

Land Alienation and Contestation in Kenyan Maasailand

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Abstract:

In the 1900s, the Maasai² people of Kenya (then the Protectorate of British East Africa) were forcibly moved into reserves to make way for white settlement of the highlands. It is estimated that the community lost at least 50 per cent of the land they had once utilized as pastoralists, and that the land they were moved to was environmentally inferior to their former grazing areas in the Rift Valley and Laikipia. Today the Maasai claim that the policies of post-independence governments (since 1963) have led to further serious losses of common land, through sanctioning 'encroachment' by other ethnic groups to land that had been reserved by the British for Maasai use only, and the conversion of large areas of former Maasai territory into national parks and game reserves. The introduction of individual land title (as well as subsequent sell-off and subdivision into uselessly small plots) is also a major factor in today's 'land poverty'. This paper draws on oral testimony and archival research to explain the long-term legacy of this early land alienation, and contestation over land rights in the twenty-first century that utilizes Kenya's new constitution to claim 'lost' land as ancestral cultural heritage.

Key words: *Kenya, Maasai, colonialism, pastoralism, protected areas, constitutional rights*

INTRODUCTION: THE COLONIAL HISTORY

Before the arrival of British colonisers at the end of the nineteenth century in the territory that was to become Kenya, the transhumant pastoral Maasai people had wandered freely with their cattle, sheep and goats across a great swathe of the country. All land was commons, with shared resource use by different territorial sections centred on localities (*in-kutot*, sing. *en-kutoto*) which formed the basis of the herding system. What the British termed 'Maasailand' broadly followed the line of the Rift Valley and fanned out on either side. (Maasai also lived then and now in German East Africa, later renamed Tanganyika and finally Tanzania, but that is not the focus of this paper.) However, once a protectorate had been established in 1895, British administrators began to regard the Maasai as posing a threat to peaceful co-existence with white settlers, who began pouring in from Britain and South Africa in the early years of the twentieth century. These fears were largely baseless, since the Maasai were behaving peaceably – at least towards settlers, while regularly settling their own scores violently with one another. These early European 'pioneers' began casting covetous eyes on the Maasai's rich pastures, which had been made sweet by grazing, and pressure began to

¹ The Open University, UK. Email: lotte.hughes@open.ac.uk. This paper relies heavily on my previously published work, especially my 2006 book *Moving the Maasai*. I would like to warmly thank Deborah Manzolillo Nightingale for commenting on and improving an earlier draft, also Ben Koissaba and Johnson Ole Kaunga for supplying vital information.

² Maasai is the correct spelling, but Masai will be used when quoting British colonial documents. The Masai Mara Game Reserve is still officially spelled this way.

mount on the administration to free up more land for European settlement. Maasai land was regarded as under-utilised and 'waste', and the argument was that European farmers would make better use of it. The British government needed to make the territory pay, because it had spent a fortune building the Uganda Railway from Mombasa to Uganda, which spliced 'Kenyan' Maasailand in two.

In 1904-1905 the British forcibly moved certain sections (known as *il-oshon*)³ of the Maasai from their favourite grazing grounds in the central Rift Valley (the lush corridor between Naivasha and Nakuru) into two reserves in order to make way for white settlement. One reserve was on Laikipia in the northern highlands, the other in the south on the border with German East Africa (later Tanganyika), where other Maasai sections already lived. Under a 1904 Maasai Agreement or treaty, the Maasai were told they could keep these reserved areas for 'so long as the Masai as a race shall exist'. After seven years, however, the British broke their promise and moved the 'northern' Maasai again, at gunpoint, from Laikipia to an extended Southern Maasai Reserve. Upwards of 20,000 people and at least 2.5 million livestock were moved between 1911 and 1913. White settlement of the highlands was also the primary reason for the second expulsion. Other motivations included an official desire to concentrate the Maasai in one reserve in order to facilitate their administration and taxation, and to control livestock that was believed to pose a disease threat to imported settler stock.

The second move was sanctioned by a 1911 Agreement, which Maasai later claimed their leaders signed under heavy duress. Today, Maasai refer to it in inverted commas as an 'Agreement' to indicate the coercion which led to their representatives putting their thumbprints to it. (Today, the two agreements are often wrongly referred to by Maasai activists and other Kenyans as the Anglo-Maasai Agreements, but this was not their proper name.) This second Agreement effectively rendered the first one void. Neither Agreement granted land tenure to the Maasai, in so many words; but since the first Agreement declared the reserved territory was for the sole use of the community 'so long as the Masai as a race shall exist', and delineated boundaries, it represented a type of *de facto* tenure. As a result of these two moves, and other smaller ones I shall not describe here, the Maasai of British East Africa (BEA) lost at least 50 per cent of the land they had once utilised. It may have been as much as 70 per cent; it is difficult to arrive at an exact figure since land in Maasai use, as opposed to occupation, before 1904 was never surveyed and quantified.

