders (see Ensminger and Knight 1997 on the Orma).

There are yet other reasons, which contribute to the weakening of the authority of the elders' councils, in particular, the presence of government-appointed "traditional chiefs" who represent alternative authorities on the local level. Though government-appointed chiefs and sub-chiefs enjoy some local support, they after all act – together with district officers – as members of the state administration at the local level (Mboga 2009, Republic of Kenya 2013). Also, too strong an association of traditional elders with a distrusted state administration considered to be corrupt may damage their authority (Kona 2004, 12f.).

In the following, we will mainly focus on two types of conflict – first criminal cases in urban areas and further below land conflicts – that stand for different categories of impunity and obstacles to access to justice.

Theft and murder in an urban, multi-ethnic town (Southern Rift Valley)

A first type of legal conflict – criminality in the form of theft and murder – was studied in Narok, a multi-ethnic town in the Southern Rift Valley. The most striking feature of dealing with such crimes is mob justice, which is both common and widespread in Kenya mostly in urban contexts. While overall figures do not exist, McKee found that between August 1996 and August 2013 roughly 1500 mob justice killings were reported by Kenyan newspapers (McKee 2013, 2) with an average of 1.2 such killings per day for the April–August 2013 period alone (7, 21–34). Kenya Police (2011, 11) reported a total of 543 cases of mob violence for the year 2011, amounting to a daily average of almost 1.49 cases. As indicated by the three above cases of burning culprits alive and further illustrated by McKee (2013, 7–9), such killings are cruel. While authorities condemn mob justice, it is rarely prosecuted and punished (McKee 2013, 11), not least because of the unavailability of witnesses allowing investigations to be successful.

Three cases of mob justice in Narok

On 24 April 2011, Maasai warriors from Limanet caught a Kikuyu man in Olpopongi village, brought him to the Narok football stadium and killed him by setting him on fire.

The Narok police did not intervene but came three hours later to take the remains to the mortuary. The victim reportedly had previously served a sentence for having killed his parents over a quarrel over land inheritance. After his release, he started to date a Maasai woman from Limanet village. One night, the two began to quarrel and he killed her. When he buried the body in the bush he was observed by two young boys from Limanet village who grazed their cattle nearby.

On 24 May 2011, a man took a handcart with goats in the absence of the owner in Narok town. When the owner discovered the theft, he went to search for his cart. He found the thief at Majengo estate near the Chief's area, and shouted alarm in order to attract the attention of the public. People quickly surrounded the thief and started threatening and cursing him. An old tire was put around his neck and was set on fire. While the incident took place at 7:30 in the morning, the police reached the place only at 11:00 just to collect the remains of the body and to bring them to the mortuary. They did not take any other measures, and nobody was arrested.

On 26 May 2011, a taxi motorcyclist drove a client from Narok town to the Total area near Lemek village in North Narok district. When they reached a forest area, the client stopped the driver and killed him with a long knife because he wanted to steal the motorbike. A Maasai woman passing nearby observed the scene and alerted other taxi motorcyclists. They caught the killer, started to beat him and then used an old tire to burn him to death. The police arrived at the scene several hours later to collect the body. Apparently, no other measures were taken.

These incidents, which occurred during our field research, are interesting because they happened in an area where state presence is strong and where, in the first case, a police post was nearby. Also, to hand over a criminal to the authorities does not involve any costs. It also can be assumed that people living in the Narok area are sufficiently informed about the functions of the police and other relevant authorities and how to approach them. Thus, lack of geographic proximity, costs involved or lack of knowledge identified above as the usual key obstacles to access to justice cannot explain why the victims of a crime and their communities do not turn to the justice system but engage in violent self-help thus victimizing the perpetrator, and also why state authorities remaining passive thereby contributing to impunity.

