



International Environmental
Law Research Centre

FOLLOWING GOD'S CONSTITUTION

THE GENDER DIMENSIONS IN THE OGIEK CLAIM TO MAU FOREST COMPLEX

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ABBREVIATIONS

KFWG	Kenya Forest Working Group
EMCA	Environmental Management and Coordination Act
NGO	Non Governmental Organization
OWC	Ogiek Welfare Council
ORIP	Ogiek Rural Integral Projects
CKRC	Constitution of Kenya Review Commission
ACHPR	African Commission on Human and Peoples Rights
ACNNR	African Convention of Nature and Natural Resources
CEDAW	Convention on Elimination of Discrimination Against Women
CRC	Convention on the Rights of the Child
ICESCR	International Convention on Economic, Social and Cultural Rights
ICCPR	International Convention on Civil and Political Rights
ILO	International Labour Organization
UDHR	Universal Declarations of Human Rights

I. INTRODUCTION

Land and resources linked to it form a critical part of many communities' life lines. Lack of access to these resources can lead to the decimation of the affected communities. This is especially the case where the communities' life is linked to a particular ecosystem as the case for the Ogiek. In a situation where the rights of the entire community are under threat, the weaker actors ordinarily hold the shorter end of the stick in so far as access to, control over and ownership of resources is concerned. It is against this background that this chapter looks at the struggle of the Ogiek for access to the Mau forest in the face of competing actors. The metaphor 'Following God's Constitution' is adopted as a frame of reference to interrogate the Ogiek community perception of their relationship with the state, the forest and its resources. In a patriarchal setting, an understanding of God's constitution must be read in the context of male domination and socio-cultural and legal relations in which men as a class have power over women as a gender. Those power relations are social constructs and neither biological nor natural. This power can be ideological, social, political and economic. The cultural aspect of patriarchy in most cases takes the form of the devaluation of women's work or achievements while the ideological aspect portrays women as natural, biological creatures inherently different but inferior *vis a vis* men.

A. Who are the Ogiek?

Many historical works refer to the Ogiek as the 'Dorobo' which means poor people who cannot afford cattle. The name Dorobo is derived from a Maasai name *il torobo* which means a poor person who has no cattle and has to live on hunting and gathering. From documented, literature especially the works of W.A. Chandler, the Ogiek were first seen to have unique physical features and thought to be different compared to other tribes.¹ What followed was a general speculation about the Ogiek and their neighbors and the final conclusion reached by 1974 was that there is nothing in the traditional Ogiek life of hunting and gathering which would indicate a prior adaptation to a plains environment or pastoralism or agriculture.² The Ogiek are one of the few remaining hunter-gatherer peoples of East Africa. They are arguably the largest hunter-gatherer community in Kenya. Their home since time immemorial has been the Mau mountain forest overlooking Kenya's rift valley. The population of the Ogiek is 20,000.³ They are scattered within the rift valley from Mount Elgon in north Uganda up to the northern part of Tanzania. Mr. Taptich,⁴ an Ogiek elder says the word *Ogiek* means 'caretaker of the universe'.

They depend mainly on hunting and gathering, while the majority grow vegetables and keep livestock also. They have traditionally hunted such animals as antelope and wild pigs which is now generally illegal. They gather not only wild plants but also honey from beehives which they make from hollow logs and place in the high branches of the forest trees. The honey plays a central part in Ogiek society. It is used for food and for brewing beer and also to trade with neighbouring people outside the forest.⁵ The question remains as to why the Ogiek were never taken to be a tribal and distinct cultural entity and why everyone wanted them out of their habitat.

B. The Link to the Forest and Land: A Story of Domination of a People

Throughout the period of colonialism, the Ogiek were seen as harmful and barbaric. Subsequently, the colonial government sanctioned a series of efforts to dispossess them of their land and exterminate, assimilate and impoverish them. In 1933, the colonial government set up the Carter Land Commission to examine the question of land. The Ogiek made several claims for their ancestral territories, but all of them were rejected. Among the 42 tribes that the Carter Land Commission differentiated, the Ogiek were not listed.⁶ They were considered 'just a wandering people' and thus not recognized as a distinct tribe. From that time on, the Ogiek became squatters on their own

1 Kamau., J. The Ogiek. The History of the forgotten tribe. Rights Features service. Accessed at <http://www.ogiek.org>.

2 Blackburn, R. H. 'The Ogiek and their history', 9 *Azania* 150.

3 CIA world fact book.

4 Interview done on 24th October 03.

5 Government bee-keeping projects initiated in the 1970s in Busia and Luo Nyanza in Western Kenya and in Ukambani in Eastern Kenya failed. Unlike the Ogiek, however, these communities had no knowledge of bee-keeping.

6 The Carter Land commission was set up in 1932 by the secretary of the state for colonies, to consider the land requirements of the African population.

land. When Kenya became independent in 1963, nothing improved for the Ogiek. The independence governments adopted the colonial policy on ethnic minorities including the Ogiek.

The Mau forest complex, the home of the Ogiek, has been considered a forest zone protected under the Forest Act. It covers about 290,000 hectares of land and is about 250 kilometres from Nairobi Kenya's capital city. It is one of the largest continuous indigenous forests in Kenya. As a water catchment area, the forest traps, stores and releases rainwater thus regulating stream flows and has been responsible for much of the rain in the country. While the Ogiek were perceived as a danger to the forest environment and attempts made to evict from what in essence is their ancestral land, the government started selling parts of Mau forest to influential people of the dominant Kenyan tribes in the 1980s. The government also allowed charcoal burning, logging, tea and flower farming in the Mau forest. It is estimated that up to 60 percent of the tree cover has been lost over the last 20 years.⁷ Moreover the Ogiek way of life is being transformed from one of hunters and gatherers to a sedentary farming community. Inter-marriage with other communities is also reducing the numbers of authentic Ogiek community members.