It is widely accepted, however, that the Maasai probably lost more land to the British than any other community in Kenya, although every ethnic group experienced losses of one sort or another. But this is not just a matter of quantity. Their *qualitative* losses, in terms of the richness of their former northern habitat, the comparative inferiority of the Southern Reserve, and the immigrants' vulnerability to disease there, were largely unknown before I attempted to document them, from oral and archival sources, in my

³ *Oi-oshon*, pl. *il-oshon*. An autonomous socio-territorial section of the Maasai. Today there are around 22 sections, though some scholars list 16 and 19, in Kenya and Tanzania, of which the Purko is the largest. It was this section that bore the brunt of the forced moves. Each section is divided into the localities mentioned earlier (*in-kutot*), and rights to resources secured via residency in these localities over time.

doctoral dissertation and book (2002, 2006). The oral testimony I gathered from Maasai elders – some of whom were, incredibly, old enough to have taken part in the second move as children – emphasised the environmental and disease impacts of the moves. Nearly 90 years after the second move, elders in western Narok (who have all died since being interviewed between 1997 and 2000) still talked with passion about its effects on the health of humans and herds. They described the impact of the move in ‘pathological’ terms, believing that the British deliberately sent them ‘to that land where *ol-tikana* is’ (the fatal disease East Coast Fever, ECF) in order that they might die there. They claimed that they and their herds succumbed to diseases in the Southern Reserve which were unknown or not prevalent in their northern territory, most specifically Laikipia, and that they had been blighted by sickness ever since. They insisted that the land they were moved to was not only grossly inferior to Entorror (the Maa word for the whole of their former northern territory) in terms of water supplies, grazing, and disease vectors, but that the new environment infected and killed them. In the collective oral mythology, Entorror is referred to as an Eden, its sweetness constantly compared to the bitterness (*ol-odua*, which also means rinderpest) of the Southern Reserve.

Through checking early veterinary records and other archival sources, I established that there was in fact a substantial amount of truth in Maasai claims, at least with regards to environmental challenges and disease. The massive stock losses, especially in the decade or so following the second move, can partly be attributed to a lack of veterinary support in the Southern Reserve. Other factors included the lack of resistance in Maasai stock to strains of certain diseases in the new territory, the fact that the stock had been considerably weakened during the long and stressful march south, and the role of increased ox-drawn transport in World War One (Maasailand was on the front line between British and German East Africa) in spreading ECF. There were more than half a million livestock deaths in the reserve from tick-borne diseases, bovine pleuropneumonia and rinderpest in 1919-20 alone. In 1922, rinderpest killed between 60 and 100 per cent of all cattle in the Narok and Loitokitok areas (Hughes 2006, 2010). Such is their dependency on livestock, and total identification with cattle – *en-kishu* means both cattle and Maasai as a people – that cattle disease is inextricably linked to human health and is spoken of almost interchangeably with that of humans, and in this case human illness swiftly followed that of cattle. This dependency is lessening today as their economy diversifies to include agriculture and wildlife tourism.

I won’t elaborate on this here, but you may well ask why the Maasai did not resist the forced moves and land alienation? After all they had a standing army of warriors, whose prowess on the battlefield was both admired and feared by the British – who knew about it at first hand, because from the 1890s they had hired Maasai warriors as mercenaries in a series of raids (known as ‘punitive expeditions’) against other ethnic groups who were resisting conquest. The short answer is that the Maasai did not resist violently, as they were fully expected to do, but on the advice of European sympathisers in the protectorate (notably Scottish doctor Norman Leys) chose to hire British lawyers, based in Mombasa, and mount a legal challenge to the moves in the High Court of British East Africa. The landmark Masai Case of 1913 made headlines in Britain, thanks to the support the plaintiffs received from whistle-blowers and some British MPs (Hughes

2006). They lost on a technicality, however, and have been lamenting their losses ever since. I will return to these later in the paper.

LAND POLICY AFTER INDEPENDENCE

To summarise some key points in what is a very complex history: the problem until recently, with the launch of a national land policy (though this is yet to be implemented), is that independent Kenya has never had one. Under the Kenyatta and Moi regimes (1963-78 and 1978-2002) public land was given out in return for political favours, with huge areas also acquired by their family members who own it to this day (e.g. Klopp 2000). Incidentally, newly-elected President Uhuru Kenyatta, son of first president Jomo Kenyatta and one of the wealthiest men in Kenya, was challenged during the 2012/13 election campaign to explain why he owned so much land, to which he replied he had acquired it legally through inheritance and had no reason to apologise, let alone return it to anyone.

To describe briefly what happened after 1963 in the Rift Valley, the former epicentre of Maasai grazing lands, it was imperative for the first independence government led by Jomo Kenyatta that it dealt swiftly with land issues there. Much of this land had been acquired by the colonial state and leased or sold to white settlers, who established ranches, plantations and commercial estates. By the 1940s thousands of largely Kikuyu squatters, recruited from the so-called Kikuyu native reserves in former Central Province, to the east of the Rift, were living and labouring on white farms. The attempt by settlers to expel squatters and their stock fueled resistance culminating in the Mau Mau anti-colonial revolt of the 1950s, which paved the way for independence (Kanogo 1987). After 1963, Kenyatta established settlement schemes which largely favoured his own ethnic group, the Kikuyu, which remains the largest ethnic community in Kenya. Up to 1966 some 20 per cent of the land in the former White Highlands (about 1.5 million acres in all) was bought through state-financed programmes, 'parceled up to create settlement schemes and transferred to Kenyan smallholders' (Boone 2012: 92). This continued into the 1970s, with the government purchasing more former settler farms that were divided up and turned into small farms for immigrants to the Rift. Also, Kenyatta encouraged citizens to create semi-private land-buying companies in the 1960s and 70s, which bought or leased farms and estates in the former White Highlands from the government and subdivided them.

