

From Constitutional Law to Reality

A Field Study on the new Kenyan Constitution's Affects on
Land Conflicts



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Abstract

In this field study it is examined how the new Kenyan constitution, approved in 2010, has affected conflicts related to land. The study is based on a combination of quantitative data, conducted through standardized interviews with 90 people living in areas affected by land disputes, and qualitative data, gathered through deep-interviews with seven policy experts, all being differently involved in the constitutional reform work. The results show that people perceive that conflicts over land have decreased after the approval of the new constitution. Still, many frequently refer to continuous land problems that relate to title deed mismanagement, land transaction fraud and inheritance disputes. However, ethnic land conflicts, widely focused on in previous research, appear to be exceptions. The results are interpreted through implementation theory through which it is concluded that a legal framework now is in place, yet few institutional tools are available in order to use it, largely because of political reluctance.

Key words: Kenya, land, conflict, constitution, implementation

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1 Introduction

Land, being a fundamental resource in many aspects, such as for food production, is more than a source to life. It also can be the reason for conflict with deadly outcomes. As the consequences of climate change become more serious, and as world population grows, contests over land increase.¹ In Africa alone the population is projected to grow up to 400 percent in certain regions between 1990 and 2035.² At the same time about 60 percent of all arable land in the world is located in Africa. However, rather than being efficiently utilized, land is at the center of conflict in many civil wars in Africa, mainly as a result of lack of consensus regarding who owns the land.³

In Kenya land has been at the heart of politics since the beginning of the 19th century. In recent years land has been a reoccurring source of conflict in conjunction with political elections. The post-election violence that followed the 2007 disputed elections stands as a clear example, and confirmed the need for a new constitutional framework in order to address sensitive issues such as land ownership. In 2010, Kenyan voters overwhelmingly approved a new constitution, including a whole new chapter on land. For the first time in Kenyan history land disputes are to be resolved within a legal context. Aware of the fact that having laws is one thing, but putting them into practice is something completely different, every Kenyan now is asking: Is the new constitution really making a difference?

¹ Hermele, "Land Matters", 2012, p. 10.

² Population Action International, "Projected Population Change", 2011.

³ Berkeley & Lewat, "Land Rush: How do you feed the world?", 2012, min. 3:55-4:01.

1.1 Map of Kenya⁴



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⁴ Human Rights Watch, "High Stakes: Political Violence and the 2013 Elections in Kenya", 2013.

1.2 Purpose

The objective of this field study is to assess what the new constitution means in actuality for people who are involved in and affected by land conflicts. In other words, it is relevant to examine to what degree the constitution has become internalized in Kenyan society, that is, if it has become accepted as a means for fair and just resolution of land disputes. And more generally, if it in real practice is an important institutional tool in order to shape a stable and democratic Kenya. If a political goal is to strengthen democracy through institutional tools, such as constitutions, then we need to evaluate how efficient current institutional mechanisms are and also to identify explanations as to why this is so. Even though numerous Kenyan reforms await implementation, it is specifically important to protect constitutional rights that play key roles in Kenyan society. Land rights are one of them, not only because conflicts over land almost exclusively involve various human rights abuses, but also in view of the fact that land matters for most Kenyans and extends into so many different levels of society. Looking at how the Kenyan state handles conflicts over land, one can get indications of the quality of its judicial and political system.

In this study it is asked whether the intensity (which includes factors such as frequency and brutality) of land disputes have increased or decreased after the approval of the new constitution. It is also relevant to examine if the new constitution contributes to a transformation where specific sorts of land disputes decline or intensify. The correlation between land disputes and the effectiveness of the constitution is important to study in order to understand better the constitution's possibility to prevent and resolve land disputes, especially since the constitution specifically dedicates one chapter to land issues. It is important to make clear that it is not taken for granted that the constitution has resulted in any significant impact in terms of land management, however if the constitution has made any difference it is interesting to examine why.

A perspective of implementation provides useful analytical tools when seeking explanations to policy performance.⁵ Therefore a theoretical framework of implementation is applied in order to interpret the results of this study. It is also relevant to ask what the findings of the study can tell about constitutional implementation in Kenya and if any theoretical contribution can be made to the implementation discourse. In Kenya, implementation constitutes a widely recognized instrument through which the constitution is to be put into practice, perhaps most proved through the establishment of the Commission for the Implementation of the Constitution (CIC).⁶ Therefore it is valuable to be critical and examine what is not explained through the theory, and how the constitution can be put into action by looking beyond strict models of implementation.

⁵ Hill & Hupe, "Implementing Public Policy", 2008, p. 3.

⁶ The Constitution of Kenya, 2010, p. 182.

1.3 Research Questions

The basic research question in this study is:

- How has the new Kenyan constitution affected conflicts related to land?

Based on the basic research question focal points of the study are illustrated through two sub questions:

- What importance does ethnic violence play in Kenyan land conflicts today, compared to before 2010?
- How can policy performance in Kenya be understood through implementation theory?

1.4 Background

Background information is provided below in order to help readers to understand better the results presented in this study. The importance of land is underlined through some key historic processes and events that help to identify explanations to current land conflicts. Eventually, major features of the new constitution are described.

1.4.1 The Importance of Land

Using an economic perspective, the importance of land derives from the scarcity of fertile soil in Kenya. Only one-third of the country is arable.⁷ This may serve as one explanation to why conflicts arise in certain regions. The disastrous drought that swept over the Horn of Africa in 2011 resulted in mass famine as a direct consequence of inadequate harvests. In fact, some scholars point to drought as a reason for the increases in demand for farmland.⁸

However, land in Kenya is seen as much more than a pure economic asset. Often overlooked, the traditional and emotional meaning of land should not be underestimated. The soil is regarded as the mother of every human being.

⁷ Oucho, "Undercurrents of Post-Election Violence in Kenya: Issues in the Long-Term Agenda", 2008, p. 1.

⁸ Boone, "Land Conflict and Distributive Politics in Kenya", 2012, p. 86.

Kenya's first president Jomo Kenyatta stressed the importance of land for the members of his ethnic community in his first book,

*There is a great desire in the heart of every Kikuyu man to own a piece of land on which he can build his home.*⁹

The meaning of land can be illustrated by looking at how land transactions used to be surrounded by unwritten laws in the beginning of the 19th century. If interested in buying a specific piece of land, one did not just ask the owner to consider selling it. The query was carried out with deepest respect, with the potential buyer bringing beer to the home of the owner as a confirmation of his desire to buy a certain land plot.¹⁰ Even though traditions varied among different communities and times, land still has an emotional attachment in the minds of most Kenyans. As expressed by Adam Chivumba, living in a rural village by the Kenyan coast, when asked about the risk of losing his land,

*If it happens it's like taking my life.*¹¹

1.4.2 A Glimpse at History

The British colonial administration, beginning in the late 18th century, early understood the importance of land and efficiently used it as tool to divide and rule. Part of the explanation to contemporary land conflicts lies in the fact that the United Kingdom dispossessed Kenyans of land and made them tenants of the British state. During colonialism, all land in Kenya belonged to the British crown, and black Kenyans were forced to live in fenced settlement schemes. Uprisings in the 1950's, under the slogan "land and freedom," consisted of the Mau Mau Rebellion against the colonialists, and eventually led to independence. A main issue in the anti-colonial struggle was the Kikuyu's demands for the right to own land in the Central Province of Kenya.¹²

Upon independence in 1963, Kenya's first president, Jomo Kenyatta, was given a mandate to transfer land back to black Kenyans. During what came to be known as the Million Acre Scheme, Kenyatta gave back large areas of land to a carefully selected group of companies and individuals loyal to his Kikuyu-dominated government, while members of other communities, such as the Massai, Kalenjin and Mijikenda, were more or less ignored.¹³ Kenyatta also seized large areas of land for himself, his immediate family and political allies, with the Coast and Rift

⁹ Kenyatta, "Facing Mount Kenya", 1938, p. 55.

¹⁰ *Ibid.*, p. 38.

¹¹ Interview with Adam Chivumba, Coast Province, January 23, 2013.

¹² Boone, "Land Conflict and Distributive Politics in Kenya", 2012, p. 79.

¹³ *Ibid.*, p. 82.

Valley being two of the most desirable provinces. Otsieno Namwaya, researcher at Human Rights Watch, points out that a substantial portion of all fertile land in the Central Province was occupied by white settlers before independence, and shared among five families after independence, one of which was the Kenyatta. Numerous squatters in Central, predominantly Kikuyus, expected to resettle in their ancestral lands upon independence, but because individuals such as Kenyatta grabbed a lot of these lands, those expectations were never fulfilled. Consequently, one big problem remained for Kenyatta: Where to resettle the squatters. In order to solve this problem, Kenyatta turned to the Rift Valley Province, where a lot of land appeared to be uninhabited because of the nomadic lifestyle of the Kalenjin community. Despite the Kalenjin's communal land rights in the Rift Valley, Kenyatta picked some areas where the Kikuyu squatters were resettled. However, far from all Kikuyus were given land by Kenyatta.¹⁴ With reference to contemporary land disputes, Otsieno Namwaya adds,

*But how do you convince the Kalenjins that there are other Kikuyus who just bought land? They know! But you see, the moment there is this problem, when war starts, every Kikuyu gets guilty.*¹⁵

After Jomo Kenyatta's death in 1978, Daniel Arap Moi took over the presidency. Moi inherited his predecessors' habits. In the mid-1980s large areas of land, such as forest reserves, were cleared to resettle his Kalenjin community.¹⁶ Not much later brutal violence shook the country in conjunction with Kenya's first multiparty elections of 1992. In the Rift Valley local leaders, sponsored by high-level politicians, supported Kalenjin gangs in carrying out large-scale evictions and killings. A significant number of the victims were settlers who had benefited from Kenyatta's land programs.¹⁷ Investigations revealed that the Moi government was responsible for provoking the violence, resulting in 1,500 killings and hundreds of thousands displacements. Human Rights Watch concluded,

*If action is not swiftly taken, there is a real danger that Kenya could descend into civil war.*¹⁸

During elections in 1997, violence erupted in the Coast Province, remarkably similar to the conflicts in Rift Valley five years earlier. The violence of 1997 was explained as being directed against people from "up-country," a popular term referring to Kenyans from the Central parts of the country. Politicians in the

¹⁴ Interview with Otsieno Namwaya, Nairobi, January 29, 2013.