C. Resisting Domination

In this whole schema, a great animosity has emerged between the Ogiek and the government over the way in which the forest has been handled. For instance, in allocating forestland, the state did not give priority to the Ogiek and in May 1999 the government threatened to evict between 5,000 and 10,000 of the Ogiek community from Tinnet Mau on the grounds that they were illegal squatters in the forest. Supported by the Roman Catholic Church, they contested the eviction. In a ruling finally given in March 2000, the Nairobi High Court ruled that the Kenyan government was within its rights to evict the Ogiek. The judgment even denied that the Ogiek were indigenous to Mau Tinnet.⁸ Even though Kenya has ratified several international treaties related to protection of rights of indigenous peoples – for example the ICESCR and the ICCPR – the recommendations have not been respected when concrete policies are being formulated and implemented.⁹

The Ogiek have resisted this assault over the years for the colonial times to the present day. They have taken the contestation to court as well as organised themselves in groups to resist the assault. The groups include the Ogiek Rural Integral Projects (ORIP) and the Ogiek Welfare Council (OWC). They have come together as a group to assert their rights which they see as rooted in their identity as a distinct people and have the following to say about themselves

They are the only community in Kenya that follow God's Constitution. They live in the forest and maintain it with an inborn knowledge of conservation just the way God made it and wants it to continue to be.¹⁰

According to Mr Joseph Sang,¹¹ the tribe regard themselves as the only truly indigenous tribe of Kenya who did not migrate there. He also asserts that the Ogiek lived with God in the forest along time ago. When one killed an Elephant, God left the Ogiek and went to Heaven. And so we know that we cannot hunt big animals.¹²

D. The Gender Dimension of Domination and Resistance

It is against this background that we investigate and examine the gender dimension in the Ogiek claim to the Mau forest complex. Four themes emerged from the study namely; environmental concerns; marginalisation of the

7 The Daily Nation quoted UN Consultants as saying that the forest excisions will negatively impact on the Aberdare circuit and the Mau Hills Catchment areas. They warned that, ultimately, communities in Nyanza Province and the planned Sondu- Miriu hydroelectric power project would be affected. See Daily Nation, 10 March 2001, www.nationaudio.com.

8 Bob Wong, Racism and Administration of Justice, Kenya Indigenous Group Faces October 1 Court Case, *World Rainforest Movement Journal* at <http://www.wrm.org.uy/bulletin/62/Kenya.html>.

9 Anonymous, 'Kenya: Local Peoples' Land Rights Ignored', 40 *World Rainforest Movement Bulletin* (2 November 2000) at <http://www.wrm.org.uy/bulletin/40/Kenya.html>.

10 Personal communication with Mr. Towett, a member of the Ogiek community.

11 Co-ordinator of Ogiek Welfare Society interviewed on 16th October 2003.

12 Interview carried out on 21st November 2003.

community; the forest as symbol of culture and land rights. Women have not been at the forefront and gender issues have not taken priority in the discourses. This highlights the intersectional discrimination that women suffer on account of being members of a marginalised community as well as being women. Barriers for women in these contexts seeking to access justice are insurmountable as the seemingly more urgent and nagging community concerns take centre stage.¹³ For the Ogiek women, the quest for land and forest rights as an assertion of the rights of the Ogiek as an indigenous group and to their culture, brings to the fore the issue of women and culture. The Ogiek women are strongly controlled by culture. Paradoxically, the claim of the Ogiek to their cultural rights is a seemingly liberation struggle but within the same culture will be rooted Ogiek women's subjugation. An analysis of the data collected enables us to distil women's voices. It also provides a lens through which to critically analyse and engage the human rights framework, upon which claims to indigenous rights and cultural identity are predicated, against women's lived realities.

As the Ogiek seek to negotiate space in the political, legal and economic spheres, a number of narratives can be discerned in their struggle. First is the struggle by a people for their cultural rights to land and to continue living in the forest. Second is the juxtaposition of community management of environment resources with the dictates of sustainable management of environmental resources. Third is the domination of the poor by the richer and more powerful groups. Fourth and most importantly for us is the experience of these narratives by different members of the community. In this narrative, it is important to explore whether the vigour with which the Ogiek resist domination is the same vigour with which they protect weaker members of their community from domination by the stronger members.¹⁴ In this respect we will look at how women have fared in the Ogiek resistance against domination.

E. Rays of Hope and Windows of Opportunity

Three major developments in Kenya have raised hopes in the Ogiek struggle for land rights. In 2001 the Constitution of Kenya Review Commission (CKRC) was formed. The Commission has the assignment of making a new constitution for Kenya, including the division of land. The Ogiek took the opportunity to bring their demands to the CKRC. The new constitution is not finalized yet. The second development was the election of President Mwai Kibaki by the end of 2002. Kibaki's Rainbow Coalition ended 25 years of Moi's moderate dictatorship. A more democratic government was put in place. The climate has never been so favorable for change. The third development is the ongoing National Land Policy Formulation Process which seeks to establish a framework of values and institutions to ensure that land and associated resources are held, used and managed equitably, efficiently, productively and sustainably. These three developments present an opportunity for the Ogiek to get their legal rights over their ancestral lands.