Pastoralists (with the possible exception of a few elite leaders) did not gain from these schemes, though they were the ones who had lost out in the first place. This has caused simmering resentment which continues to this day, not just among Maasai but also Kalenjin communities in the Rift, that exploded in Kalenjin on Kikuyu violence (and vice versa retaliation) after the contested elections in 2007/08.⁴ As Boone writes, 'there is no doubt that settlement policies and practices in the core farming districts of the Rift ignored customary rights to land, which were viewed by the Kenyatta state as having

⁴ This is a simplification. Much of the violence during the post-election period was between the Kikuyu and the Luo communities. But in the Rift Valley, as the Waki Report (2008) described it, there was a pattern of attacks by Kalenjin youth gangs against Kikuyu, which triggered counter-attacks.

been extinguished by the British land appropriations of the early 1900s. Those at the losing end of this process were those who claimed these ancestral rights' (Boone 2012: 96-97). Since the Kalenjin did not exist as a discrete community before the 1940s (Lynch 2011), their claims to be indigenous to the Rift are much more tenuous than those of the Maasai, but that is another story. Attempts by former president Daniel arap Moi (who belongs to Kalenjin sub-clan the Tugen) and his political successors to 'weld the various ethnicities of the central Rift into a cohesive Kalenjin ethnic group' (Boone 2012: 96) have succeeded to a large extent, reflected in the recent election of Kalenjin leader William Ruto as the new deputy president in what many regard as an unholy alliance with the leader of the Kalenjin's 'traditional enemies', the Kikuyu. A challenge to the election result by runner-up Raila Odinga, the former prime minister, failed in late March.⁵ The Maasai and others who voted for Raila (as he is popularly known) have little faith in the Kenyatta-Ruto alliance and its commitment to constitutional implementation, given that Ruto led the 'no' campaign against the new constitution in the run-up to a public referendum in 2010. It is feared the new leadership may undermine future efforts by the Maasai (and other minority groups) to secure land rights via constitutional avenues, since their claims could be perceived to threaten the land rights of Kenyatta-Ruto supporters in the Rift Valley. There are already warnings of threats to devolution under the new government, with Raila Odinga talking of 'an elaborate attempt to kill devolution' by some 'government insiders'.⁶ In his inaugural speech, however, President Kenyatta gave a public commitment to ensuring that devolution succeeds.⁷

In summary, land and natural resources including government-owned forests have been used for decades as a patronage resource by political leaders, who call in favours from their clients at election time. Forest areas settled in this way include some in former Maasailand, such as parts of the Mau Forest, where the Moi regime settled thousands of Kalenjin families from about 1986 onwards. In June 2005 more than 10,000 of these settlers were violently evicted by the NARC government, ostensibly in order to save this vital water catchment area, but actually because it was political payback time against the former KANU regime and those who supported it (Kantai 2005).⁸ A very different

⁵ Former Prime Minister Raila Odinga, who narrowly lost to Uhuru Kenyatta in the 4 March presidential election, immediately challenged the 2013 election result in the Supreme Court, alleging malpractice and fraud, but lost in a ruling announced on 31 March. When I say 'the Maasai' largely voted for Raila, this is obviously a generalization, but all the indications are that the majority of this community favoured him and his CORD (Coalition for Reforms and Democracy) political alliance.

⁶ 'Raila meets Cord Senators, MPs to draw legislative agenda', *Daily Nation* online, 4 April 2013.

⁷ The inauguration ceremony took place in Nairobi on 9 April 2013.

⁸ In a synopsis for a book that was never published (and apparently not completed), which aimed to investigate the Mau evictions and the wider story behind them, Kenyan journalist Parselelo Kantai wrote: 'The Mau Forest eviction was the first major attack by the NARC administration [National Rainbow Coalition, headed by then president Mwai Kibaki] on the old KANU order'. KANU is the Kenya African National Union, the party led successively by Jomo Kenyatta and Daniel arap Moi. It was not simply a matter of a Kalenjin president settling his kinsmen on the Mau; Kantai and co-writer Billy Kahora had discovered during research that the Ntutu family (a prominent Maasai family in western Narok District, that includes former Assistant Minister Stephen Ole Ntutu, newly-elected Senator for Narok County in March 2013) 'had played a key role in the encroachment and settlement of the Maasai Mau', making a

example, of a forest that remains an important common property resource as well as a sacred site for the Maasai, is that of the Loita Forest in Narok District, east of the Masai Mara Game Reserve, known to the Maasai as Naimina Enkiyo or the Forest of the Lost Child. Zaal and Adano (2012) have described how the Loita section of the Maasai successfully fought off an attempt by a leading Purko Maasai cabinet minister (they do not name him, but it was William Ole Ntimama, of whom more will be said below) and the Maasai-dominated Narok County Council to gazette the forest. They wanted to exploit it for tourism development and conservation that would have benefited the elite, and trampled on local people's rights. The 330-square kilometre Loita Forest, which provides the local Maasai with important dry-season grazing, remains one of the few ungazetted forests in Kenya, meaning one in which local people's access is not restricted by law.⁹ Former president Moi had previously used Ntimama to excise parts of the Mau Forest, to allow for a tea-growing zone and for Moi's own business interests in a tea factory.