¹⁵ *Ibid.*

¹⁶ Boone, "Land Conflict and Distributive Politics in Kenya", 2012, p. 82.

¹⁷ *Ibid.*, p. 87.

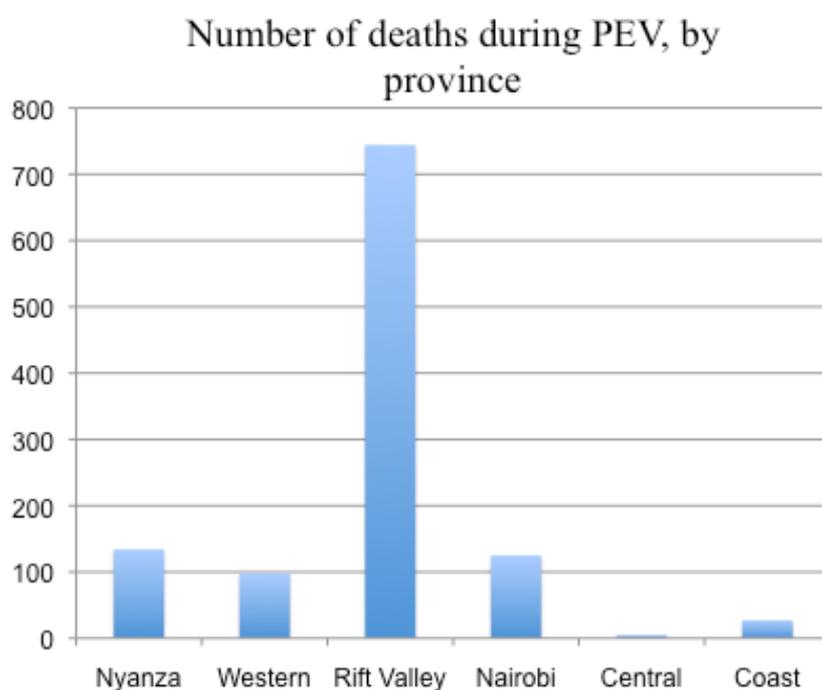
¹⁸ Human Rights Watch, "Divide and Rule: State-Sponsored Ethnic Violence in Kenya", 1993, p. 1.

ruling KANU party, aiming to reduce the voting power of the opposition, were blamed for triggering the conflicts.¹⁹ Kenya had approximately 350,000 internally displaced persons when Moi and his government stepped down in 2002.²⁰

1.4.3 Recent and Current Land Conflicts

The post-election violence that shook Kenya after disputed elections in 2007 confirmed that issues over land ownership are far from resolved. At least 1,133 people were killed and a minimum of 663,921 people were displaced and left homeless during the end of 2007 and the beginning of 2008.²¹ In the Waki Report, the Rift Valley was singled out as being the worst hit province.²²

Chart 1 ²³



Interestingly, British historian David Anderson commented that there was no coincidence that a majority of the clashes in Rift Valley occurred in areas where former politicians Jomo Kenyatta and Daniel Arap Moi had distributed land to members of their own communities.²⁴ Confirmed by several other observers,

¹⁹ Harneit-Sievers & Mghanga, "Usipoziba Ufa Utajenga Ukuta: Land, Elections, and Conflicts in Kenya's Coast Province", 2010, p. VI.

²⁰ Boone, "Land Conflict and Distributive Politics in Kenya, 2012", p. 88

²¹ Human Rights Watch, "Turning Pebbles: Evading Accountability for Post-Election Violence in Kenya", 2011, p. 13.

²² The Commission of Inquiry on Post Election Violence, "Waki Report", 2008, p. 309.

²³ *Ibid.*

²⁴ Anderson & Lochery, "Violence and Exodus in Kenya's Rift Valley, 2008: Predictable and

unsolved issues over land ownership prompted a significant part of the violence. The Humanitarian Policy Group described the post-election displacement in Kenya as a “*recurring trend linked to land grievances*”.²⁵

One of the victims of the violence was Peter Kuria, a farmer living in Muchorwe, a rural village in the Rift Valley’s Molo District. Peter was woken up in the night by a strange noise. When he went out to see what was going on he instantly realized that armed men surrounded his compound.²⁶ Referring to the ancestral lands of Peter’s ethnic community, the attackers told him,

*Your next stop is Central and nothing else.*²⁷

But the attackers suddenly decided not to give Peter’s family a chance to leave. Screaming “*kazi iendelee*,” president Kibaki’s political slogan meaning “work must go on,” the attackers killed Peter’s wife, his father, two kids and his four brothers. In order to give proof of the killings for the people ordering them, the attackers cut off the hands of Peter’s brothers. An arrow hit Peter himself, luckily it wasn’t poisoned and Peter managed to hide in a ditch until the morning when he escaped to a refugee camp in Nakuru.²⁸

Inter-communal violence still is highly present in Kenya. The United Nations summarized the situation in 2012 in the map below.²⁹

Preventable?”, 2008, pp. 335-339.

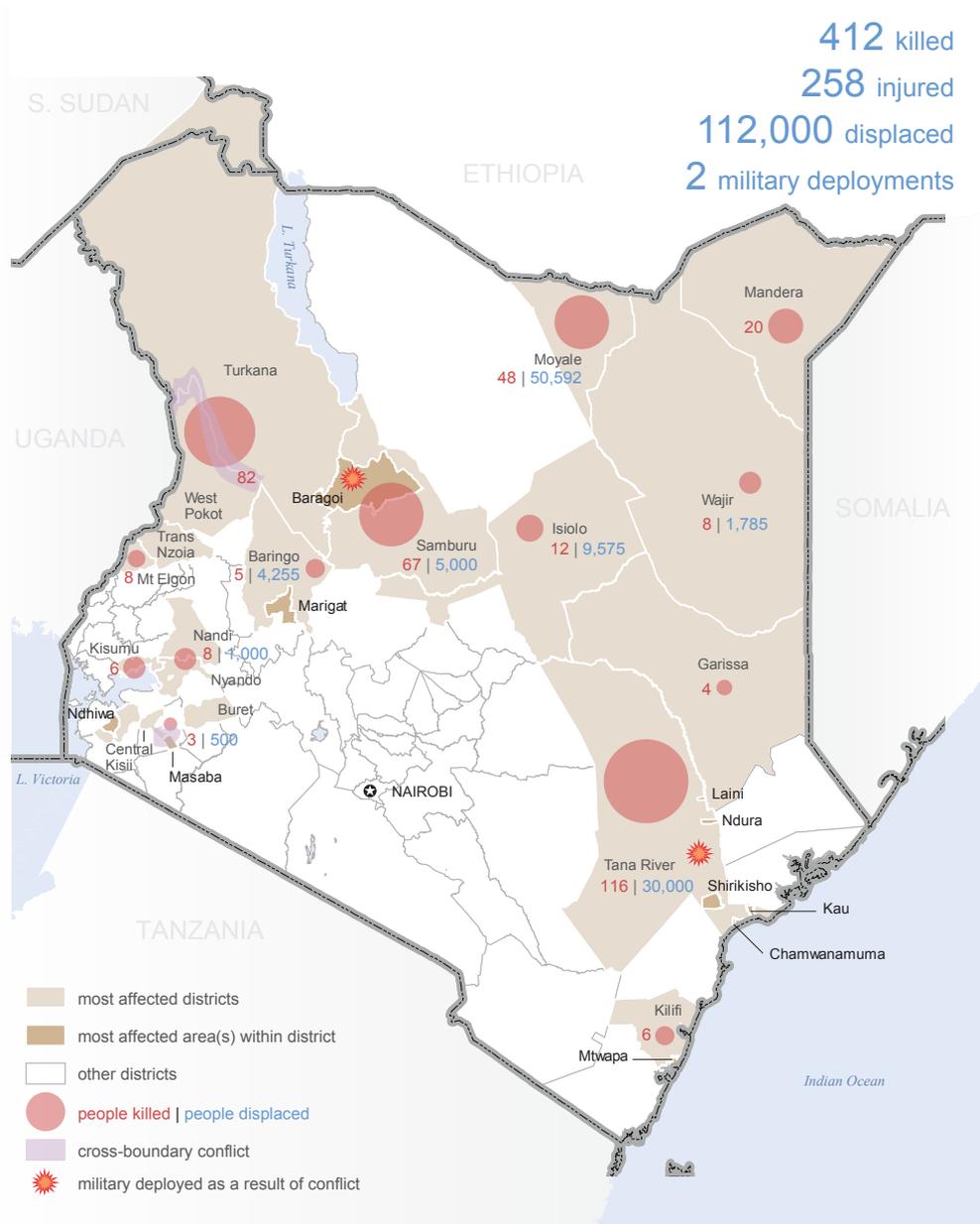
²⁵ Humanitarian Policy Group, “Crisis in Kenya: land, displacement and the search for ‘durable solutions’”, 2008, p. 1.

²⁶ Interview with Peter Kuria, Rift Valley Province, January 14, 2013.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Office for the Coordination of Humanitarian Affairs, “Kenya: 2012 Inter-communal conflict by district”, 2012.