Part II of the chapter comprises a historical background. Part III provides the legal and conceptual framework within which the research is anchored. It provides the context of the analysis of the Ogiek cases from a gender perspective at Part IV. Parts V and VI look at the impacts of marginalisation of the Ogiek generally and cultural identity politics respectively. Part VII comprises the conclusion and way forward.

II. HISTORICAL BACKGROUND

Land is central to most African communities offering both a means of subsistence as well as the only readily available economic resource. In Kenya, the population's dependence on land is underscored by the high percentage of persons engaged in agriculture and pastoralism, both anchored on land. Moreover, the main foreign exchange earnings are agriculture (including horticulture) and tourism also based on land. The way in which rights in land are organised is therefore central to Kenyans' aspirations to alleviate poverty as well as create wealth.

The history of land rights in Kenya exemplifies a process of alienation and displacement of native Kenyans from their lands into reserves and the systematic acquisition of prime land for settler occupation and its designation as

13 Fareda Banda & Christine Chinkin, *Gender Minorities and Indigenous Peoples* (Report of the Minority Rights Group International, 2004).

14 *See generally*, Elizabeth Fox-Genovese, *Feminism Without Illusions: A Critique of Individualism*, (1991).

the white highlands. Discriminatory policies were then set in motion to facilitate the exploitation of land resources and the institutionalisation of colonial agriculture. Acquisition of land rights for settlers was mainly done through political processes that were followed by legal instruments giving the political acts the requisite binding force. Colonial land policy was thus not systematic. Decisions were made in the face of day-to-day problems whose resolution demanded swift actions. This seems to have been the origin of the instrumentalist tradition in property law in Kenya.¹⁵ Indeed law played a very instrumental role in the process of alienation of land rights and the determination of who could own land and the quantum of rights that such ownership conferred.¹⁶ In this whole scheme, Africans were considered incapable of owning land in the sense in which the concept of ownership is understood in English jurisprudence.¹⁷ Customary law and rights under that law were treated as inferior to the newly introduced private property rights based on English law. This necessitated the maintenance of a dual system of land law with English law applying to areas occupied by white settlers and native law and custom applying in the reserves. The areas occupied by the settlers were expansive, more arable and habitable than those occupied by the natives. The Africans were concentrated in areas which were not immediately required for European settlement. This created social and economic problems in the reserves with poverty, disease, famine and ethnic tensions characterising the lives of the natives.

The system of separate development for settlers and natives maintained by the colonial authorities cushioned them from the burgeoning quests for individualised tenure even as the conditions for it were already well developed. The reason for this was to allow the colonial administrators' room to take as much land as the settlers needed through keeping the native rights to land usufructuary and consequently impermanent. The net effect of this process was suppression of individual initiative since African tenure was characterised as communal (equated with unregulated open access situations) notwithstanding clear pointers to the contrary.¹⁸ It also masked the rights of individuals and communities who worked on land and justified uncompensated taking of that land for allocation to settlers on permanent terms.¹⁹ It is important to point out at this juncture that what the colonialists designated as an African land tenure system was actually a creation of the colonial authorities.

By 1940, there was severe land shortage within the reserves and the Africans were demanding the restoration of stolen lands. In 1952, these demands culminated in the Mau Mau revolts predominantly led by the Kikuyu thus awakening the colonial administration to the need for tenure reform.²⁰ Having constructed African tenure systems as communal (read open access), the colonial agronomic experts viewed the solution to the African land problem as one of tenure, namely, the structure of access to the use of land in areas occupied by the natives. The factors of the traditional tenure system that made it inimical to proper land use and agricultural development were, in their view, encouragement of fragmentation which cut down on returns from labour and time expended on the land, incessant disputes which were a disincentive to long-term capital investment and an insecure basis for generating agricultural credit and the inheritance practices that encouraged sub-division of the holdings into sub-economic units of production.²¹ The solution to the problem was conceived in terms of individualised title to land and

15 Policies dealing with land in Kenya have rarely been systematic from colonial times to date. In most cases guidelines are circulated to relevant departments as working documents and later given legal authority after they have been in operation for a considerable period of time. The subsequent legal instrument validates all actions previously taken pursuant to the guidelines. This leaves room for administrative abuse of power.

16 This was, for instance, achieved through the promulgation of the two Crown Lands Ordinances of 1902 and 1905 respectively. Through these ordinances, first, the commissioner and later, the Governor, was empowered to make grants of leasehold or freehold to the settlers on very flexible terms. Similar strategies were adopted in Tanganyika first, by the German colonialists and later by the British.

17 See e.g., H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (ACTS Press, Nairobi, 1991). See also Smokin C. Wanjala ed., *Essays on Land Law: The Reform Debate in Kenya* (Nairobi: Claripress, 2000).

18 Among the Kikuyu, initiatives taken by family members were acknowledged by giving the individuals limited rights to the land in question and the produce of that land.

19 See M.P.K. Sorrenson, *Land Reform in the Kikuyu Country* (1967) and Martin Chanock, 'Paradigms, Policies, and Property: A Review of the Customary Law of Land Tenure', in Richard Roberts & Kristin Mann eds., *Law in Colonial Africa* 3 (1991). Similar happenings in the Mt. Kilimanjaro area of Tanzania where individual rights to land were so prevalent that even after the introduction of *ujamaa* (socialism) which designated all land as government land and that individuals were lessees of the government, people continued to deal with land as private property as they had done before. See Sally Falk Moore, 'From Giving and Lending to Selling: Property Transactions Reflecting Historical Changes on Kilimanjaro', in Richard Roberts & Kristin Mann eds., *Law in Colonial Africa* 3 (1991).