What people say

Why do people resort to mob-justice? What do they say are their reasons for taking such drastic measures? To answer these questions, a series of semi-structured interviews was conducted with community members as well as public officials.[2] In addition, questionnaires were used to get answers.[3]

Asked about the reasons why respondents would kill the thief rather than hand him over to the police, about 63% (137 out of 220) of the respondents said that the police and courts would release the culprit and an additional 26% declared that the police and courts cannot be trusted (57 out of 220 respondents). Policemen and other officials were blamed for releasing suspects for "lack of evidence" or after having tampered with the evidence because of corruption or intimidation. In order to prevent nepotism and partiality, policemen, district commissioners and judges of the lower levels of state administration often are from another province. As these officials are insufficiently supported by a weak state and as "outsiders" cannot resort to local social networks, they are reluctant to intervene in a conflict and take "unpopular decisions" in order not to be involved in "local affairs", avoid being accused of "wrongdoings" by those against whose interests they intervened

in carrying out their duties. Even officials themselves are aware of the fact that their own shortcomings are the main reason for people practicing mob justice. Out of 27 officials from the Chief's Office, the Office of the District Commissioner, from the Police Station and the Court, interviewed in Narok, 15 respondents mentioned release of culprits and 12 lack of trust as the main reason for mob justice.

The deep distrust of state authorities was also expressed when an overwhelming 70% of the respondents (155 out of 170) reported that they are not at all willing to act as witness on mob justice before the police or the courts. This result was partially confirmed by officials in Narok where 13 out of 27 respondents mentioned the unwillingness to act as witnesses as the main reason why people do not report mob justice to the police. Fourteen, however, felt that this was due to a lack of knowledge about how to report.

Comparison: crime and justice in rural Turkana

The occurrence of mob justice and the reasons provided for it by the people in the multi-ethnic urban context of Narok (Southern Rift Valley) are in contrast with responses to crime in rural, mono-ethnic areas of Turkana where access to state institutions is very limited due to the relative absence of or geographical distance to the police and courts (Kona 2004, 15ff.).

Conflicts among the Turkana are expected to be settled in a peaceful manner by a Council of Elders (*ekitoe ng'ekeliok*) in line with traditional law, where specific sanctions are imposed for crimes, such as murder, adultery, rape and theft. The Council of Elders is easily accessible, deliberates the case in public, takes into account public opinion, and has the authority to enforce punishments (Pkalya, Adan, and Masinde 2004, 48–52, 58).

In a case of theft, the culprit is beaten in public and ordered to return the stolen goods. In order to avoid future embarrassment, a family may even kill one of its members if he or she is considered to be a (notorious) thief. These fines and punishments are seen as having a deterrent effect. However, if a Turkana steals out of hunger, he can be forgiven (Pkalya, Adan, and Masinde 2004, 52).

In case of murder, the culprit has to pay compensation by providing a certain amount of animals to the victim's family (30 cows or camels for a man, 60 such animals for an unmarried woman and 40 for a married woman). The culprit has to pay the compensation, although often his kinsmen will contribute. However, if they do not support him and the compensation is not paid, the victim's kinsmen have the right to kill the murderer (Pkalya, Adan, and Masinde 2004, 50). If this happens, it is not a case of mob justice but a formal sanction according to traditional law. The Turkana

> regard the traditional method of solving disputes as incorruptible unlike the modern judicial system that is synonymous with corruption. All parties to a conflict have faith in the system and none of them feels aggrieved or denied justice. The system is regarded as accessible, objective and community owned as it is backed and based on customary law, norms and culture (id. 59).

However, whereas conflicts among the Turkana are expected to be settled peacefully and according to traditional law, the killing and robbing of non-Turkana is yet another matter. The Turkana consider virtually all the surrounding tribes, especially the Pokot and Toposa, as their enemies. Raiding and killing enemies result in considerable losses of livestock and human lives (Pkalya, Adan, and Masinde 2003, 35 ff.; McCabe 2004, 89–105; Kona 2004, 18–23; Mkutu 2008; Schilling, Opiyo, and Scheffran, 2012,

9–13).[4] However, this is regarded as the normal course of life and not a legal case, despite the fact that according to state law killing and robbing constitute crimes.