The boundaries and names shown and the designations used on this map do not imply official endorsement or acceptance by the United Nations.
 Creation date: 21 November 2012 Sources: Media reports and humanitarian partners Feedback: ochakenya@un.org www.unocha.org www.reliefweb.int

Several of the conflicts highlighted by the UN are direct consequences of land grievances. For instance, clashes between cattle keepers and crop farmers in the Tana River Delta were a serious concern in late 2012, and analysts repetitively refer to land problems as a key source of the Tana violence.³⁰ The political struggle of the separatist group Mombasa Republican Council (MRC) is mainly rooted in land ownership grievance along the Kenyan coast. Yet, land conflicts in

³⁰ Warah, "There must be more to the killings in Tana Delta than meets the eye", January 21, 2013.

different parts of the country vary in nature.³¹ For instance, while many conflicts in the Rift Valley are results of historical injustices, the violence in the Tana River Delta is closely interlinked to resource scarcity, such as access to land and water. The major sorts of land conflicts can be categorized as:³²

- **Ethnic conflicts**, resulting from historical injustices and political manipulation.
- **Resource conflicts**, becoming increasingly problematic due to population growth, irregular rain seasons and discoveries of natural resources, such as oil.
- **Individual conflicts**, personal disputes including fraud and inheritance issues within families, compounded by record mismanagement, such as the absence of reliable title deeds.
- **Land Grabbing**, often a core element in all conflicts identified above. Undertaken by politically powerful, individual and commercial interests, and often result in evictions.

Different conflicts related to land are deeply intertwined and few can be put in one of these categories. Still, a division is necessary in order to get an overview of the key elements behind land conflicts in Kenya, especially when seeking solutions. Using a more general perspective, it is clear that access to land is a redistributive game, creating winners and losers, as expressed by Catherine Boone.³³ British journalist Michaela Wrong states that the violence following the 2007 elections never would have occurred if all Kenyan's believed they had equal access to the resources of the state.³⁴ Instead, land in Kenya is used as a mean to gain and retain political power,³⁵ which is part of the explanation behind current allegations of the ICC against high level politicians, including Uhuru Kenyatta, accused of inciting evictions in the Rift Valley during the 2007-2008 post election violence.³⁶ It is also demonstrated through the state's unfair allocations of land. One example is the government's favoring of certain ethnic communities in resettlements of IDPs, widely recognized during the presidential campaigns prior to the 2013 elections.³⁷

³¹ Dabbs, "Secessionist winds blow on Kenya's coast", August 30, 2012.

³² For a different and more detailed categorization, see Wehrmann, "Land Conflicts: A practical guide to dealing with land disputes", 2008, pp. 9-10.

³³ Boone, "Land Conflict and Distributive Politics in Kenya", 2012, p. 76.

³⁴ Wrong, "It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower", 2009, p. 307.

³⁵ Boone, "Land Conflict and Distributive Politics in Kenya", 2012, p. 77.

³⁶ Smith, "Kenya's deputy prime minister faces trial at international criminal court", January 23, 2012.

³⁷ Human Rights Watch, "Kenya: Discrimination Against Rift Valley Displaced", 2013.

1.4.4 The Constitution

The process of creating a new Kenyan constitution began in 2002. However, it was not until the end of the post-election violence in 2008 that the new constitution was considered a top-priority matter in Kenyan politics.³⁸ A draft constitution was rejected in a 2005 referendum, and President Kibaki then appointed a Committee of Eminent Persons to advise him on how to proceed next. Its recommendation was to create a Committee of Experts with responsibility to develop a new draft. Patricia Kamari-Mbote was one of the members of the Committee of Eminent Persons and a drafter of the National Land Policy, a document released in 2009, and excerpts from it were incorporated into the constitution.³⁹ Mbote testifies of a highly contested process characterized by political reluctance:

*There was a group that was very opposed to the land chapter. Some of the proposals that had been made in earlier constitution drafts were dropped during the discussions. Especially if we look at different drafts, for instance what was the National Land Commission to do, you would see that article 67 of the constitution left out some crucial elements.*⁴⁰

Even though the land chapter became the focus of no-campaigners, Kenyans overwhelmingly approved a new constitutional draft in a 2010 referendum. After years of struggle to replace the constitution of 1969, Kenyans were in euphoria, and the international community praised their approval. Turkey's envoy, Tuncer Kayala, commented:

*We congratulate Kenya and pledge support for the implementation of the new constitution through bilateral assistance. Kenya has set a good example for many African countries.*⁴¹

The new constitution adds checks and balances on the centers of power, for instance by reducing the president's powers, devolving power to regions, and including a bill of citizens' rights. Chapter Five, which deals with land and the environment, includes division and definition of public, private and community land. It also regulates how to solve current and past land ownership disputes through the establishment of a National Land Commission. In addition, women are allowed to inherit land for the first time in Kenyan history. Though, the constitution is only a set of general laws, therefore a core part of the implementation is about the adoption of more specific legislation.⁴² The Land Act, Land Registration Act and the National Land Commission Act, passed in early 2012, are the first land reforms to be adopted as mandated by the

³⁸ Wahman, "Kenyas ödesval", July 30, 2010.

³⁹ Interview with Patricia Kamari-Mbote, Nairobi, December 17, 2012.

⁴⁰ *Ibid.*

⁴¹ Okwembah, "The 20-year push by diplomats", August 7, 2010.

⁴² The Constitution of Kenya, 2010, p. 42.

constitution. Some observers regard these laws as a milestone in the implementation of the constitution.⁴³ At same time the delay in the establishment of a National Land Commission, which is regarded as a core institution in order to address land issues, is creating concerns about slow practical implementation.⁴⁴ Others point out that the most crucial land law, the Community Land Act, is yet to be put into force.⁴⁵

1.4.5 Previous Research

A number of reports and scholarly articles were written after the post-election violence in 2008. Looking at general factors as explanations for the violence, few examined the role of land in more detail. Even fewer studies have been made on the relationship between what is written in the new constitution and the reality on the ground. However, Catherine Boone⁴⁶ and Ambreena Manji⁴⁷ in two different research articles express doubts as to how the constitutional reforms will affect the ways land is being used. Clearly, the discourse on the constitution's ability to promote change consists of various opinions, ranging from limitless optimism to significant skepticism, as represented by Manji and Boone. Few, however, have examined the issue in field. The objective of this field study is to fill that academic gap.

⁴³ Manji, "The Politics of Land Reform in Kenya 2012", 2013, p. 4.

⁴⁴ Wanambisi, "Kenya: Kibaki Petitioned to Appoint National Land Commissioners", December 9, 2012.

⁴⁵ Interview with Benson Ochieng, Nairobi, December 20, 2012.

⁴⁶ Boone, "Land Conflict and Distributive Politics in Kenya", 2012.

⁴⁷ Manji, "The Politics of Land Reform in Kenya 2012", 2013.

2 Implementation Theory

Implementation theory is used as a framework in order to interpret the results of this study. Some key concepts of the theory are defined in this chapter, first by presenting general discussions characterizing the discourse, then by looking more specifically at parts of the theory applied in this study.

2.1 A Struggle for Coherence

If asking a person working with societal change about solutions to problems, the answer is often unambiguous: implementation, implementation and more implementation. But what is implementation? Many would say it is to fulfill, produce, complete and to carry out.⁴⁸ Being a sub discipline of governance studies, implementation can be defined as the process of turning policy into practice.⁴⁹ As an object for implementation, a policy includes certain prescriptions on how to address matters of various kinds. It is not crystal clear where a line should be drawn in order to distinguish between policy and implementation, especially since a policy can contain both goals and means of achieving them.⁵⁰ There are, however, some useful approaches. One is to look at the concepts from actor perspectives. Political scientists Peter Hupe and Michael Hill pose three key questions of definition: Who is the formulator, who is the decision maker and who is the implementer?⁵¹ Seeking answers to these questions may clarify concept definitions; at the same time the complexity of the discipline becomes clear as the answers easily overlap each other. The scholar Kent Buse and his colleagues oppose the idea that the process of implementation can be seen as a divided process between policy makers on the one hand, and administrators at lower level implementing the decisions, on the other hand. Implementation is a highly interactive and complex phenomenon including various actors influencing the process in terms of executing given policies and directing the way of implementation, according to Buse.⁵² One person actually may hold each of the positions identified by Hill and Hupe and formulation and decision-making can take place at different levels of society.

⁴⁸ Hill & Hupe, "Implementing Public Policy", 2008, p. 3.

⁴⁹ Buse et al., "Making Health Policy, 2012", p. 128.

⁵⁰ Hill & Hupe, "Implementing Public Policy", 2008, p. 3.

⁵¹ *Ibid.*, p. 4.

⁵² Buse et al., "Making Health Policy, 2012", p. 146.

Another relevant discussion has to do with the difference between evaluation and implementation analysis. Are they the same thing, as asked by Hill and Hupe? Even though the concepts overlap, evaluation provides descriptions of what happened, but excludes casual connections in order to explain certain developments. This is done through implementation analysis.⁵³ An even simpler way of looking at it is that, while implementation studies focus on ongoing processes, an evaluation is made when the process has ended. Critics point out that implementation theory is characterized by low degrees of coherence, which results in absence of cumulative effect from previous research.⁵⁴ The current academic trend point in another direction however. Implementation has become an increasingly studied practice among scholars in recent years. The combination of implementation as an accepted theory, and its novel academic standpoints, is a good motivation to use it in scholarship today.

2.2 Implementation in this Study

It is particularly important to emphasize how implementation theory is applicable in this study. In actuality, a constitution is only a set of formal laws. Its power depends on its acceptance among individuals.⁵⁵ Whether looking at farmers or key decision makers such as government officials, unwillingness to accept the laws of the constitution results in an unlikely implementation process. In other words: the constitution becomes meaningless. The main argument for using theory of implementation in order to examine how the constitution has affected conflicts related to land is that implementation research makes it possible to measure policy performance.⁵⁶

Even though the new Kenyan constitution was approved as recently as 2010, it is valuable to investigate whether the constitutional policies have resulted in any change in the past years. Some scholars state that full implementation of the constitution will take several years, which is certainly true and would be an argument for conducting a study of this kind at a later stage.⁵⁷ However, fears about the slowness of implementation serve as an even greater reason to examine how and why the constitutional implementation is progressing, even in its early stages.