The development of group ranches

Post-independence governments decided to ignore traditional concepts of land tenure in favour of capitalist tenure rights, and promoted the privatization of communal lands and the development of group ranches in the Narok and Kajiado Districts of Maasailand (as well as a few non-Maasai areas) from the late 1960s. The establishment of ranches involved a shift in land tenure from traditional common ownership of the range to subdivided holdings each owned collectively by a group of registered members and managed by an elected committee (Galaty 1981, 1994; Rutten 1992; Mwangi 2007a, 2007b). 'Regarding pastoral rights in and use of rangeland resources', writes Galaty, 'the program was predicated on the assumption that common property led to overgrazing, inefficient use of resources, low levels of investment, and inadequate levels of herd offtake by pastoralists' (Galaty 1994: 190). In other words, it aimed to prevent a Tragedy of the Commons. He surmises that the real, hidden reason in the long term 'was to remove this relatively large portion of land, adjacent to the densely populated Kenyan highlands and the capital city of Nairobi, from communal hands, and bring it onto the lively Kenyan market for individually owned real estate' (op. cit). Individual-owned ranches were developed alongside the group ranches in each area, and the trend towards subdivision has continued. Maasai reluctantly agreed to the establishment of group ranches, taking the view that 'formal and legal tenure of communal resources was the best protection against individuation and increasing migration of farmers onto Maasai lands' (Fratkin 1994: 9). Mwangi suggests they consented in order to prevent appropriation by others, both in and outside the Maasai community. By the time the programme ended in 1979, 57 group ranches had been created in Maasai land (Mwangi 2007a).

Severe droughts in 1968 and 1971 immediately exposed the fragility of group ranch boundaries as Maasai were forced to graze their stock on land communally held by kin or stock partners, and crossed the national border into Tanzania – a regular occurrence,

fortune in the process. I lodged with Stephen's late sister Veronica when doing doctoral fieldwork in Lemek in 1999-2000.

⁹ For a description of the struggle for Loita Forest also see Karanja, Tesema and Barrow (2002).

before and since. And as Maasai began casting covetous eyes on the individual ranches, elite members of the group ranches were able to secure large individual holdings within the group structures, which went against the original principle of equitable division. This led ordinary group ranch members, by the mid-1980s, to consider subdivision as a way of protecting their interests (Galaty 1994: 191). What followed was a headlong rush towards subdivision and individuation, despite the knowledge that this would inevitably lead to a 'patchwork of relatively small, economically nonviable holdings' in drylands (op. cit). Further severe droughts (those of 1974, 1979 and 1984 alone caused up to 60 per cent herd losses according to Galaty, 1994:196) forced many pastoralists to sell their holdings. and led to bankruptcy for those unable to pay off bank loans. As Galaty and others have noted, and I have directly observed, there is also an unfortunate pattern of Maasai men with drink problems selling land to get quick cash, ostensibly to pay school fees; the cash is then spent on alcohol or generally frittered away.¹⁰ Hence the plea by many Maasai women, during public talks on the new constitution during the constitutional review process (from 2000), for gender equality in landholding so that they can prevent the squandering of family resources in this way.¹¹ Many of the remaining group ranches, especially the most successful ones, now have a conservation and wildlife tourism element (more on this below). Mwangi writes that although group ranches were successful in preventing further state appropriation of Maasai land, they were ineffective when it came to defending members' rights against 'unsanctioned appropriation from within the community itself' (Mwangi 2007: 903). Overall, the group ranch experiment is regarded as a failure.

Long-term impacts of the moves: environmental

Sindiga has described how 'colonial intervention in Maasailand led to the breakdown of traditional ecosystems', and attributed the subsequent severe degradation and pressures on land in Kajiado and Narok Districts to a process begun in 1904 (Sindiga 1984: 27). Tignor has written: 'The loss of the dry weather grazing forced the Maasai to overwork the more arid southern reserve, resulting in loss of vegetation, soil erosion and overall decline in grazing. In the twentieth century, the reserve became progressively less able to support its livestock' (Tignor 1976: 8, 38). Rutten, in a study of factors that have led to land losses and undermined the livestock economy in Kajiado District, asserts: 'Moreover, in terms of quality the loss [of alienated land before 1912] was even more severe as green pastures located in ecologically favourable areas had to be abandoned and were replaced with a less comfortable habitat, heavily infested by tsetse fly and mostly lacking sufficient water and all year round grazing' (Rutten 1992: 8). Western and Manzollilo Nightingale (2004) have linked the early land alienation to Kajiado pastoralists' increased vulnerability to drought.

Zaal and Adano (2012) point out that the moves pushed various sections of the Maasai more closely together, notably the Purko and the Loita, and triggered an ongoing

¹⁰ Kantai (2005) noted that every August, at the start of the harvesting season, Narok town is 'in the grip of a land-selling mania', fuelled by alcohol.