In the course of the commercialization of cattle raiding and due to a stronger position and autonomy of young men, the authority of Turkana elders and the efficacy of the traditional conflict resolution mechanism has been eroded. This can be seen from the fact that now cattle-raiding even takes place between Turkana clans (Pkalya, Adan, and Masinde 2004, 46–47 and 59; Kona 2004, 13–14). Turkana elders, thus, often face problems in preventing young men from infringing traditional law and to punish them for raiding other Turkana. This is particularly the case in areas where commercial cattle raiding is rampant. Nevertheless, by and large traditional law is still in place and the authority of the elders, in principle, still accepted even by those young men who sometimes breach customary rules. Thus, there is a marked difference to mob justice in multi-ethnic, urban contexts.

Mob justice as a mode of informal justice

Mob justice in Kenya is described as "extra-legal punishment, usually entailing death or severe physical harm, perpetrated by groups claiming to represent the will of the larger community" or as "an act of communal punishment outside the law" (Berg and Wendt 2011, 5).

On the one hand, mob justice in Kenya can be seen as being outside the law in a dual sense. Not only does it amount to a crime in the sense of state criminal law but it also takes place outside traditional mechanisms where criminals, as illustrated by the case of Turkana criminal justice mentioned above, may also end up being beaten or killed, but only after a procedure that determines their guilt and authorizes such punishment on the basis of a finding that relevant norms of behavior were violated.

But on the other hand, as highlighted by Alston (2010, 360), mob justice should not be seen "as a simple exercise in lawlessness, a certain return to barbarous traditions," but rather "as a rational community response to a failure of the justice system to address serious problems perceived by the community." In this sense, mob justice may be regarded – and seems to be seen by the people themselves – not as a deliberate killing outside the law, but as a non-traditional form of informal justice prevalent in multi-ethnic urban contexts, whereby perpetrators caught red-handed are executed by members of a neighborhood. People administering mob justice often constitute a kind of ad hoc tribunal where some of those present are aggressively punishing the culprit, while other people are either neutral bystanders or even try to curb down mob violence. Sometimes it is the victim himself who may halt the violence against a perpetrator by saying that the culprit has been sufficiently punished.[5]

Four factors may contribute to the widespread practice of mob-justice in multi-ethnic, urban areas, such as Narok: (1) a high level of urban crime (Agostini et al. 2010, 9) conducive to a climate of insecurity, particular among the urban poor; (2) an inadequate response by ineffective and corrupt police and courts, and thus a perception among victims of crime that reporting perpetrators to state authorities would be useless or even counter-productive because they would either not act at all or soon release the criminal due to corruption or other undue influence. In addition to this, those who brought the culprit to the police, risk so, becoming the target of revenge-attacks by the perpetrator; (3) at the same time, the absence of traditional community-based mechanisms among urban populations where rural-urban migrants from very different rural communities mix and lose traditions that in rural contexts might be able address crime in a meaningful way; (4)

and finally, the passivity of state authorities to sanction mob justice, i.e. the reluctance of the police to intervene when urban communities take the "law" into their own hands.

Hence, in mob justice, impunity is threefold: (1) crimes are not investigated and punished due to state inaction; (2) mob justice as a reaction to state inertia remains unsanctioned and (3) no action is taken against police and courts that do not live up to their obligations. The first and second type of impunity correspond to Viñuales' category (D) (impunity for non-state actors due to functional obstacles at the level of formal justice institutions) and the third type to category (B) (impunity for state actors due to functional obstacles at the level of formal justice institutions) of the six scenarios of impunity identified above. Impunity at the level of state actors thus is mainly rooted in functional deficiencies. At the same time, traditional non-state institutions are unable to deal with criminals in urban areas not only because they have lost much of their authority in such contexts but also because they are ill-equipped to deal with cases where perpetrators and victims belong to different ethnic communities. This leads to structural impunity in the sense of category (E) identified above at the level of non-state actors.

The emergence of mob justice, thus, can be explained by reference to the legal vacuum, created by the simultaneous absence of traditional institutions of law and by the functional deficiencies of the State legal system in multi-ethnic, urban contexts (see also Francis and Amuyunzu-Nyamongo 2008, 228; Berg and Wendt 2011, 6).