Experts, such as the scholar John Oucho, states that even though Kenya has set up numerous commissions on everything that ails the country, one has failed to implement their recommendations. Oucho claims that this compounds rather than

⁵³ Hill & Hupe, "Implementing Public Policy", 2008, p. 11.

⁵⁴ *Ibid.*, p. 12.

⁵⁵ Hollis, "The Philosophy of the Social Science", 1994, p. 110.

⁵⁶ Hjern & Hull, "Implementation Research as Emperical Constitutionalism", 1982, p. 108.

⁵⁷ Rice, "Kenyan constitution signed into law: Tens of thousands join a host of African leaders to celebrate 'birth of the second republic', August 27, 2010.

resolves the problems that the commissions have been set up to investigate.⁵⁸ The Independent Review Commission (IREC), also known as the Kriegler Commission, was established in order to investigate all aspects of electoral rigging after the 2007 General elections. Danish political scientist Jørgen Elklit was the Secretary of IREC and testifies,

*We came up with various recommendations, some of which have been incorporated into the new constitution. But others certainly have not been followed. I wrote a couple of times to the Committee of Experts on Constitutional Review to share our concerns, but they did not listen.*⁵⁹

Implementation theory is based on a number of terms, three of which will be discussed here. The first two, the bottom-up and top-down approaches perhaps are the best-known concepts when talking about implementation theory. The bottom-up perspective explains how local-level actors influence the implementation process, whereas the top-down approach focuses on higher level of influence represented by actors like single decision makers or institutions such as national governments.⁶⁰ This study is based on quantitative interviews with people at the local-level and qualitative interviews with policy experts. Since the interviewees represent a diverse range of people involved in the implementation of the constitution, both perspectives of bottom-up and top-down contribute to a nuanced visualization of the matter. It is important to bear in mind that these theoretical approaches have come to characterize the whole idea of what implementation research is all about. However useful top-down and bottom-up perspectives may be, they are not necessarily adequate for providing an entire explanation, especially when recalling Buse's discussion of implementation as an interactive process including different actors with blurred and overlapping roles.⁶¹

A third key concept in implementation analysis that is relevant for this study is what is known as the implementation gap, which refers to the difference between what policies say and how they are practiced.⁶² Possibly there exist few relations between policies and practices that do not have implementation gaps. The larger the size of the gap, the lesser the presence of implementation is. Yet, it is natural that the implementation gap is large after less than three years with a new constitution. The question is: How fast is it shrinking? The longer the chain of causality, the more complex the implementation becomes, scholars state.⁶³ Unsuccessful implementation therefore could be the result of complex societal functions where perceptions and responsibilities lack coherence. Considering the complexity of Kenyan society, one hypothesis would be that implementing the new constitution is a true challenge.

⁵⁸ Oucho, "Undercurrents of Post-Election Violence in Kenya: Issues in the Long-Term Agenda", 2008, p. 1.

⁵⁹ E-mail correspondence with Jørgen Elklit, December 17, 2012.

⁶⁰ Buse et al., "Making Health Policy, 2012", pp. 131-137.

⁶¹ *Ibid.*, p. 146.

⁶² *Ibid.*, p. 129.

⁶³ Hill & Hupe, "Implementing Public Policy", 2008, p. 7.

Moreover, an implementation model offers a formal bureaucratic viewpoint, leaving little attention to more informal political structures, such as clientelism.⁶⁴ The empirical reality is, of course, much more complex, especially in Kenya where land traditionally has been managed outside a legal context. Therefore a great part of implementing the new constitution is about leaving traditional structures behind in order to leave room for formal institutionalization. In this sense, implementation theory can be regarded as a highly normative model of what the relationship between political decision-making and bureaucratic administration should look like, which contrasts a lot of previous research that has focused on informal structures, such as the importance of ethnicity, in order to understand how land is managed in Kenya.

⁶⁴ *Ibid.*, p. 150.

3 Methodology

In this chapter the bases of study are provided. The fieldwork is presented and focus is put on the sampling process, then analysis methods are gone through, although very brief. Finally, some key terms are operationalized.

3.1 About the Study

This study is based on a combination of quantitative and qualitative interviews. Totally 97 people were interviewed in 41 villages and estates, during December 2012 and January 2013. Thus, the major focus of this study is the empirical research, the case itself, rather than the use of theory.⁶⁵ The interviewees were categorized into two subgroups, consisting of 90 respondents on grassroots level, and seven informants on policy level.⁶⁶ The study is descriptive in trying to answer how the constitution has affected conflicts related to land, and explanatory when it comes to presenting reasons to why the constitution's impact functions the way it does.⁶⁷ While data gathered through quantitative interviews provide descriptive information from a street-level perspective, results from the deep interviews, made with policy experts, are used to strengthen the explanatory power of the study. In other words, the in-depth interviews are used as a follow up in order explain the results generated from the quantitative data. In addition, testimonies from policy experts provide valuable information with respect to the top-down approach in implementation theory. A strong methodological argument for combining standardized and deep interviews is based on the fact that standardized interviews tend to promote reliability, while deep interviews secure validity to a larger extent.⁶⁸ The interviews were conducted in English, Kiswahili and other local languages through the assistance of interpreters.

⁶⁵ Esaiasson et al., "Metodpraktikan", 2007, p. 42.

⁶⁶ *Ibid.*, pp. 257-258.

⁶⁷ Svensson & Teorell, "Att fråga och att svara", 2007, p. 22.

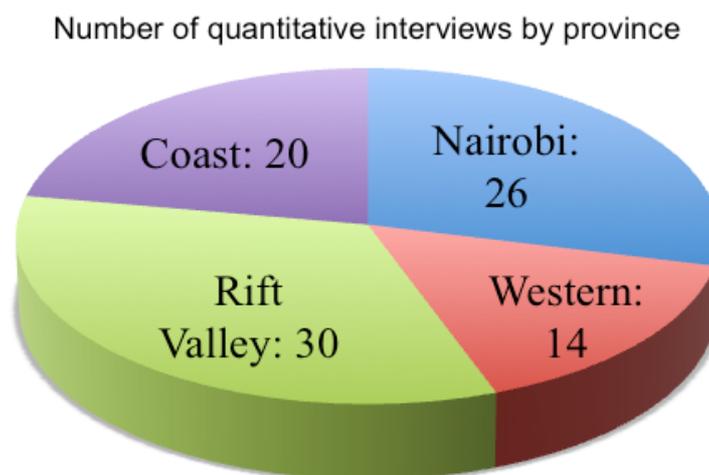
⁶⁸ *Ibid.*, p. 268 & 270.

3.2 Case Selection

Kenya serves as role model in a region characterized by political instability. South Sudan is developing its institutions and has chosen Kenya as its model of democracy, and Zimbabwe used Kenya as a model in the creation of a power-sharing government in 2008.⁶⁹ Thus, studying the implementation of constitutional reforms in Kenya is of regional interest since the country is regarded as being in the forefront of democracy and governance in Africa. Yet, due to various unique functions of Kenyan society, such as the key role of ethnicity and the complexity of how land is used and perceived, the results of this study should be restrictively applied to cases in other countries.

Naturally, the most detailed information relevant for this study is found in locations where land dispute problems have been extensive. In addition, the chance of obtaining first-hand information is high in locations plagued by recent conflicts over land.⁷⁰ For this reason a majority of the respondent interviews were conducted in towns and villages where the impacts of land conflicts have been devastating. These locations were selected from reports that identified some of the most affected villages and estates of the post-election violence in 2008.⁷¹ 26 interviews were conducted in the slum areas of Nairobi, 20 in and around Mombasa and Kwale, 14 in Mount Elgon and 30 in and around Nakuru and Molo. These locations represent four provinces affected by different kinds of land conflicts and offer a variety in urban and rural settings. Except for Mount Elgon, these locations may be more affected by land conflicts that escalate in conjunction with political elections in comparison to other areas of the country.

Chart 2⁷²



⁶⁹ JWCEP EDR Training Concept Paper, 2013, p. 2.

⁷⁰ Esaiasson et al., "Metodpraktikan", 2007, p. 293.

⁷¹ The Commission of Inquiry on Post Election Violence, "Waki Report", 2008.

⁷² Quantitative data from standardized interviews available to download at:
https://dl.dropbox.com/u/6238341/Quantitative%20results%2C%20street-level_fulltext.xls

Given the conditions in these locations, a wide sample of different individuals was selected in order to be able to generalize the results onto a larger population. Despite the generalizing ambition the results must be interpreted with a critical eye and may not be representative for locations where interviews were not conducted. Additionally, due to the relatively small sample size the findings can give clear indications of how the constitutional implementation is progressing but should not be regarded as pure statistical results. The selection was made in accordance with methods of cluster sampling and simple random sampling.⁷³ In total 46 men and 43 women representing 14 different ethnic communities were interviewed, of which the most frequent were Kikuyu, Kalenjin, Luhya, Kamba and Mijikenda. With respect to the selection of policy experts, interviewees were people with different roles in the constitutional land reforms taking place. This selection provides nuance to overall explanations and corroboration of information that consists of similar testimonies from independent sources. These interviews were semi-structured and ranged from 40 minutes to one hour. The seven experts included: a drafter of the National Land Policy; a human rights expert; a researcher in the Committee of Experts on Constitutional Review; a judge of the Environment and Land Court; and constitutional land experts.

3.3 Analysis and Theoretical Application

The results are analyzed through the theory of implementation. First of all, whether the constitution has affected the probability of land ownership disputes at all will be made clear, mostly by examining results from the standardized interviews with respondents. Thereafter factors that have influenced the results from the standardized interviews will be discussed based on implementation theory and answers given in the in-depth interviews. This disposition is inspired by a methodological discussion in which it is proposed that it is of primary interest to clarify whether the independent variable (the constitution) has any effect on the dependent variable (land disputes). Identifying other factors that affect the dependent variable is of secondary importance.⁷⁴ Eventually, the core part of the analysis is to contrast the two perspectives of bottom-up and top-down, and to examine how the results from both groups of informants and respondents fit together. In this crucial part of the study the acclaimed combination of a large quantity of standardized interviews and fewer qualitative interviews becomes clear.⁷⁵

⁷³ Svensson & Teorell, "Att fråga och att svara", 2007, pp. 84-86.