¹¹ The new constitution eliminates 'gender discrimination in law, customs and practices related to land and property in land', Chapter 5, Part 1, Article 60.

process of encroachment on each others' land that has sometimes led to conflict, e.g. around the Loita Hills and Forest. Campbell (1984: 36), in a study of responses to drought by farmers and herders in Southern Kajiado District, to which some of the 'northern' Maasai moved, notes that not only were herders deprived of some of their best grazing lands, but linkages were disrupted between herders north and south of the Rift Valley. The loss of mobility was absolutely central, then and since. In recent years, he writes, other factors such as increasing cultivation and pastoral land alienated to national parks, have made things worse in semi-arid lands where 'herding, farming, and wildlife activities are all constrained in their location by the distribution of moisture' (op. cit.: 37). Other scholars have made similar remarks, linking the early losses to later degradation, drought and other pressures (e.g. Thompson and Homewood 2002). As options narrowed for pastoralism and transhumance, more people have turned to agriculture, increasing the demand for farmland and irrigation. In every part of Maasailand one now sees smallholdings and larger areas under maize and other crops, which stands in stark contrast to the position even ten years ago. Of course, the fencing that accompanies modern farming methods also prevents mobility, further confining the movement of those Maasai whose livelihood still centres on transhumant pastoralism.

Other factors that contribute to increasing pressure on land in former pastoral areas include population growth,¹² the move towards privatised land holdings and the acquisition by previous governments of large areas of former Maasai land for game reserves and national parks, from which human residents (apart from tourists and their service-providers) are excluded. Most of this type of alienation took place before the 1960s,¹³ and was not entirely forced by government – for example, Maasai elders in Narok District asked the government to set aside land for wildlife, thus ushering in the Masai Mara Game Reserve (initially a wildlife sanctuary from 1948).¹⁴ By 2010, 11.76 per cent of Kenya's total land area was turned over to protected areas, including many in former Maasailand such as Amboseli National Park, Nairobi National Park and the Masai Mara Game Reserve.¹⁵ The reason why so much of Maasai land has been converted to protected areas is because of the abundance of wildlife in these areas. The Maasai do not traditionally eat game, do not kill wild animals unless they threaten their livestock, and their traditional practices (e.g. an absence of fencing) are beneficial to wildlife, hence wildlife and humans have co-existed for centuries in these particular areas, and wildlife has thrived.

¹² In the 2009 census the Kenyan Maasai population was 841,622, compared to 377,089 in 1989. The total population of the country was 10.9m in 1969, 38.6m by 2009, and 41.6 million by 2011.

¹³ For example, Nairobi National Park was gazetted in 1946, Amboseli, Chyulu Hills and Tsavo gazetted as reserves in 1948 and later upgraded to parks.

¹⁴ This fact is frequently overlooked by certain Maasai activists who call for the Mara to be 'returned' to the community, alleging it was grabbed against their wishes. Since it is run by the Maasai-dominated Narok County Council, not central government, it is effectively Maasai owned, a huge revenue earner for the Council and source of local Maasai employment. Furthermore, parts of it have been excised over the years and given back to local communities. See Hughes 2007.

¹⁵ The World Database on Protected Areas, www.wdpa.org. Mwangi (2007a:902) quotes Kituyu (1990) as saying 25,792 square kilometres of Maasai land were alienated for wildlife conservation between 1946 and 1961.

Another growing phenomenon has been the establishment of ‘parks beyond parks’ – buffer zones or wildlife dispersal areas around protected areas, that are controlled by local Maasai associations which manage them for wildlife conservation and tourism, with the revenue ostensibly spent on meeting community needs such as schools, clinics and dams. They are effectively community conservation areas, established wherever communities decide to set aside land for conservation outside unfenced parks or reserves, which are unable to contain the wildlife ‘load’. The growth of community-based natural resource management (CBNRM), including community-based conservation, has ‘represented a conceptual revolution – the idea that successful conservation should involve communities rather than being state-centric, and that natural resources could be managed in such a way that both development and conservation goals were reached’. The idea was that by offering locals a stake in wildlife they would be more incentivised to conserve it (Beinart and Hughes 2007: 303). Although it has been much criticised (e.g. for Zimbabwe, Dzingirai 2003), and failed in certain respects, CBNRM has clearly benefited some Maasai communities. Success stories include the wildlife conservation projects and tourist lodges run by group ranches Il Ngwesi, Ol Kiramatian, Shompole, Siana, Kimana and Olgulului. As activist Johnson Ole Kaunga says of the link between conservation and Maasai, which the community has capitalised upon: ‘Conservation without Maasai is like bread without butter. You can’t eat butter alone but you can always eat bread!’¹⁶ There are also increasing numbers of private conservancies; today there are some 120 conservancies covering four per cent of Kenya’s total land surface, which is half the area covered by national parks and game reserves.¹⁷

Long-term impacts: psychological

By placing the Maasai in reserves, and hedging these about with treaty promises that included a pledge to repel ‘aliens’, the colonial British nurtured an enduring obsession among Maasai with boundaries, promised land and exclusivity (Hughes 2006). This has manifested itself since the early 1990s in ‘ethnic’ (de facto politically instigated) clashes between Maasai and other communities regarded as immigrants to ‘their’ reserved land (notably Kikuyu, though in fact Kikuyu and Maasai have intermarried and intermingled for generations), and renewed calls for *majimbo* or regionalism which minority groups believe would help to redress inequity and historical marginalization. Devolution of power and resources to 47 new county governments, which is allowed for under the new constitution, will bring a degree of regionalism, although this is not *majimbo* in the sense in which the word was used in the 1960s. The sense of righteous historical grievance fuels Maasai leaders’ and activists’ adept use of the politics of belonging and identity (e.g. Geschiere 2009), both within Kenya and on the international stage; for example, at United Nations’ advocacy level and through globalised internet activism.