In this legal vacuum, strengthening the police and the judiciary in a way that rebuilds trust into state institutions would certainly be an adequate way to remove the functional obstacles to access to formal justice. However, as long as such fundamental reforms do not take place, mob justice will substitute for the specific functional deficiencies of the police and the judiciary, thus forming yet another informal system of law in multi-ethnic urban contexts within the framework of empirical legal pluralism in Kenya. While mob justice adds to the intricacy of empirical legal pluralism and appears to be highly dysfunctional from the perspective of state law and the state's monopoly of power, our data indicate that it is considered by – at least parts of – the urban population as the best solution to the legal problem of impunity and as a legitimate procedure under the current circumstances.

Land conflicts in a rural, multi-ethnic area (Southern Rift Valley)

A second type of legal conflict – land conflicts – was studied in the rural, multi-ethnic area of Mau Forest (Southern Rift Valley).[6] In this area, we find Maasai and Ogiek, Kikuyu and Kipsigi farmers and herd-owners, living in interspersed villages and hamlets. By using some of the case studies collected during our field-research, we aim at highlighting structural aspects of impunity in relation to land conflicts.

Two cases

Mr O, a Maasai living in Majengo in the central administrative division of Narok North (Mau Forest), divided his land into three portions and transferred the plots to his three sons in early 2011. One of them, Mr Z, sold his portion of land to Mr V from the Kikuyu community without informing his father and his two brothers. Mr Z and Mr V signed the contract. However, when Mr V brought the building material to his plot in July 2011, the father and two brothers intervened. They told Mr V not to build a house since Mr Z was not allowed to sell the plot without consulting all the family members. The same day they called a meeting of the family. Z denied having sold the land but admitted to having

leased it to V. The family called Mr V to inform him about Z's position and stressed that even if he had not leased but sold it, they could not allow V to use their land. Mr V protested and asked to get his money back. The discussions escalated and the two brothers started beating Mr V. Mr V went back to his home and brought a group of relatives who started a fight with the O family. The brawl escalated into violence between the Maasai and Kikuyu communities in the whole area. Mr V brought the case to the Office of the government-appointed Chief in Narok. The Chief summoned the Mr O's family to pay back the money paid for the land. However, the family did not turn up and, instead, accused the Chief of being bribed by Mr V.

In Oinoptich, an Ogiek village in Molo district (Mau Forest), participants of a focus group discussion on 8 September 2012 stressed that land conflicts within the community are usually solved through the Council of Elders. However, the problem was with the state as authorities continued to distribute title deeds on traditional Ogiek land to Kalenjin and Kikuyu farmers. "We do not know who gives the title deeds but our people lose land the Ogiek always possessed. If we fight one holder of a title deed taking our land, then another and yet another comes" one of the elders said. To address state authorities in such cases was of no avail: "We go to the District Commissioner to complain and then wait. We don't get an answer and then we go back but there is no solution. They do not listen to us and send us back. The state is like a closed door and you cannot enter." Participants of the discussion were convinced that taking the issue to court would not be a solution as the community had lost all their court cases in the past. Turning to the Chief and the Sub-chief was also not an option as they are appointed by the state. "We do not trust the State" an elder concluded.

The Maasai: selling land – losing land

The case of Mr O and his family is an example of loss of land by the Maasai that has its roots in the land adjudication and registration programs started during colonial times and intensified after independence. Under these programs and based on the Land Adjudication Act 1968 (Mwangi 2005, 8), land titles were granted to individual owners or communities and registered as such with the consequence that the "land thereupon ceases to be subject to customary law and is governed instead by the complete code of substantive law" as previously contained in the registered Land Act, 1963 (Coldham 1979, 615) and today in the Land Bill, 2012. In the late 1960 and 1970s, the program was extended to the pastoral lands of the Maasai which were previously "held in trust, first by the Crown, then by the Kenyan government" by dividing them into "ranches" ultimately resulting in individual ownership or possession, a process often tainted by corruption and ethno-politics by the Maasai land committees (Mwangi 2005, 13–25). Individual titles meant that Maasai now were allowed to sell their land to outsiders, a possibility used by many, in particular poor people (Galaty 1992, 27). Munei and Galaty (1998) concluded that "[a]s a result, large tracts of Maasai land are increasingly falling into the hands of non-Maasai" with negative consequences not only for "the long-term economic security of individual families" but also "the cultural sustenance of an indigenous culture."