⁷⁴ *Ibid.*, p. 207.

⁷⁵ *Ibid.*, p. 16, 89 & 236.

3.4 Operationalization

Operationalization often is defined as a process of making theoretical words and concepts measurable by identifying their indicators in empirical reality.⁷⁶ Some examples that can be regarded as indicators of successful implementation include awareness on local level of the content of the constitution, as well as establishment of executing institutions such as courts and commissions. Applying the theory of implementation, the impact of the constitution is examined through two different interview guides. The formulation of the questions in these guides is based on the idea to measure perceived as well as absolute impact of the constitution. For instance, people were asked directly about conflicts in their immediate surroundings, in addition more general questions, such as whether risks for conflicts have changed, provide answers that give an idea about overall perceptions. Other methods of conducting information could also be applied in a study of this kind, examination of court files and police reports being one example. However, interviews were chosen not only because they provide relatively accessible information, but especially because of the valuable contribution of first hand information. Political scientist Peter Esaiasson and colleagues confirm this in a discussion in which they advocate interviews with respondents who have strong experience of the subject being studied.⁷⁷

What kind of land conflicts is referred to in this study and what constitutes change generated by constitutional land reforms? With regard to the latter, positive change is obviously the desired outcome of implementation.⁷⁸ In terms of risks for land conflicts one aspect of change has to do with whether people experience that their safety have increased or decreased, for instance as a result of changed frequency of hostile rhetoric that can include threats about eviction. Disputes and conflicts referred to in this study occur when at least two parties claim to have the legal or ancestral right to the same land property,⁷⁹ and more significantly when actions generated from this result in property damages and personal injuries.

Two other concepts that need further explanation in this study are outlined below.

- **Ethnic community.** Plays a key role in Kenyan politics and in the Kenyan society as a whole.⁸⁰ If one should be restrictive with universalizing terms, as Iver Neumann indicates, ethnicity and community, is definitely a good example.⁸¹ Ethnicity is socially constructed, which makes it a problematic term to define. People often have several ethnic identities that varies between contexts as well as

⁷⁶ Beckman, "Grundbok i idéanalys", 2005, p. 24.

⁷⁷ Esaiasson et al., "Metodpraktikan", 2007, p. 293.

⁷⁸ Hill & Hupe, "Implementing Public Policy", 2008, p. 3.

⁷⁹ Wehrmann, "Land Conflicts: A practical guide to dealing with land disputes", 2008, p. 9.

⁸⁰ Wrong, "It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower", 2009, pp. 42-44.

⁸¹ Neumann, "Mening, materialitet och makt", 2003, p. 149.

individuals; as political scientist Daniel Posner puts it, “people are many things,” referring to aspects like language, citizenship and family.⁸² Kenya with its 42 different ethnic communities, excluding a number of sub-groups, constitutes a perfect example. Kenyans see themselves in multiple ways depending on which context they find themselves in.⁸³ Bearing these considerations in mind, ethnicity in this study refers to an ethnic community that is organized under a traditional chief, as suggested by Posner.⁸⁴ For instance, Kenya’s largest ethnic community, the Kikuyu, views itself as originating from a man called Gikuyu, known as the founder of the community.⁸⁵

- **Land.** Refers to a physical area defined as public, private or community land in accordance with the constitution of Kenya. This categorization is used, although with an awareness that the divisions are much more problematic in reality than in theory.⁸⁶

⁸² Posner, “Institutions and ethnic politics in Africa”, 2005, pp. 294-296.

⁸³ *Ibid.*, pp. 260-261.

⁸⁴ *Ibid.*, 2005, p. 1.

⁸⁵ Kenyatta, “Facing Mount Kenya”, 1938, pp. 3-4.

⁸⁶ *Ibid.*, p. 25.

4 Results

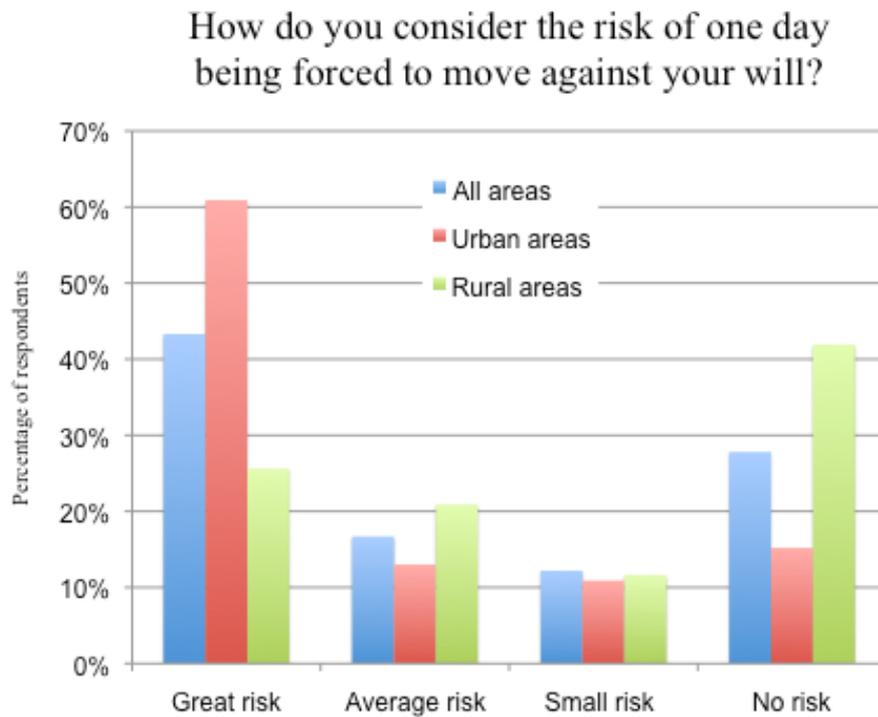
This chapter is the core part of the study. In two sub-chapters the findings conducted on street- and policy level are presented through quantitative data and specific examples in the form of quotations. Due to the small sample size the quantitative data does not represent definite local or regional conditions; it rather serves as an indication of where it is reasonable to believe that reality lies.

4.1 Data and Testimonies from Grassroots-level

Conflicts, particularly land conflicts, often result in internal migration and displacement.⁸⁷ Over 35 percent of the people who were interviewed had moved to the land where they live today in the late 2000s or even later. This may be one indicator that confirms the high presence of land conflicts in the locations where interviews were conducted. Another interesting result generated from background questions is that 77 of the respondents (85.6 percent) state that they live on privately owned land. In actuality, many people officially live on public land, especially in urban informal settlements such as Mukuru in Nairobi and Likoni in Mombasa. Therefore, it is remarkable that so many respondents recognize the land where they live as private. Possibly this is a consequence of extensive grabbing of public land, an almost institutionalized phenomenon that may have turned ownership perceptions upside down. A figure that does not surprise as much, but is important to emphasize, is that 77.8 percent of the respondents declare that it is important or very important that they can continue to live where they live now. The gravity of land security problems becomes clear when putting this information next to the fact that over 43 percent of the respondents proclaim that there is great risk of being forced to move against one's will, as illustrated in the chart below. If taking only the results gathered from urban areas into account, the figure rises to 60.9 percent.

⁸⁷ Humanitarian Policy Group, "Crisis in Kenya: land, displacement and the search for 'durable solutions'", 2008, p. 3.

Chart 3⁸⁸



When individuals are asked to mention some changes they have experienced after the approval of the new constitution, only 17 percent responds that there has been no change. In other words, the majority has seen change in at least one area, of which the most frequent are the judiciary (9.5 percent of the interviewees) and infrastructure (7.6 percent). Interviewees explain the changes in almost exclusively positive terms. Moreover, the changes vary in nature and intensity. Whereas infrastructure improvements, such as road construction and better access to water, have affected people directly, improvements within the judiciary are referred to in more abstract terms. Despite the fact that many people have experienced change, only five percent of the respondents intuitively mention changes related to land. If compared with other areas, one conclusion using this perspective is that land has not been affected much by the post-2010. At the same time, it is not obvious that the changes are outcomes of the new constitution; better infrastructure, for instance, could be the result of other factors such as increased foreign investment. Yet, because of the question, *Mention some changes you have experienced after the approval of the new constitution*, people responded with the constitution in mind. Therefore, other causations most probably are relatively low.