Publicly-voiced grievances

The Maasai’s collective sense of loss and betrayal regarding their early land losses and ensuing additional hardships has not gone away. If anything it has deepened over time,

¹⁶ Johnson Ole Kaunga is Director of the NGO IMPACT, Indigenous Movement for Peace Advancement and Conflict Transformation, based in Nanyuki, Kenya. Personal communication April 2013.

¹⁷ My thanks to Deborah Manzollilo Nightingale for some of this information, which includes information she conveyed from conservation scientist David Western in personal communications by email.

aided by the growth of identity politics and non-governmental organisations (NGOs), both local and international, committed to securing indigenous peoples' rights under United Nations protocols.¹⁸ Activists have been inspired by recent victories such as the February 2010 ruling by the African Commission on Human and Peoples' Rights against the Kenyan government over its eviction of the Enderois community, between 1973 and 1986, from a game reserve on Lake Bogoria – though the circumstances are very different and the ruling is not enforceable (Lynch 2012; Yeshanew 2013).

Public expressions of grievance by Maasai have been articulated on five main occasions: (1) in 1932 to the Kenya Land Commission set up by the British colonial government to enquire into African and other land grievances; (2) in 1962 at the second Kenya Constitutional Conference at Lancaster House, London, that preceded independence; (3) during 2004 in the form of threats by Maasai activists to bring another lawsuit against Britain on the hundredth anniversary of the first Agreement; (4) during campaigns that preceded two constitutional referenda, first the failed 2005 referendum on the so-called Wako Draft of the proposed constitution (which citizens rejected), and again in the run-up to the second referendum in August 2010 at which Kenyans finally voted for a new constitution; and (5) at the Truth, Justice, and Reconciliation Commission (TJRC) hearings that began in April 2011.¹⁹ A claim for compensation for historical injustices, colonial and postcolonial – one largely centred on land – has been mooted since at least 2004 (Kanchory 2005). The new constitution, which is currently being implemented, has radically changed the 'rights climate' in which such a claim may be brought, and I will say more about this in a moment. Maasai activists waited for the passage of the new constitution before attempting to file a case because they believe there is more chance of success under the new dispensation.

William Ole Ntimama (until the March 2013 elections Minister of State for National Heritage and Culture and MP for Narok North), activist Meitamei Olol-Dapash (a self-appointed Maasai cultural ambassador who was until recently based in the United States) and others have previously declared that the Maasai will use the TJRC to pursue this claim.²⁰ However, they have failed to understand what the TJRC can and cannot do. It is not authorized to consider injustices that occurred before 1963 and it does not have powers of enforcement.²¹ Former high court judge Justice Moiyo Ole Keiwua (a longstanding research contact of mine), was among those spearheading the

¹⁸ Primarily the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in September 2007, and the International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989 which came into force in 1991.

¹⁹ The TJRC became operational in November 2009, but there was a long delay before hearings began, largely because of wrangles over first chairman Bethuel Kiplagat, who resigned in November 2010, but was later reinstated. It is mandated to investigate unlawful killings, human rights violations, historical injustices, corruption and ethnic violence between 12 December 1963 and 28 February 2008. Its final report is long overdue, and it should have wound down by now.

²⁰ In March 2013 Ntimama lost the Narok seat he had held since 1988 to lawyer Moitalel Kenta, with Olol-Dapash a distant third.

²¹ Kipchumba Kemei and Gakuu Mathenge, 'Ntimama wants probe into annexation of Maasai land', *The Standard*, Nairobi, 14 March 2010; Karanja Njoroge, 'Maasai want TJRC to probe land injustices'. *The Standard*, 23 February 2010.

claim, but he died suddenly in late 2011.²² The Maa Civil Society Forum was created in 2004 to pursue this and related claims for redress of historical injustices, but does not appear to have been active recently.²³ At Lancaster House, after Maasai delegate John Keen's demand for £5.8 million compensation for alienated land was turned down, the delegation refused to sign the final conference document and were effectively sidelined. Maasai involvement in the recent constitutional review process may partly be ascribed to their determination not to be left out of the constitution this time around.²⁴

The younger generation of Maasai has turned to internet- and NGO-aided activism to challenge historical injustices, sidelining older players such as Ntimama who is now seen as a spent force. The original plan to sue Britain for recompense for 'lost' land has now been modified, in the new constitutional climate, since the constitution provides new avenues for redress for historical justices within Kenya – at least, in theory.