20 Okoth-Ogendo, *supra* note 17.

21 See R.J.M. Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya* (1954).

intensified agriculture in African areas through technological improvements. It was hoped that this would increase production and divert the attention of the Africans from the settler occupied areas.²²

The assumption was that individual proprietorship would generate entrepreneurship irrespective of the injustices occasioned by expropriation of African rights to land by the settlers. A Commission was set up to investigate African tenure systems and make recommendations on ways of improving them and making them contribute to the economic development of the colony. The Swynnerton Plan recommended the consolidation of land holdings of families into one, followed by the adjudication of property rights in that land and the registration of individuals as absolute owners of land adjudicated as theirs. This process was to end the perceived uncertainty of customary tenure already considerably modified by years of European contact. The coincidence of the tenure reform process with a deteriorating political climate centred on the land issue presented an occasion for the colonialists to ingrain a political flavour within the process. Through tenure reform, the colonial administrators sought to create a stable landed gentry among the natives. This gentry was to act as a buffer between the settlers and political mavericks hankering for redistribution of land.²³

The instrumentalist role of law perfected by the colonial administrators was very handy in ensuring that the rights granted to the loyalists and the settlers were protected through law from claims by the Mau Mau protagonists who had gone into the forests to fight for land rights. The administrative process of consolidation, adjudication and registration was formalised by the Native Land Tenure Rules of 1956.²⁴ To ensure that the rights granted through the process were not disturbed, the African Courts (Suspension of Land Suits) Ordinance was passed in 1957 to bar all litigation to which the 1956 Rules applied. It is indeed remarkable that a large part of Central Province was consolidated in 1956 with a state of emergency in place.²⁵ The net effect of these laws was to close avenues available to aggrieved landholders and dispossessed peasants. Subsequent laws on land tenure adopted these provisions. The Native Lands Registration Ordinance of 1959 spelt out the rights of the registered proprietor at § 37(a) namely, an estate in fee simple in such land together with all rights and privileges belonging or appurtenant thereto.²⁶ While the rights of the registered proprietor were stated to be subject to duties that such proprietor had as trustee, it is instructive to note that customary notions of trusteeship, recognised under some Kenyan communities' native customs, were not included.²⁷ More specifically, according to the registration statute, a right of occupation at customary law would only be protected if noted on the register. Many families did not bother to note customary rights on the register because they saw no possibility of a piece of paper vesting any more rights in the family representative than he would have had at custom. Cases of such family representatives seeking to evict the other family members from the family land however, escalated.²⁸ The Ordinance moreover, declared that a first registration was not to be challenged even if it had been obtained through fraud.²⁹

22 Okoth-Ogendo, *supra* note 17.

23 See Sorrenson *supra* note 19. See also Ng'weno Osolo-Nasubo, *A Socio-Economic Study of the Kenya Highlands from 1900-1970: A Case-Study of the Uhuru Government* (1977) and Christopher Leo, *Land and Class in Kenya* 28 (1984) and D. Biebuyck, ed., *African Agrarian Systems* 52 (1960).

24 These rules empowered the Minister for African Affairs to set up machinery for the adjudication of areas of 'native' lands within which private rights to land were considered to exist.

25 The Kikuyu districts of Kiambu, Nyeri and Fort Hall (now Murang'a) (comprising Central Province), and Embu and Meru (comprising part of Eastern Province) were among the first areas where tenure reform was carried out. See e.g., figures given in J.D. MacArthur, 'Land Tenure Reform and Economic Research into African Farming in Kenya', 8 *E. Afr. Econ Rev.* 82 (1961). Consolidation consisted of the process of amalgamating all the pieces of land owned by one person to determine the acreage such person was entitled to. It would be followed by adjudication, namely, a determination of the rights each person to that land and then registration that vested absolute rights in the registered proprietor to the land.

26 See *Colony and Protectorate of Kenya, Native Lands Registration Ordinance No. 27 of 1959* (1959) [hereinafter THE NLRO, 1959]. The aim of this ordinance as stated in the Preamble was 'to provide for the ascertainment of rights and interests in, and for the consolidation of land in the native lands; for the registration of title to and transactions and devolutions affecting such land and other land in native lands and for purposes connected therewith and incidental thereto'. It was the precursor to the current Registered Land Act, Chapter 300 of the Laws of Kenya. [hereinafter the RLA].

27 Case law has dealt extensively with the issue of trustee and though there seems to be no general agreement, the removal of formal courts' jurisdiction to adjudicate on land matters and the transfer of that jurisdiction to local chiefs and elders seems to have been an acknowledgement of the need to consider the circumstances surrounding any registration in native areas to determine the interests of all potential beneficiaries. See the Magistrates' Courts Jurisdiction Act, Chapter 10 of the Laws of Kenya.

28 See *Obiero v. Opiyo* (1972) *East African Law Reports* 227; *Mwangi Muguthu v. Maina Muguthu* Civil Case No. 377 of 1968 (Unreported) and *Esiroyo V. Esiroyo* (1973) *East African Law Reports* 388.