⁸⁸ Quantitative data from standardized interviews available to download at: https://dl.dropbox.com/u/6238341/Quantitative%20results%2C%20street-level_fulltext.xls

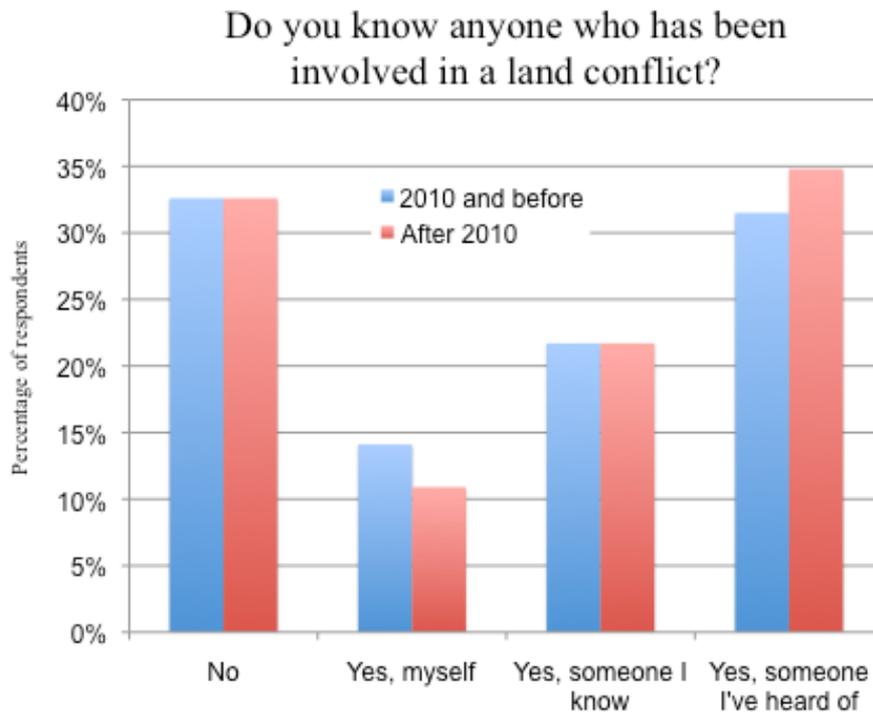
A crucial component in the implementation of the new constitution is that ordinary people are being informed of its content in order to be aware of their own rights. For this reason people were asked to give examples of areas where the constitution provides guidance. Only 13.6 percent of the respondents are not able to mention any issue included in the constitution. A significant number of people actually provides detailed examples of new laws in place, with a few highlighting specific paragraphs. However, people in rural areas tend to be less successful in providing examples of new constitutional laws. The most frequent areas referred to are devolution of power (9 percent of the respondents), land (13 percent), and women's role (15 percent). Several respondents link women's role to land by underlining that women now are allowed to inherit land.

An aspiration in this study is to measure both perceived change in risk for land conflicts and absolute changes in land conflict intensity. With regard to the latter, respondents were asked to provide examples of conflicts in their immediate surroundings before and after the new constitution was approved. A majority was able to give examples of conflicts, but few have been involved directly and refer to friends or conflicts they have heard of in more general terms. It is reasonable to believe that part of the explanation is that discussing conflicts related to land is an extremely sensitive subject of conversation, and people may hold back the most grievous information such as personal experiences. In some locations this was more evident than in others. Sirikwa, a rural village in the Rift Valley, was one of them. Even though the village has been subjected to brutal violence erupting because of land disputes, as documented in the Waki Report,⁸⁹ people interviewed in Sirikwa repeatedly denied any knowledge of land conflicts. The case of Sirikwa may be specifically problematic since gangs of the dominant Kalenjin community have been accused of inciting the killings of Kikuyus, and these accusations have created a perception of guilt projected against the entire local Kalenjin community. If innocent people are associated with crimes they have not committed, it is understandable that they fear further accusations and are reluctant to talk. At the same time, silence may be the clearest proof that tensions are still high and that conflict could break out again, which is important to bear in mind.

As indicated in the chart below, a surprising result is that respondents refer to similar amounts of land conflicts that have occurred in the two latest years as the entire period before 2010. This could mean that conflicts actually have increased in frequency after the constitution was approved. There are, however, explanations to why this most probable not is the case. Since few respondents refer to conflicts that they have been directly involved in, it is understandable that people talk more about recent conflicts than older conflicts. It is easier and feels more relevant to provide details from current conflicts, especially if you are not personally involved.

⁸⁹ The Commission of Inquiry on Post Election Violence, "Waki Report", 2008, p. 88.

Chart 4⁹⁰



Even more interesting is that a significant number of land conflicts appear to be small-scale disputes between individuals, something that contrasts with previous research, where conflicts of large magnitude, including hostile interactions between ethnic communities, are given most of the attention. Interviewees in this study, however, refer to conflicts caused by title deed mismanagement, disputes over inheritance within families, landlords evicting tenants because of selling land or planning new use of it, and fraud, often consisting of multiple buyers of the same property. These conflicts are often intertwined, as exemplified by Moses Budugu, living in an estate on the outskirts of Mombasa:

My family, we bought a piece of land. When my dad died it turned out that the land belonged to someone else. We left and another family moved in.⁹¹

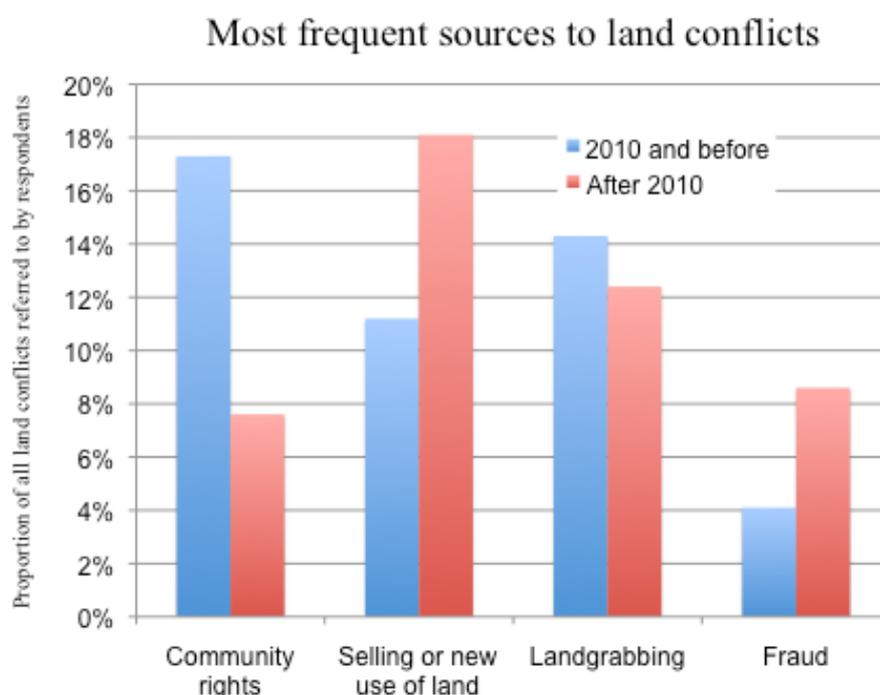
The most outstanding finding however shows that 17.3 percent of the respondents give examples of ethnic land conflicts that took place before 2010, whereas the same figure falls dramatically to 7.6 percent, when people are asked to provide examples of recent ethnic land conflicts occurring after 2010. It is natural and obvious that more land conflicts have taken place before 2010, simply because

⁹⁰ Quantitative data from standardized interviews available to download at: https://dl.dropbox.com/u/6238341/Quantitative%20results%2C%20street-level_fulltext.xls

⁹¹ Interview with Moses Budugu, Coast Province, January 22, 2013.

conflicts before 2010 may have occurred at any point in time during the entire contemporary history of Kenya. Nevertheless, it is not only the absolute amount of land conflicts that is of interest, but the overall intensity under which they are played out.

Chart 5⁹²



In other words, the intensity of ethnic land conflicts appears to have decreased significantly after the approval of the new constitution. Despite the fact that several respondents have a wait-and-see attitude and point out that the actual impact of the constitution only will be known after the political elections in March 2013, a number of individuals still confirm less ethnic hostilities linked to land, with many stating that levels of coexistence are higher today than before 2010. For example, John Gichuru in Kampi Ya Moto said,

*We are now united. We have no wars anymore.*⁹³

Having presented the results from a positivist perspective of absolute conditions, an additional aspect is to take perceived changes in risk for land conflict into account. It is widely accepted that expectations and perceptions shape human actions.⁹⁴ For this reason people were asked about the change in risk for land

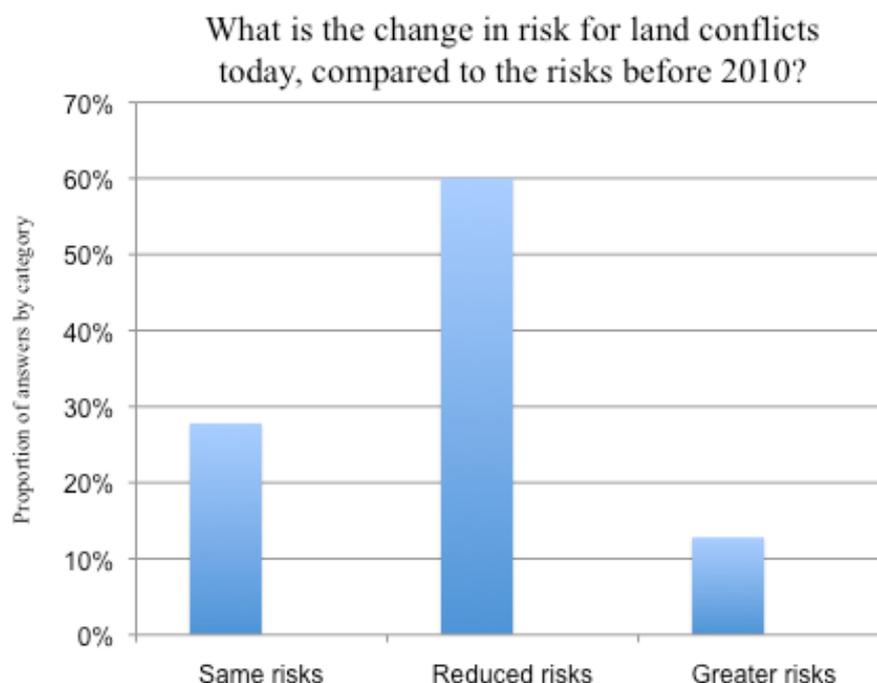
⁹² Quantitative data from standardized interviews available to download at: https://dl.dropbox.com/u/6238341/Quantitative%20results%2C%20street-level_fulltext.xls

⁹³ Interview with John Gichuru, Rift Valley Province, January 13, 2013.

⁹⁴ Hollis, "The Philosophy of the Social Science", 1994, pp. 198-200.

disputes today, compared to the risks before 2010. The result shows that 60 percent claim that risks have been reduced, yet to a minor extent according to many.