Despite the privatization of land whereby it is turned into a commodity that can be sold, discussions with informants indicated that the customary conception of land ownership as "usufructuary" right is still present. The concept of such right to use a part of the community land, which would revert back to the community once the individual would stop working on it, induces people to feel that "selling land" would not necessarily mean permanent loss of ownership. This idea appears to be implicit in the O family's argument

that son Mr Z did not sell but lease the land to Mr V. The idea that land belongs not to an individual but a collective is expressed by the argument that the son could not sell without the agreement of the family.

How could the conflict between Mr V and the O family, which continued to linger at the time of our fieldwork, be solved? In terms of process, the dispute could be submitted to the Council of Elders and/or state authorities including the court. A survey we conducted in the sub-location of Kuresoi in the sub-division of Molo/Nakuru district showed that communities (Kikuyu, Kalenjin as well as Maasai) prefer to bring cases to the Council of Elders (*waaze*) due to its accessibility, fast administration of justice, affordability and comprehensible language.

However, such decisions are not always recognized by the losing party who can bring the case to the magistrate court. According to the data collected at the Narok magistrate court, 27 of the 104 cases recorded (26%) concerned land disputes. The vast majority of the cases of land disputes (89%) followed a prior *waaze* decision, whereas this rate was only at 59% in the total of sample. Though 27 cases do not constitute a significant sample, the high percentage of cases first submitted to the *waaze* may indicate that people have some trust in the Council of Elders to settle land disputes, but this trust is not sufficiently strong to prevent the party that loses the case turning to state courts in the sense of forum shopping.

The outcome of the dispute between Mr V and the O family will very much depend on whether son Z had a registered title for his piece of land or was just allowed by his father to use it. One can safely assume that in the absence of a title deed, the sale would be considered null and void by a state court. Traditional mechanisms might come to the same conclusion based on the argument that the son was not authorized by the family to sell the piece of land his father gave him to use. Thus, under both systems, Mr V would have to return the land and Mr Z the money.

In the hypothetical case that Mr Z had a valid title deed and transferred it to Mr V according to the law, things might turn out to be more complex. In this case, traditional understandings and formal state law would clash. As stressed by Duraiappah et al. (2000, 12)

> anthropologists suggest that the Maasai believed that the land they sold would still be available for their livestock during the critical periods (Bruce, 1988). Another reason could be the customary 'host-guest' practice which recognises newcomers as guests who are offered rights to use the land but only on a temporary basis, while the original habitants retain ultimate authority over land use and ownership (Hussein, 1998)

Based on such traditional notions, the Council of Elders would probably insist that, in principle, land should not be sold, whereas the magistrate court would most likely protect the transaction of land because the requirements of state law were met. Thus, Mr V as a buyer would prevail at the court level. However, if the O family would continue to insist on the legitimacy of the *waaze's* decision and refuse to implement the court decision, the conflict between the two communities might further escalate. If the court decision were enforced, Mr V would certainly be satisfied with his access to justice both in formal as well as substantive terms. The perspective of the O family, however, would be different. Due to the incompatibility of traditional and state law and the fact that state courts can only apply the latter they could not held Mr V accountable for taking the family's land in violation of what the family considers to be the legitimate law. If, however, the *waaze's* decision would be enforced, Mr V's perspective would be one of the impunity of type E as for structural reasons he was unable to take the O family to account for not honouring the sale agreement with their son.

Conflicts like the one between the O family and Mr V are illustrative of clashes between contradicting traditional law and state law understandings of legal concepts that cannot be reconciled with each other. In such cases, parties are unlikely to be able to agree on the appropriate forum for solving their conflicts as the choice of either a traditional or a state mechanism will predetermine the outcome of the case. These are structural obstacles to access to justice that cannot be removed as long as with regard to land law empirical legal pluralism exists and those involved are not ready to reconcile regardless of their legal positions.