29 See § 89 (1) of the NLRO *supra* note 26.

The tenure reform process only took into consideration the rights of people who had land and not the landless or those who had rights that in the colonialists reckoning did not amount to ownership.³⁰ Further the Ordinance limited the number of persons who could be named as owners of any one piece to five thus illustrating the commitment to individual tenure as opposed to group tenure.³¹ In most cases families designated one of themselves, usually the eldest son or the male head of the household, to be registered as the absolute owner without realising the latitude that such person had to deal with the land once so registered. Women and younger men who had rights of use and occupation under customary law but were unlikely to be chosen as family representatives, were thus effectively excluded from controlling land and other resources that go with it. The elder male owners were given immense power to deal with land and could mortgage or even sell it without recourse to other members of the family who though not owning the land legally, had access rights at customary law.³²

The colonial government alienated land suitable for its citizen which became known as the white highlands and at independence when land was to be given back to the indigenous Africans, it found its way into the hands of those Kenyans who had seen the light earlier through exposure and hence tribal territory collapsed within the white occupied land. Similarly in an open market of willing buyer, willing seller, ancestral land, now belong to non-tribal members. Certain groups like the Ogiek and the Maasai have woken up to the realisation that they can claim rights over this kind of land. Unfortunately for them, their claims to land where there are forest and wildlife resources have become more complex with the emergence of considerations about environmental sustainability. Indeed the process of alienation of land and the demarcation of rights largely took place before sustainable development was internalised as a guiding principle in land management.³³

III. LEGAL AND CONCEPTUAL FRAMEWORK

Women the world over, have been at the centre-stage of economic production, including agricultural, livestock and business sectors. In Africa, where the mainstay of most economies is farming or agriculture and livestock production, women contribute to over 80 percent of the workforce. In most parts of the continent, women are closely associated with production of food and raw materials for the industrial sector. Indeed, women are also more directly involved in small-scale crafts and localized industries, trade and general business. This has until recently been ignored or obscured in national production statistics.

However, women who comprise over half of the world's population, rarely own any reasonable forms of property; do not have adequate access to the same, and do not even make major decisions pertaining to allocation and use of such property. According to a UN Commission on Women's Status, women constitute 60 percent of the global population, perform nearly two-thirds of working hours, receive one-tenth of the global income and own less than 1 percent of global property.

Traditionally among various Kenyan communities, most women do not own land or other immovable properties. At best, they have *usufruct* rights, which are hinged on the nature of the relationship obtaining between them and men either as husbands, fathers, brothers or such other male relatives. Such access can be denied, as it is dependent on the whims of such male benefactors. This situation does not only place women in a precarious position in terms of their survival and livelihoods, but stifles their effective role and contribution to national development.

Men's and women's interaction with the environment reflects the gender division of labour and absence of other economic opportunities. Women's struggles to access land and property rights are part of the ordering of the

30 This process marginalised categories of people such as the 'ahoi' among the Kikuyu who lived and worked on other people's lands for generations. See Jomo Kenyatta, *Facing Mount Kenya* (1945).

31 § 66 of the NLRO *supra* note 26.

32 See, e.g., Tabitha Kanogo, 'Women and Environment in History', in Shanyisa A. Khasiani ed., *Groundwork: African Women as Environmental Managers* (1992). In the process of consolidation, adjudication and registration, the major targets were heads of households (invariably male) who got absolute rights to the land in total disregard of the rights enjoyed by other members of the population.

33 World Commission on Environment and Development, *Our Common Future* (1987). Sustainable development has been adopted by later environmental conventions and declarations. It has also been adopted in many national environmental laws. Kenya's Environment Management and Coordination Act 2000 has it as one of its guiding principles.

ownership of means of production in capitalist settings.³⁴ It is within this context that one must isolate women's rights within marginalised communities such as the Ogiek. Women who are members of minority and indigenous communities such as the Ogiek are particularly marginalised.³⁵

A. Women's Rights and the Law in Kenya

Law can be used to reinforce or give permanence to certain social injustices leading to the marginalization of certain groups of people. In the realm of women's rights, legal rules may give rise to or emphasize gender inequality. Legal systems can also become obstacles when change is required in legal rules, procedures and institutions to remove the inequality by the oppressed. This necessitates an inquiry into what injustices are intertwined within the legal systems and the extent of their operation. One often finds that the *de jure* position which may provide for gender neutrality cannot be achieved in practice due to the numerous existing obstacles which make the law powerless. For instance, there are certain legal rules and principles in our statute books which legitimate the subordination of women; the structure and administration of laws can also occasion the subordination of women to men and the socio-economic realities in Kenya and many African countries couple with the patriarchal (the ordering of society under which standards – political, economic, legal, social- are set by, and fixed in the interests of, men) ideology pervading society prevents the translation of abstract rights into real substantive rights for women.

Women have been systematically removed from fully participating in the development process despite their active participation in the production processes alongside men. Even where women's legal rights have been provided for, ignorance of such rights exacerbated by illiteracy ensures that they do not benefit from such provision. The effectiveness of laws in according women equal opportunities with men depends largely on the society's willingness and ability to enforce such laws. It is at this point of enforcement that one gets caught up in the dichotomies and conflicts of statute law, customary law and law in practice which many a woman find themselves warped up in.