Chart 6⁹⁵



In this case, as in so many others, it is hard to estimate whether the reduced risks are outcomes of the new constitution or results of other influencing factors. For this reason, people were asked directly how the constitution has affected the risks for land disputes. As illustrated below, 33 percent state that the constitution has made no impact. Although 60 percent claim that new laws have had a small positive impact or decreased the risks, a large group of respondents provide several reservations to their answers. As one anonymous interviewee says,

*I believe in change if I see it where I live, even though I hear of good news in other areas.*⁹⁶

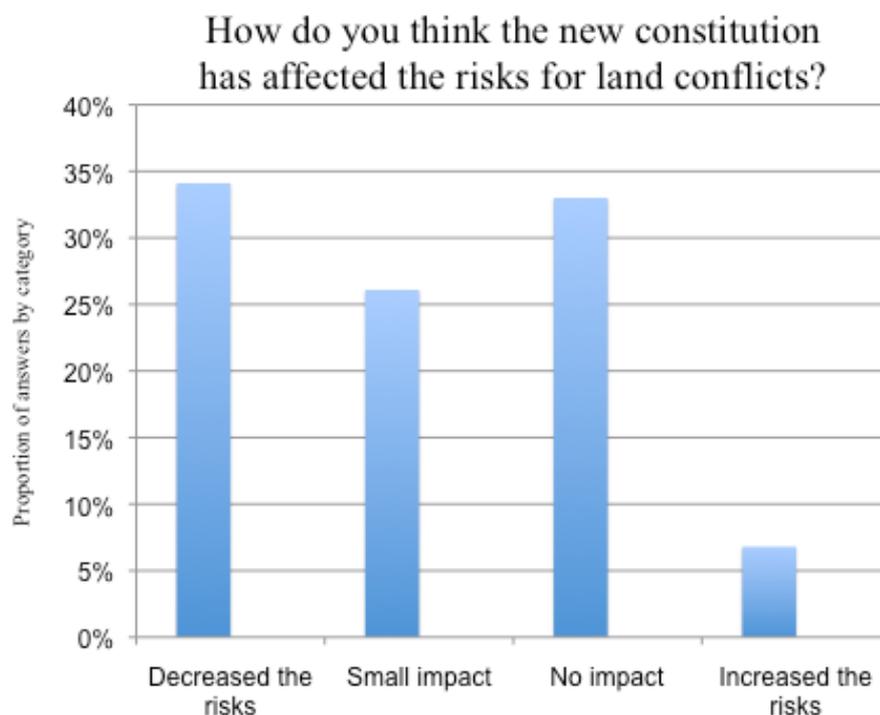
Other respondents underline complications similar to what Anna Ndiema of Mount Elgon shares,

*The constitution gives us women rights, but we have to struggle for those rights.*⁹⁷

⁹⁵ Quantitative data from standardized interviews available to download at: https://dl.dropbox.com/u/6238341/Quantitative%20results%2C%20street-level_fulltext.xls

⁹⁶ Interview with anonymous interviewee. Name, date and location withheld.

Chart 7 ⁹⁸



4.2 Testimonies on Policy Level

All policy experts interviewed in this study testify to the protracted process leading up the approval of the constitution, with many underlining that the new constitution has to be understood through a historical context. Some other common points of reflection are identified below and can be regarded as key results.

1. The constitution will promote change in urban areas first. This appears to be a common belief as bureaucracy and administration become less efficient when the distance to cities increases, especially from the capital Nairobi. In addition, urban citizens tend to be more enlightened regarding their own constitutional rights, which also was reflected in the quantitative results from the local level. Extensive media consumption and overall higher degrees of education in the cities are probably important parts of the explanation. Patricia Kameri-Mbote says that recent cases where slum dwellers claim their rights in courts are proof of the constitutional impact in cities like Nairobi,

⁹⁷ Interview with Anna Ndiema, Western Province, January 26, 2013.

⁹⁸ Quantitative data from standardized interviews available to download at:
https://dl.dropbox.com/u/6238341/Quantitative%20results%2C%20street-level_fulltext.xls

*Now I see a lot of cases coming up where people are challenging individuals who try to privatize public resources.*⁹⁹

2. It will be difficult to address conflicts related to community land. Having been a legally neglected category, the survival of community rights is clear and their inclusion in the constitution illustrate how important these laws are for many who do not possess individual title deeds. For first time in Kenyan history, community land now is recognized and legally protected. However, the Community Land Act is still being drafted and several experts point out that addressing conflicts related to community land will be the most challenging step in the implementation of constitutional land reforms.¹⁰⁰ Part of the problem lies in the complication of defining community land. Constitutional Scholar Ben Sihanya poses concerns expressed by several others, concerns that need to be addressed, not only within a legal framework, but also from a practical standpoint.

*Community is a term that is interpreted in so many ways. To what extent do you interpret community? Is it only on local level?*¹⁰¹

3. The establishment of a National Land Commission is crucial. Being the single most important institution responsible for addressing land issues, several policy experts express concern over the delay in its establishment. Some also imply that the mandate of the NLC has been restrained throughout the constitutional phases, starting with the National Land Policy, continuing with the approval of the new constitution and ending with the latest land laws, of which one is the National Land Commission Act. There are several hypotheses as to why the NLC is not running. Political reluctance is definitely one. Having an independent institution beyond political control is simply not of interest for political officials.¹⁰² During a parliament debate in April 2012, Major-General Nkaisserry argued that only people who own land are qualified enough to manage it, referring to the appointment of members to the NLC.¹⁰³ However, Elizabeth Kamundia, a former researcher in the Committee of Experts on Constitutional Review, suggests an even more trivial explanation when asked about to what degree the implementation of constitutional land reforms is prioritized:

It's not necessarily a question of priority, it's that the land issue is a very complicated issue and we are going into an

⁹⁹ Interview with Patricia Kameri-Mbote, Nairobi, December 17, 2012.

¹⁰⁰ *Ibid.*

¹⁰¹ Interview with Ben Sihanya, Nairobi, December 19, 2012.

¹⁰² Interview with Otsieno Namwaya, Nairobi, January 29, 2013.

¹⁰³ Kenya National Assembly Official Record (Hansard), April 18, 2013, p. 41.

*election. So some of the harder questions, nobody really wants to be seen touching or answering them in a very black and white sort.*¹⁰⁴

4. Political will is key in order for implementation to take place. All experts interviewed in this study state that political will is crucial if land reforms are to be put into practice. Political action must take place at various levels, but especially the highest level, including executives. As exemplified through the case of the NLC, personal interests generate low degrees of political will since certain people with political influence have benefited from irregular allocations of land.¹⁰⁵ Without political support, public servants have limited possibility to secure land rights. Possibly this is what Judge Anne Omolo of the Environment and Land Court refers to when stating:

*Land issues are not really being addressed.*¹⁰⁶

Lack of political will not only is reflected in the absence of practical action. Even more fundamentally problematic is that the intention to reduce the power over land for executives fails when legislation is formulated and power is given back to the executive.¹⁰⁷ Again, a perfect example is the mandate of the NLC, which has shrunk gradually after the approval of the National Land Policy of 2009.¹⁰⁸

¹⁰⁴ Interview with Elizabeth Kamundia, Nairobi, January 8, 2013.

¹⁰⁵ Interview with Otsieno Namwaya, Nairobi, January 29, 2013.

¹⁰⁶ Interview with Anne Omolo, Nairobi, January 18, 2013.

¹⁰⁷ Interviews Benson Ochieng, Nairobi, December 18, 2012.

¹⁰⁸ Interview with Otsieno Namwaya, Nairobi, January 29, 2013.

5 Interpreting the Results

In this chapter a short summary helps to focus on the most important results in the study. Thereafter, the theory of implementation is applied in order to interpret the results. Finally, the findings of this study are put into a larger context by comparing them to previous research.

5.1 Land - Still Not Beyond Political Control

In summary, the quantitative results show that ethnic land conflicts appear to have decreased, but the change in absolute intensity of land disputes is difficult to measure. People's perceptions though, tend to point in the direction of reduced risks for land conflicts. The qualitative results give an idea about continuous challenges at the policy level, although these challenges vary depending on different thematic and geographical areas. Yet and as earlier mentioned, due to the small sample size, the findings must be regarded as clear indicators rather than pure statistical results.

A common perception among interviewees in this study, regardless whether one lives on the cloudy hills of Mount Elgon or sits in an air-conditioned office in Nairobi, is that the responsibility of implementing the land reforms is always some else's. Many express concern over continuous land conflicts, yet few are personally ready to do anything about the situation. There seems to be a pronounced wait-and-see attitude, including citizens who are expecting government officials to promote change, whereas politicians urge the general public to carry out implementation on the ground.¹⁰⁹

This may be understood as a natural consequence by recalling Kent Buse's and his colleagues' discussion of implementation as a highly complex process including various actors with overlapping and unclear roles. The question is: Who bears what responsibility? Top-down and bottom-up outlooks may be helpful in order to answer this and when tackling traditional beliefs of how land should be managed, in favor for a formalized legal framework. Still, it becomes dangerously problematic if constitutional land reforms are to be implemented exclusively in accordance to certain implementation models, with no regard to the informal

¹⁰⁹ Daily Nation, "Kibaki urges Judiciary to settle pending land cases", November 5, 2012.

structures of Kenya, which often seem to be the conviction of not only policy makers, but also of ordinary people being subjected to policy changes.