The Ogiek: evicted from and returning to the forest

The example of the Ogiek illustrates a situation where the reality of mutually exclusive norms of traditional and state law in the sense of empirical legal pluralism create structural obstacles to access to justice at a macro-level. The Ogiek are a community that identifies itself as an indigenous and forest-dependent people who lived since time immemorial as hunters-gatherers in the Mau Forest with bee-keeping and honey production as an important aspect of their livelihoods (Huntingford 1929, Blackburn 1982). During colonial times, the Ogiek started to lose their lands. As Kamau (2000, Chapter 2) summarizes:

> In 1932, Mau East Forest was gazetted, which meant that nobody was allowed to live within the forest perimeter. The 1937/1938 Kenya Land (Carter) Commission tried to evict the Ogiek from the remaining forests and to concentrate them either on European farms as squatters and labourers or similarly in Forestry Department labour camps. By 1954 all the land in Mau Forest was gazetted and this meant that the Ogiek were by now landless people. [...] The 1957 Forest Act formally put the Ogiek land under the control of the government.

What followed was a series of evictions of Ogiek from different parts of Mau Forest (Kimaiyo 2004, Chapter 5). In 2001, important parts of Mau Forest was de-gazetted in order to settle landless families, in particular, victims of clashes that occurred in the 1990s; at the same time, plots of five acres were provided to Ogiek families (Prime Minister's Task Force 2009, 36–37.). However, a governmental commission found in 2009 that almost all of these "title deeds (18,516) [were] affected by irregularities." (45). They included allocation of land "carried out by unauthorized persons" or benefitting "non-deserving people, such as senior Government officials, political leaders and companies" (45).

In addition, many Ogiek sold the land they had received from the government and moved back to protected forest areas and land for which they had no title deeds. As a consequence, the government decided on various occasions, including in 2009, that in order to protect these forest areas, these people should be evicted (African Commission 2010, 42).

The Ogiek did not accept losing land they regarded as their own and initiated a series of legal proceedings. In a 1999 decision regarding the eviction of Ogiek families from Tinet Forest, the Kenyan High Court concluded that the Ogiek, by returning to the forest after being evicted violated the Forests Act because they had to a large extent abandoned their lifestyle as hunters-gatherers and therefore were not entitled to live in the forest. Commenting on the Ogiek's argument that these returns were motivated by their desire to regain their land and lifestyle, the Court concluded "These people do not think much of the law which will stand between them and the Tinet Forest" (Republic of Kenya 1999).

The "law" standing between the Ogiek and their claims aptly describes the structural nature of obstacles to access to justice – and, in the eye of the Ogiek, of impunity for

taking of land they regard as their own in terms of informal law – in cases of disputes over land between communities and the state where state law fundamentally contradicts traditional law. Traditional justice mechanisms obviously lack the power to address conflicts between communities and with governmental authorities and thus are not able to provide redress for what communities regard as a violation of their traditional rights by the state. While such communities have formal access to state courts, they will most often lose their case as judges will reject claims based on traditional law with the argument that such claims are not protected by and actually violate state law. Thus, from their perspective, they cannot get justice in a substantive sense and state organs depriving them of their lands remain unaccountable for structural reasons (impunity type A).

As illustrated by the irregularities in the allocation of lands mentioned above, the issue of access to justice may be further exacerbated by functional problems, such as corruption, undue influence of politician and big business, and breaches of state law that go unpunished (impunity type B) and thus further undermine the trust of communities in state institutions.

Land conflicts: where judicial reforms are jeopardized by legal pluralism

Formal land law in Kenya is extremely complex with a mixture of public land used by the state, public land leased to private persons, community land and private land (Kenya, The Land Act 2012), a complexity which is further contributed to by customary land practices not recognized by the state. This as well as the continued existence of large tracts of unregistered public or private land, a history of political use of allocations of public land and of land grabbing by influential groups or individuals, and corruption (Hughes n.d., 4–6) are among the key factors explaining why conflicts over land are so frequent in Kenya.