To understand the role of law in women's lives, one needs to understand not only the intention and rationale behind the law but also the consequences of law on individuals. In Kenya, despite the gender neutrality of our legal provisions, equal rights and privileges cannot be assumed to have been guaranteed and realized. Gender neutral laws have, in many instances, resulted in *de facto* discrimination. As Tove Stang Dahl aptly points out

As long as we live in a society where women and men follow different paths in life and have different living conditions, with different needs and potentials, rules of law will necessarily affect men and women differently. The gender-neutral legal machinery ... meets the gender-specific reality...³⁶

The ratification and domestication of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) has been identified as an important first step to removing obstacles in this area. Revision of national laws is perceived as crucial to the endeavour. Laws have a part to play in the process of eliminating barriers in the way of women's advancement. The test of effectiveness of such laws, however, lies largely in their implementation. It is consequently imperative that implementation mechanisms be engrained into the specific pieces of legislation if they are to benefit Kenyan women. Another crucial area of concern is awareness by women of their rights. A right whose content is not known by the holder is at best a paper right. Legal awareness should be part of the task of achieving change in the legal status of women. Education of women on the content of their rights and modes of exercising those rights is a must if law reform is to achieve its stated objectives.

B. The Legal Framework

I. Land

Land in Kenya is owned by four entities: individuals, the state, local authorities and communities. Land held by local is designated as trustland. Trust land consists of areas that were occupied by the natives during the colonial

³⁴ See Vandana Shiva, 'Biotechnological Development and the Conservation of Biodiversity', in Vandana Shiva & Ingunn Moser eds, *Biopolitics: A Feminist and Ecological Reader* (Zed Books, London (1995) 193.

³⁵ See Banda & Chinkin, *supra* note 13.

³⁶ Tove Stang Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (Oslo, Norwegian University Press, 1987).

period and which have not been consolidated, adjudicated and registered in individuals' or group names and native land that has not been taken over by the government.³⁷ It is governed by the Trust Lands Act and is vested in local authorities designated as councils.³⁸ State ownership of land is governed by the Government Lands Act chapter 280 of the Laws of Kenya while individual ownership is regulated under the Registered land Act, Chapter 300 of the Laws of Kenya and the Transfer of Property Act. Not surprisingly, state and individual ownership have been given most prominence. Community ownership is regulated through the Land (Group Representatives) Act Chapter 287 of the Laws of Kenya. This law was introduced to provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land. It applies mainly to pastoralist areas. The process of getting groups together and leadership of such groups is influenced by the patriarchal norms. The significance of the ordering of land ownership is that women are left out of ownership and control of land. Less than 1% of women have title deeds to land.

The Registered Land Act chapter 300 is the statute under which excised land in Mau forest complex was issued. Section 147 of the Act, provides that first registrations, even if by fraudulent means, will not be challenged. Sections 27 and 28 confirm that registration of the title shall be proof of ownership of the land. For a person holding a title in the settlement scheme within Mau complex therefore, it does not matter whether you belong to the Ogiek community or not, your ownership is protected by law.

This means that for the women where land has been registered in the husbands' name they have no control over the land no matter how much work they put into it. Section 27 and 28 allow the husband to dispose of the land any time he wishes to without her consent, hence the feelings expressed by the women that land may either be registered in their names or jointly with their husbands. The Act does not expressly recognize a holding in trust for the unregistered parties.

The constitution on the other hand provides for equality of all sexes and a right to own property but the usual rider that allows for discrimination in matters of personal law comes in. In the Ogiek community where women are regarded as property, it will not be easy for 'property to own property' hence efforts should be made to encourage ownership of property by women in the community.

Article 13 of CEDAW gives women the right to obtain family benefits and bank loans and financial credits so this would mean that women should be allowed to own property and giving them land would be a positive step towards this. Yet this instrument like many others has not been domesticated and is rarely relied upon even in court decisions. There is the issue of land being given to other communities without regard to the need of the Ogiek women for land or a specific programme to ensure the women at least have access to the land being allocated.

Articles 13 and 14 of CEDAW have placed a responsibility on state parties to ensure rural women have equal access to social and economic growth and participate in planning and implementation of programmes aimed at improving their economic and social welfare. The Ogiek women do not benefit from the forest in terms of hunting as a natural resource or logging by big companies neither is their interest taken into account when policies for environmental preservation leading to economic growth are taken into account.

2. Forests

The Forests Act Chapter 385 of the Laws of Kenya provides the legal framework for the conservation of forests. It governs the conservation, management, and utilization of forests and forest products and has no provisions directly bearing on the conservation and management of wildlife and their relation with surrounding communities. The forest legislation, like other environment related legislation emphasizes maximizing short-term gains through the use of exploitative practices. Under the Forests Act, the Minister responsible for natural resources is empowered to declare any forest area a nature reserve for the purposes of preserving the natural amenities thereof and the flora and fauna therein. The killing of wild animals in a nature reserve is prohibited. The vesting of monopoly rights in the government is explained to be based on a number of grounds namely, forests serve important functions that transcend the scope of immediate individual preoccupation and a system of public control is therefore deemed imperative to assert the overriding public interest. Secondly, the management and conservation of forest resources entail the outlay of human, financial, and technical resources far beyond the capabilities of the individual. Lastly,

³⁷ See §115 of the Constitution of Kenya (1983).

³⁸ See § 114 of The Constitution of Kenya (1983) and Chapter 288 of the Laws of Kenya.

state control is essential since it ensures an effective and sustainable framework for long-term planning and implementation of policies.