The point is not that formalized institutionalization should be abandoned. Undoubtedly, a consistent judicial and political machinery is necessary if problems related to land ever are going to be managed democratically within reasonable limits of control. However, implementing constitutional land reforms is not a black or white sort of undertaking. In other words it is a true challenge to handle deep-rooted informal behaviors with legal tools, which explains difficulties in speeding up implementation to more desirable levels. This discussion closely is linked to the idea that implementation becomes more complex the longer the chain of causality is.¹¹⁰ It is not the constitution itself that causes change, which might be indicated in the subtitle of this study, but rather a number of causal variables, ranging from specified legislation to individual will on varied levels. The function of the constitution in the implementation process can be regarded as a platform to start from and reconnect to in order to secure coherence. However, even though different actors may agree on policy goals, such as putting the constitution into force, the critical aspect is to what degree people share opinions in terms of solutions in order to achieve constitutional goals.¹¹¹

As indicated before, especially among policy experts interviewed in this study, political will is crucial if land reforms are to be implemented. In many ways this is a contradicting result because the political task of approving new legislation is almost over. Only the Community Land Act, currently being drafted, is yet to be approved by parliament.¹¹² One may want to believe that an implementation process constitutes different phases of responsibility of this sort, where decision makers and street-level implementers work separately. This study shows that nothing could be further from the truth, as interviewees underline the importance of continuous political support. It is clear that the arm of political control is very outstretched in Kenya, and extends into various bureaucratic mechanisms that in theory are to be beyond political control. Previous research has recognized that it is particularly difficult to carry out implementation that creates winners and losers.¹¹³ This could explain why key decision makers, many being owners to illegally acquired land, are reluctant to move the implementation process forward by making use of the land reforms that are in place and secure practical action, which includes legal action in order to bring back grabbed public land. If distinguishing between the approaches of bottom-up and top-down with regard to this discussion, it is not hard to see that the single most important perspective in order to bring about implementation is the top-down. Actually, political reluctance to implement land reforms may be the clearest example that devolution of power,

¹¹⁰ Hill & Hupe, "Implementing Public Policy", 2008, p. 7.

¹¹¹ Buse et al., "Making Health Policy, 2012", p. 128.

¹¹² Interview with Benson Ochieng, Nairobi, December 20, 2012.

¹¹³ Buse et al., "Making Health Policy, 2012", p. 141.

which is a core element of the new constitution, remains slow within some of the most critical areas covered in the constitution.

Nevertheless, one cannot avoid the fact that results in this study show people's great optimism in the constitution's ability to reduce conflicts over land. The question is how these expectations affect the implementation process. If people perceive that conflicts have decreased, an immediate reflection could be that this corresponds fairly well to the actual reality. But beliefs that the risks are fewer may be more apparent than real, not only in view of the fact that the absolute change in conflict intensity is unclear, but also considering alarming reports from various observers such as the United Nations.¹¹⁴ At the same time, it remains to be seen whether expectations will be lived up to in the future. One risk is that possible disappointment could generate a counterproductive impact, where grievance is turned into violent actions similar to the events of the 2007 elections. Still though, people believe in the new constitution and without that support implementation would become impossible. One clear indicator of successful implementation is that people on various levels of society seem to be aware of core parts of the constitutional legislation.

Some of the results in this study are not necessarily remarkable because they indicate change after the approval of the new constitution, but since they complement and even oppose previous research. The most evident example is that land conflicts among ethnic communities seem to have decreased, and even more fundamentally important, that these conflicts appear to be exceptions rather than frequently common in comparison to other sorts of land conflicts. Not only media have dedicated a lot of attention to ethnicity as causal factor to resource conflicts, such as land conflicts in Kenya, but also eminent scholars such as Edward Azar focus on ethnicity and hold that social conflicts flourish in societies with different communities.¹¹⁵ In fact, a substantial share of research on ethnic politics focus on the hostile effects that it generates.¹¹⁶ Even though ethnicity may be an important contributing factor to many conflicts, the problem is often more complex, which is indicated in this study. British historian David Anderson has put a lot of focus on ethnic conflicts in his work on Kenya, but in one of his most recent articles Anderson and his colleague Emma Lochery conclude that conflicts over land in Kenya actually have little to do with what ethnic community people belong to, it is more relevant to speak of poverty and class struggles as essential reasons behind land disputes. However, people tend to discuss the matter in terms of

¹¹⁴ Office for the Coordination of Humanitarian Affairs, "Kenya: 2012 Inter-communal conflict by district", 2012.

¹¹⁵ Azar, "Managing Protracted Social Conflicts in the Third World: Facilitation and Development Diplomacy", 1986, p. 396.

¹¹⁶ Hulterström, "In Pursuit of Ethnic Politics: Voters, Parties and Policies in Kenya and Zambia", 2004, p. 21.

ethnicity because the political elite of Kenya successfully has turned the problem into an ethnic struggle for land.¹¹⁷

¹¹⁷ Anderson & Lochery, "Violence and Exodus in Kenya's Rift Valley, 2008: Predictable and Preventable?", 2008, p. 339.

6 Concluding Remarks

This study is based on an aspiration to understand how the new Kenyan constitution has affected conflicts related to land. What role do hostile interactions between different ethnic communities play in land conflicts today, compared to before 2010, and what can implementation theory tell about constitutional change in Kenya? As earlier stated, the results of this case study should be restrictively applied to other cases, much due to various unique functions of Kenyan society, such as the function of Kenyan politics and the complexity of how land is used and perceived.

6.1 A Legal Framework Without Institutional Tools

The tragic story of the farmer Peter Kuria, referred to in the beginning of this study, is a brutal example of how life can change dramatically as a result of land ownership disputes. Fortunately, the ethnic and political violence that Peter was subjected to in 2007-2008, seem to be less common today and generally not as widespread as indicated in previous research. Rather, small-scale problems on micro level of society constitute a greater share of land related conflicts. These problems, including inheritance disputes and land transaction fraud, may be the easiest ones to handle through basic title deed management. If implemented successfully through bureaucratic and administrative action, positive changes could spill over to, or at least simplify, more complex land problems linked to issues such as historical and communal injustices. Focal points of land reform implementation, such as the above-mentioned, needs to be further identified in future research. A mistake likely to occur when implementing land reforms is that sensational land conflicts, being less common and particularly complicated, are given top-priority and addressed prior to more basic and frequent problems related to land. As from 2010 up to today however, the implementation has been characterized by adaptation of land legislation in accordance to the prescriptions of the constitution. Practical impact on the ground however, shines with its absence. In other words, a legal framework that people put much faith in now exists, but still few institutional tools are available in order to use it.

Having concluded the empirical lessons, the main theoretical conclusion shows that it is problematic to separate roles and functions of actors involved in implementation since they often overlap each other, especially in socially complex societies like Kenya, where formal and informal interests are blurred. The relationship between the perspective of implementation and more informal structures is worth looking closer at in future research. It is important to note however that role divisions are understandable if accountability is to be secured to satisfactory degrees.

Going back to Peter Kuria, it is clear that Peter is one of the most brutally affected individuals by land conflicts in Kenya. Despite the unimaginable experiences of 2008, Peter still lives in the same village where his family was killed. Peter sees glimpses of hope for the future, and points to the fact that people now respect the boundaries of his new land plot because they keep their cattle off it. At the same time, Peter is involved in a new dispute where another person claims to have bought the same land property as Peter lives on now. Still, if Peter sees change coming, who is the last person with reason to be optimistic, then the situation is definitely moving in the right direction. Instead, the main concern is how fast changes are coming. Considering that the 2013 elections were relatively peaceful, cautious optimism may be motivated. However, it remains to be seen to what extent the new Kenyan government is ready to put new land policies into force.

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9 Appendix A – Interview Guide, Respondents*

- Date of interview:
- District:
- Urban
- Rural
- Village/compound:
- Gatekeeper:
- Language of interview:

Name:

Sex: M
F

Where does this name come from (part of the country)?

When did you move to your present location?

What do you do for a living?

- A. Working (if yes, what kind of job?)
- B. Housewife
- C. Without a job/seeking work
- D. Student
- E. Retired

1) Who owns the land where you live?

- A. Private -> 1) Owner (bought or inherit?) 2) Rent 3) Occupy
- B. Community
- C. Public
- D. Other
- E. Don't know

2) Other than being your home, how do you use this land?

- A. No other use
- B. Work and studies
- C. Farming
- D. Rent it out
- E. Commercial use
- F. Storing
- G. Other (what.....?)

3) How important is it that you can continue to live where you live now?

4) How do you consider the risk of one day being forced to move against your will?

- A. Great risk
- B. Average risk
- C. Small risk
- D. No risk

5) Mention some differences you have experienced after the approval of the new constitution in 2010?

- A.
- B.
- C.
- D. No change

6) Can you mention some areas where the new constitution provides guidance? Provide examples.

- A.
- B.
- C.
- D. No

7) Do you know anyone who has been involved in a land right dispute recently? (If yes: who was involved, when was it, what was the cause behind the dispute?)

8) Do you know anyone who was involved a land dispute before 2010? (If yes: who, when and cause?)

9) What is the change in risk for land disputes today, compared to the risks before the constitution referendum of 2010?

- A. Same risks
- B. Reduced risks
- C. Greater risks

10) How did you vote in the constitution referendum of 2010?

- A. Yes
- B. No
- C. Did not vote

11) How do you think the new constitution has affected the risks for land disputes?

- A. Decreased the risks
- B. Small impact
- C. No impact
- D. Increased the risks

12) Would you like to add something that has not been said?

13) Ok to quote? YES / NO

* Quantitative data available at: https://dl.dropbox.com/u/6238341/Quantitative%20results%2C%20street-level_fulltext.xls

10 Appendix B – Interview Guide, Informants*

- 1) What is your role in the constitutional reforms taking place?
- 2) Do the paragraphs of chapter five of the constitution correspond to the needs in Kenya?
- 3) How well do think the new land laws, approved in 2012, correspond to what is written in the new constitution?
- 4) Where does the crucial key to successful implementation of the constitution lie?
- 5) What kind of land issues do you think the new constitution will be most/least successful to handle?
- 6) Do think the new constitution will be more successful in resolving and preventing land disputes in specific areas of the country? What areas in that case?
- 7) How prioritized is the implementation of chapter five in comparison to other chapters of the constitution?
- 8) Is there a difference how the constitution has been received on grassroots-level and on policy level?
- 9) When will we start to see serious positive impact on land issues generated from the new constitution?
- 10) Up to today, how do you think the new constitution has affected the risks for land disputes?

** Transcriptions available upon request.*