In rural areas, land conflicts between neighbours and other members of the same community are likely to be settled by traditional community mechanisms. Land conflicts among owners of titled private land or between owners of land leased from the state and state authorities can be solved in court since in such disputes the whole case is based on state law. Here, access to justice exists in principle; where it is absent due to distance to courts, lack of resources or knowledge and the like, the obstacles that can be addressed by judicial reform like the one presently undertaken in Kenya (Republic of Kenya 2012).

The two cases described above, however, are illustrative of structural obstacles to access to justice in its substantive sense that are intrinsically linked to the existence of empirical legal pluralism. Where communities claim traditional rights to land going back to pre-colonial times to oppose evictions from or taking of land by authorities who invoke state law, they will invariably lose their case. State courts are the only mechanism they can turn to, and these courts will apply state law protecting the dispossession of traditional land. Thus, communities are left without possibility for redress because their claims, even if many would regard them as legitimate from a historical and moral perspective, are not protected by and are incompatible with state law. In such cases, judicial reforms aimed at enhancing formal access to justice by focusing on enhancing their proper functioning as presently envisaged in Kenya will not solve the problem of impunity as long as no attempts are taken to address and at least mitigate the fundamental incompatibility of formal and non-formal law.

Conclusions

It is widely recognized, also by the Kenyan government and judiciary, that access to justice in Kenya is limited and all too often impunity prevails. The 2010 Constitution and a reform framework prepared by the judiciary for the period 2012−2016 envisage reform measures facilitating access by, inter alia, establishing courts in hitherto underserviced areas and mobile courts in remote areas, simplified procedures to reduce costs, and the expansion of legal aid. At the same time, alternative dispute resolution mechanisms including traditional dispute settlement mechanisms at the local level are recognized and facilitated. As our analysis of two categories of conflicts shows, these measures, while important, might be insufficient to solve current problems under Kenya's prevailing situation of empirical legal pluralism.

Whereas traditional law has the potential to work rather well when it comes to the settlement and regulation of local and intra-ethnic regional conflicts, it fails in conflicts with the state where formal and informal legal conceptions and procedures are incompatible with each other. Furthermore, traditional law is hardly operative in multi-ethnic conflicts in both rural and urban contexts. In these contexts, people cannot turn to traditional mechanisms of dispute settlement when people from different ethnic communities are involved. While, in such cases, state law and authorities should be responsible for settling disputes, access to justice for people and communities with legitimate claims may be jeopardized at different levels.

First, a number of deficiencies, such as geographical remoteness of police and courts, lack of knowledge about how to use such institutions, high costs and the lack of legal aid, which constitute functional obstacles to access to justice, may prevent people from having formal access to justice. Removing these obstacles is the explicit aim of the current judicial reform in Kenya. Doubtlessly, such measures are very important and even constitute a necessary condition to enhance access to justice and reduce cases of functional impunity (type D) at the level of the formal (State) judicial system.

Second, as illustrated by the case of mob justice, i.e. the killing of perpetrators caught red-handed in urban areas, such measures in themselves are insufficient. As long as corruption within state institutions continues to prevail, their legitimacy is not restored. At the same time, reverting to traditional community-based mechanisms of conflict resolution is not an option for victims of crime because the institutions of traditional law are not operative in multi-ethnic urban settings − a situation which is characterized by structural impunity at the level of informal dispute settlement mechanisms (impunity type E). The prevalence of violent self-help is a strong indicator that low legitimacy caused by deficiencies, such as lack of efficiency, corruption and inertia of the state judicial system are as important or even more relevant obstacles to access to justice than lack of geographical proximity and knowledge, high costs and the absence of legal aid. Judicial reforms that do not go beyond such measures and fail to address these deeper-lying causes of functional impunity (type D) effectively will have only limited effects.