The current practice of excluding other forms of land-use from gazetted forest areas may, however, not be sustainable in the long run since it does not allow for integration of farmers into forest areas. With increases in population, political pressure to convert portions of such areas for agriculture and settlement purposes has been mounting. While the Forests Act allows the Minister discretion to excise forest areas and this has already been done to chunks of forest areas to satisfy the demands of adjacent populations, there have also been several instances of illegal conversions by populations bordering forest areas. The excisions of forest land by the government for grants to powerful politicians also impacts negatively on forest conservation and management since it leads to perceptions of forests as open access areas amenable to appropriation by

The proposed Forests Bill 2004 requires that an inventory of the forest be taken with a view to determining the true nature of the forest. Such an inventory will include the all resources in the forest and will determine the conditions upon which a management agreement is entered into between the Forests Service or local authorities and other parties. The Bill also allows for the formation of community forest associations to participate in the conservation and management of a state forest or local authority forest and may be the basis for involvement of the Ogiek in the management of the Mau forest.

C. Land, Environmental Resources And Feminism: Making the Connections

A feminist is a person who holds that women suffer discrimination because of their sex, that they have specific needs which remain negated and unsatisfied and that the satisfaction of these needs would require a radical change (or revolution) in the social, economic and political order. Feminist theories explore the incidence of oppression of women from different angles and proffer solutions to the problem as they see it. Ecofeminism stresses 'the depth to which human realities are embedded in ecological realities' and the connections represented therein.³⁹ Ecofeminists reject the Marxist assertion that dominance is based primarily on class and money.⁴⁰ They underscore the link between women and nature and link women's oppression to the degradation of the environment. This link is more pronounced among communities such as the Ogiek whose livelihoods are wholly based on the resources. The division of labour along gender lines and patriarchal notions also nuance the connections between people and environmental resources.⁴¹

In Kenya, land and resource tenure laws and policies have contributed to the removal of women from access, control and ownership of land. The marginalisation of women has had negative impacts on the implementation of environmental management policies generally.⁴² As providers of food for their families, women interact very closely with the environment.⁴³ In pre-colonial Kenya for instance, women used their knowledge to maintain a workable balance between drawing sustenance from land and allowing for the regeneration of that land within the limits of their defined rights of access and utilisation. The creation of reserves and the migration of male members of native communities to plantations and urban areas to seek paid employment, while redefining the mode of production, deeply entrenched the role of women as managers of the local environment. However, after the processes of consolidation, adjudication and registration, women lost control over the resources that they looked after and

39 Chris Cuomo, 'On Ecofeminist Philosophy', *7/2 Ethics and the Environment* (2001), 1.

40 Charlene Spretnak, 'Ecofeminism: Our Roots and Flowering', in Irene Diamond & Gloria F. Orenstein eds., *Reweaving the web: The Emergence of Ecofeminism* (Sierra Club Books, San Francisco, 1990) 5.

41 See Vandana Shiva, 'The Seed and the Earth: Biotechnology and the Colonisation of Regeneration', in Vandana Shiva ed., *Close to home: Women Reconnect Ecology, Health and development* (1994).

42 See Kanogo, *supra* note 32. In the process of consolidation, adjudication and registration, the major targets were heads of households (invariably male) who got absolute rights to the land in total disregard of the rights enjoyed by other members of the population. Some of the environmental management projects that women are involved in include reforestation, afforestation, soil and water conservation.

43 See, e.g., Wanjiku Chiuri & Akinyi Nzioki, 'Women: Invisible Managers of Natural Resources', in Shanyisa A. Khasiani ed., *Groundwork: African Women as Environmental Managers* 19 (1992). See also UNRISD & Bina Agarwal, *Gender, Environment and Poverty Interlinks in Rural India* (1995) on the effects the diminution of fuelwood on women's performance of their tasks in India.

depended upon to sustain their families. Further, the individualisation of property rights in land and the vesting of those rights in men alienated the women as managers from the ownership of the managed property.

The role of women as tenders of the environment however, continued undisturbed notwithstanding the fact that their claims to the land which they managed became more precarious and tenuous.⁴⁴ With subsequent introduction of cash crop farming for Africans and the controls put in place to ensure the adherence to good rules of farming, the workload of women increased without a concomitant enhancement of their *de jure* management and decision-making role.

Today women perform many tasks associated with environmental management and play a major role in the agricultural sector, which forms the economic mainstay of the country.⁴⁵ They provide the bulk of the labour required for day to day management of farms including planting, weeding, harvesting and processing agricultural produce.⁴⁶ Many women are also *de facto* heads of their households since their husbands have moved into the cities to seek for or perform jobs. In times of drought, it is incumbent upon the women to provide food for their families.⁴⁷ They are also responsible for saving seeds for the planting season. Biotechnology innovations leading to production of seeds for planting and the undermining of local varieties further removes women from the tools they need to perform their multiple tasks of production and reproduction.⁴⁸ Further, women's groups continue to form the major drive behind environmental management initiatives at the grassroots level.⁴⁹ Women are involved in reforestation programmes and soil conservation projects.⁵⁰ Any attempt to address the issue of sustainable management of any aspect of the environment thus needs to take into account the roles played by women. It is however not unusual to see oversight of environmental resource management put in the hands of men with no regard being had to the need for women's representation.