CONSTITUTIONAL REVIEW PROCESS

Maasai were among the minority and indigenous communities that sent representatives to contribute to the public debates on a new constitution, during the constitutional review process from 2000 to 2004. Citizens from all walks of life were able to participate in these public discussions on drafting a new constitution. This task became more urgent after the 2007-08 post-electoral crisis in which more than 1000 people died; after this watershed moment various urgent political reforms, including constitutional, were prioritised. Some Maasai used the constitutional review process, centred on conferences held at the heritage site Bomas of Kenya, Nairobi (which gave its name to the so-called 'Bomas' talks), to call for redress for historical injustices, but this time around Britain was not in the dock. The Kenyan government was (and still is) accused of perpetuating the land alienation process begun by the British and of marginalizing pastoral communities. Numerous memoranda were submitted by indigenous and minority groups. Although the government rejected the draft constitution produced at Bomas, indigenous and minority rights groups used Bomas to make their mark on the so-called Bomas Draft, some of which – notably rights to cultural heritage – later made their way into the new constitution passed in August 2010.

²² Justice Keiwua was one of several judges suspended in 2003 for alleged corruption. He returned to the judiciary after successfully challenging the suspension – 'Ringera-list judges make comeback', *Daily Nation*, Nairobi, 24 April 2010. I was in email communication with him in 2011 about plans for a suit; since his death I have been in contact with Maasai activists concerning the status of these plans, which appear to be currently stalled.

²³ The Forum was created to spearhead the claims by: 1. Engaging in local policy formulation processes; 2. Carrying out research and disseminating findings to the Maasai; and 3. Seeking consensus from all Maasai clans in Kenya on how to engage the government in issues related to reparations, compensation and restitution. Information supplied by Ben Koissaba.

²⁴ For example, a woman named Timpiyan Karani, speaking through an interpreter, told a public hearing at Magadi in 2002, 'the current Constitution when it was made, it looks [like] Maasai were not there . . . they never signed for it . . . She has much pleasure that we have personally come up to this level so that this Katiba [constitution] is our Katiba.' 'Constitution of Kenya Review Commission (CKRC). Verbatim Report of Constituency Public Hearings, Kajiado North Constituency, at Magadi Cinema Hall, Wednesday July 15, 2002', p.62. www.constitutionnet.org/files/KEREO2-295

However, many Maasai were among the 57 percent of Kenyans who had previously voted 'no' in the 2005 referendum on the Wako Draft, which was rejected. The Wako Draft (named after the then Attorney-General Amos Wako, and favoured by the then government) would have brought beneficial changes for pastoral communities, such as the creation of a national land commission which is only now becoming a reality. Indigenous voters rejected it partly because they felt it had departed too much from the earlier Bomas Draft, which contained their inputs. People feared that protected areas and communal lands would be converted into public land and transferred to central government control. Male traditionalists opposed plans to outlaw gender discrimination in inheritance. Not for the first time there was a very public split in Maasai ranks, with each side accusing the other of not being representative and of betraying the community. Indigenous involvement in the 2005 'no' campaign emboldened and empowered Maasai and other minorities who relished the new-found politics of recognition (e.g. Hodgson 2009; 2011; Igoe 2006; Taylor 1992). In the run-up to the 2010 constitutional referendum, however, Maasai threw their weight behind the 'yes' campaign. Reasons for the turnaround include the fact that the proposed constitution would return ownership and control of trust land (previously vested in county councils) to communities.

The new constitution

The now ratified constitution allows citizens to seek redress for historical injustices including colonial-era land alienation (Ghai and Ghai 2010: 15; Ghai and Ghai 2011: 78). The devolution of power and resources to new county governments appeals to minorities who have long called for *majimbo* (regionalism), although this is not actually what is being proposed. Devolution has been hailed by the NGO the Pastoralists Development Network of Kenya, whose national director is Maasai (research contact Michael Tiampati), as 'being of immense relevance to minorities and marginalized communities' because it promises to protect and promote the rights of minorities and marginalized communities (Chapter 11, Article 174 (e), and 'recognizes the rights of communities to manage their own affairs and to further their development. For the wellbeing of the target communities, it is prudent for pastoralists to consolidate their voice and develop strategies through which these opportunities shall be effectively harnessed ...'.²⁵

But since the election of Uhuru and Ruto some Maasai (and many civil society groups from across the ethnic spectrum) are voicing caution. In a recent article for the US-based indigenous rights' NGO Cultural Survival, exiled activist Ben Koissaba (who has been among those leading the campaign for restitution of alienated lands and other historical injustices) writes: 'Indigenous people in Kenya were the strongest proponents for the new constitution which gave a window of hope for an opportunity for their rights to be addressed. The dilemma now is how will Kenyatta address the interest of Indigenous people, if Uhuru and his family are accused of infringing the rights of many communities in Kenya? It is common knowledge that Uhuru has been against Western democratic forces who insisted that human rights must be respected and by virtue of

²⁵ Online at www.pdnkenya.org. The Network is also on Facebook.

being accused of crimes against humanity following the [2008] post-election violence his integrity is tainted.’²⁶