Third, even the most effective judicial reform will only have a limited impact and reach their limits where *structural* conflicts between formal and informal systems of law, constituting a system of empirical legal pluralism, exist and substantive norms, procedures and institutions that could reconcile the various legal subsystems are non-existent. This particularly pertains to disputes over land where various ethnic groups compete for the same tracts of land and where traditional claims of communities clash with modern legal concepts, such as the designation of forests or pastures as public land, an understanding of the sale of land as permanent allocation of property rights and not as transfer

of usufructuary rights. Traditional law and authorities cannot adjudicate conflicts on traditional land claims with the state and ethnic communities with traditional land claims will always loose in court as state organs are not able and willing to accept such claims but will impose what modern state law says. From the perspective of communities, this situation leads to far-reaching structural impunity (type A) of state actors violating what they consider to be their legitimate rights. Thus, it will create a deadlock which can only be overcome by a change in state law that recognizes – at least in principle – the legitimacy of traditional claims to land and finds ways to overcome or at least mitigate the incompatibilities between state and traditional law.[7]

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Notes

1. These data were provided by Prosper Nobirabo and refer to the year 2011.
2. Most of these interviews were undertaken during meetings organized by the international NGO ProMara (USAID/Kenyaś Mau-Forest Initiative) between July and September 2011 in the following areas: Narok North district (Narok town, Lemek estate, Majengo estate and Olpopongi estate) and neighboring districts: sub-locations of Olulunga, Mulot and Mara (Narok South district); sub-location of Kirindoni (Transmara district) and sub-location of Kuresoi/sub-division of Molo (Nakuru district).
3. 240 out of a total of 500 questionnaires in Swahili distributed to community members at the meetings referred to in endnote 2 were returned (110 from Narok North district areas, 70 from Narok South district areas and 40 from Transmara and Nakuru districts). A further 40 answers came from the questionnaire distributed on the road in Narok North business centre. A second questionnaire in English addressed the public administration (in particular Regional and District commissioner Offices, Police security Office and Courts) and was answered by 27 officials in North and South Narok. Although questionnaires are a somewhat unreliable source of data, they nevertheless may complement the data gathered by the participant observation and semi-structured interviews.
4. However, there are (and have been) attempts to settle inter-ethnic conflicts through negotiation. But these peace pacts (ekisil) during the dry season usually only last until the beginning of the rainy season (Pkalya, Adan, and Masinde 2004: 53–57, 60). Various NGOs are attempting to strengthen this traditional mechanism to settle inter-ethnic conflicts (see Leff 2009; Menkhaus 2008).
5. Observations provided by Prosper Nobirabo and referring to the year 2011. Victims of mob justice are not always executed. The kind of crime and its seriousness also matter whether the culprit is killed or survives after a severe beating.
6. The Mau Forest complex is the largest remaining near-contiguous bloc of Montane forest in East Africa. It covers an approximate area of 350,000 ha and is situated about 170 km north-west of Nairobi and stretches west bordering Kericho District, Narok District to the south and Nakuru to the north and Bomet to the south-west.
7. In this regard, two recent developments regarding the Ogiek case are particularly interesting and may indicate how this could happen. On 14 March 2014, the Environment and Land Court at Nairobi decided that the right to life and the economic and social rights as enshrined in the new Kenyan Constitution guaranteed the Ogiek a right to livelihoods and that these rights were violated by their eviction from the Mau Forest Complex without proper resettlement (Republic of Kenya, 2014).

   In a case involving another group of Ogieks, the African Court, a tribunal established by the African Union, ordered on 13 March 2013 Kenya to reinstitute a previous ban on transactions

over former Ogiek land that has been transferred to private owners in order not to prejudice the outcome of a pending case before the African Court on the Ogiek land rights (African Court 2013). This case has been brought by the African Commission on Human and People's Rights against the Republic of Kenya on the basis of its findings that the Ogiek evictions were in violation of multiple individual and collective rights as enshrined in the 1981 African Charter on Human and Peoples' Rights (African Commission on Human and Peoples' Rights 2010).

As the judgment of the Environment and Land Court is presently being appealed and the order of the African Court is just a first step in a longer proceeding, it is too early to tell whether the claims of the Ogiek will be recognized on the basis of Kenyan constitutional law and African human rights law.

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