Chapter 5 of the new constitution is devoted to Land and Environment. To summarise some key points, it allows for equitable access to land; secures land rights; eliminates gender discrimination with regard to land; enshrines a new national land policy; establishes a National Land Commission which is mandated to investigate land injustices and recommend appropriate redress; and states that ‘all land in Kenya belongs to the people of Kenya collectively as a nation, *as communities* and as individuals’ (2010: 65, my emphasis). With regard to communal land, it states: ‘Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest’ (2010: 67). That is a major shift. All land in Kenya is redefined as falling into one of three categories: public, community and private. Community land is a new category, much of it land that was previously termed ‘trust land’ and held by local authorities (now county governments). As eminent constitutional lawyers Yash Pal Ghai and Jill Cottrell Ghai have explained, the concept of trust land is a colonial hand-me-down, which referred to land that was still governed by customary law. It was held by local authorities, ostensibly for the benefit of the people who lived on that land, but the system was open to abuse – which included group ranch land illegally disposed of by ranch members without consulting others. ‘The objective of the Constitution is to return ownership and control of this land to the relevant communities’ (Ghai and Ghai 2011: 77).

What is less clear is how much community land still remains since wholesale privatization. My informants say it is not easy to ascertain this since most former communal land has been subdivided or grabbed in the case of former holding grounds for livestock in Kajiado and Narok Districts; the Kitengela Sheep and Goats Scheme, the Veterinary Farm at Ngong and certain group ranches are among the few remaining pieces of land that are communally held.²⁷ It is also unclear whether, since land may be regarded as part of cultural heritage, whether claims for compensation ‘for the use of [community] cultures and cultural heritage’ (Chapter 2, Article 11) could succeed with regard to protected areas on former Maasai land. There will be some interesting test cases in the coming years. Activist Ben Koissaba comments: ‘The hope of the Maasai in Kajiado, Laikipia, Samburu and Narok is on the emergence of vibrant youth who are using the social media to mobilize communities around issues that relate to land. Currently the Narok Youth Forum is agitating against the settlement of 8,000 IDPs [internally displaced persons from the 2008 post-election violence] in Mau, while the

²⁶ Ben Rapaine Ole Koissaba, ‘Kenya’s Election: Gains or Losses for Indigenous Peoples?’ 15 March 2013, online at Cultural Survival: <http://www.culturalsurvival.org/news/kenyas-election-gains-or-losses-indigenous-peoples> Koissaba is referring to the imminent appearance of Uhuru and Ruto at the International Criminal Court in The Hague, where they stand accused of crimes against humanity allegedly perpetrated after the 2007 elections.

²⁷ Holding grounds are lands that were set aside for livestock under a Livestock Marketing Project funded by the World Bank. The Veterinary Farm at Ngong, threatened with privatization, was established in the 1960s to provide veterinary services and improved stock breeds to the Maasai. Information supplied by Ben Koissaba, personal communication April 2013.

Kajiado Youth Congress has filed a case against the privatization of the former Veterinary Farm in Ngong.²⁸

To conclude

Before colonial intervention and the gradual process of individualization of land tenure begun under the British and deepened since independence, the Maasai traditionally saw land 'as a communal *territory* containing resources rather than as a *resource* which could be appropriated by individuals. The use of the territory was governed by social and political conventions designed to reduce the risks associated with the unpredictable climate of the semi-arid environment' (Campbell 1993: 258, his emphasis). Those conventions and social norms have by and large broken down, and much former common land has been swallowed up by individual private holdings. This trend, combined with extreme climate change and loss of mobility, has led to a crisis in pastoral production and livelihoods, and ultimately in Maasai society more broadly. But, contrary to what many Maasai allege when blaming outside forces for their current woes, it must be remembered that both internal and external forces have contributed to the socio-economic and environmental challenges faced by this community today. Galaty and Munei (1998), for example, have pointed the finger at 'the Maasai leadership – local and national – [which] is seriously compromised by its conflict of interest over the land question since it is most likely to benefit from land alienation and sale', indulging in greedy behaviour which has left poorer Maasai destitute. Mwangi (2007b) describes the 'elite capture' that characterises land allocation, which mirrors the colonial-era allocation to rich and influential European settlers. On the plus side, Maasai have been hugely successful in terms of international indigenous rights' advocacy, compared to many other minority groups in the region and across Africa, and the new constitution offers them fresh juridical and advocacy opportunities.

The question now is: even if the Maasai were to succeed in their land claim, what land could be returned to them? There is no such thing as empty land; all but the most arid areas have long been occupied and settled by other Kenyans. There can be no question of displacing them. And to whom would it be returned: only those who can prove they were victims of the early colonial land alienation, or everyone whose family has experienced land alienation over the years? The task would be nigh impossible. Would it be turned over to commons and equally shared out (highly unlikely), or go the way of all privatised land? This paper has described how many Maasai, while blaming others for stealing their land, are themselves guilty of selling it off and subdividing it into smaller and smaller plots that can neither sustain pastoralism nor commercial farming. Community lands have been progressively diminished by individualization (Galaty and Munei 1998). Many Maasai have turned to crop cultivation, wildlife tourism and other types of employment (including senior positions in government, business and the judiciary), but these non-pastoral sectors also tend to be dominated by elites, and there is a serious and growing gap between rich and poor within this community.

²⁸ Op. cit., personal communication.

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