IV. Analysis of The Ogiek cases from the gender perspective

In this section, we look at the experiences of the Ogiek in their quest for control of their land and resources. As pointed out above, land rights in forest areas are vested in the state. Additionally, customary rights and community tenure have not yet received legal recognition. The couching of the Ogiek issue as a community one can yield tensions when some members of the community are in conflict with others as can happen when women feel that the quest for community cultural and land rights are not necessarily to their advantage.⁵¹ We will therefore look at the Ogiek search for justice through the judicial mechanisms and the gender dimensions in this quest. In analysing the cases filed by the Ogiek, we seek to find out firstly, whether the rights affecting women or the women's views have informed the quest for justice. Secondly, we seek to underscore the importance of including a women's law approach to courts' canvassing and deliberations on women's rights.

44 See, e.g., Barbara Thomas Slayter & Dianne Rocheleau, 'Gender, Resources, and Local Institutions: New Identities for Kenya's Rural Women', in B. P. Thomas-Slayter & D. Rocheleau eds, *Gender, Environment and Development in Kenya - A Grassroots Perspective* 7 (1995).

45 Ester Boserup, *The Role of Women in Economic Development* (1970).

46 See Kanogo, *supra* note 32.

47 See, e.g., Barbara P. Thomas, *Household Strategies for Adaptation and Change in Kenyan Rural Women's Associations* (1988) and B. Thomas-Slayter, *Politics, Class and Gender in African Resource Management: Examining the Connections in Rural Kenya* (1989).

48 Women have traditionally been charged with the responsibility of preserving seeds for planting and the monoculturing of seeds through biotechnological innovations removes them from this role. See Calestous Juma, *The Gene Hunters: Biotechnology and the Scramble for Seeds* (1989) and Vandana Shiva, *Monocultures of the Mind: Perspectives on Biodiversity and Biotechnology* (1993) for a discussion on monoculturing of seed varieties. See also Vandana Shiva, 'The Seed and the Earth: Biotechnology and the Colonisation of Regeneration', in Vandana Shiva ed., *Close to Home: Women Reconnect Ecology, Health and development* (1994) documenting how the green revolution and mechanisation marginalised women in the production process.

49 See generally, B. P. Thomas-Slayter & D. Rocheleau eds., *Gender, Environment and Development in Kenya - A Grassroots Perspective* (1995). See also Wanjiku Chiuri & Akinyi Nzioki, *supra* note 43; Shanyisa Anota Khasiani, *Women in Soil and Water Conservation Projects: An Assessment*, in Shanyisa A. Khasiani ed., *Groundwork: African Women as Environmental Managers* 27 (1992) and Esther Wangari et al., 'Gendered Visions for Survival, Semi-arid Regions in Kenya', in Dianne Rocheleau et. al. eds, *Feminist Political Ecology: Global and Local Experiences* 127 (1996).

50 See generally, Shanyisa A. Khasiani ed., *Groundwork: African Women as Environmental Managers* (1992) for examples on the diversity of environmental projects that women are involved in.

51 See Banda & Chinkin, *supra* note 13.

A. Indigenous Claims and Cultural Identity

In one of the publications of the Ogiek newsletter,⁵² when describing the men who represented the community in presenting the Ogiek views to the Constitutional Review Commission of Kenya, the OASIS team wrote:

There were four Ogiek sons. Assembly member Mr Charles Sena, a soft spoken man in his early thirties who has unmatched hunting qualities besides being a shy honey eater, Dr. Johnson Chengeiyo in his early forties, also soft spoken, a serious honey eater besides being a professional hunter, Kimaiyo Towett an outspoken gentleman in his early thirties, a shy honey eater and a firm believer in the integrity of creation and finally David Mpoiko Kobeil, a professional and a serious believer in Ogiek empowerment.

The Ogiek believe that their lifestyle is distinct and that they fall under the category of indigenous communities similar to the San people of South Africa, Maori of New Zealand or Aborigine of Australia. The Kenyan constitution does not recognize indigenous people. The draft constitution has also not made provisions for them. Dr Smokin Wanjala⁵³ a lecturer at the University of Nairobi, Faculty of law summarized the position as follows

The characteristics of the Ogiek do not strictly qualify them as indigenous. This argument is a mixture of activism – all tribes belong to Kenya at least after colonialism no tribe can claim a better ownership than the other.

John Mutakha, one of the Constitution Review Commissioners, shared that view and opined that although the constitution needs to recognize certain group rights, one has to be careful to avoid a situation where some groups are singled out as having better claims to land and resources than others. He says that many other groups, including the Maasai, presented that opinion but this would result in discrimination at a time when Kenya needed a constitution to promote national unity. Liz, a programme officer with KFWG however pointed out that

When they (Ogiek) go to international forums, or when we invite them in our meetings, they are treated as indigenous people.⁵⁴

The Ogiek consider their connection to the forest as spiritual and most of their ceremonies like initiation, birth, death and marriage are linked to the forest. The use of herbs for spiritual purposes and ceremonies is pertinent here. They prayed with the sunrise and the sunset and believed in a superpower. Both girls and boys undergo initiation ceremonies. Female genital mutilation is still practised in the community. The rites of passage into adulthood are emphasised because one is considered an adult thereafter. This happens between the age of 15 and 16 years for both girls and boys. Some of the implications of these rites of passage such as boys getting out of control as they define their masculinity need shifting by the community in their claim to a right to culture so that culture is not viewed negatively.

Labour is divided along gender lines. Men hunted and kept bees for honey and women gathered by collecting herbs as well as roots and carrying the hunted animals and honey harvested by the men. Medicine was collected by both men and women who had the knowledge. The women also worked on the skins to make clothing or ornaments, gathered firewood, cooked and generally waited for the return of their men. Men would hunt for long hours or days in the forest. They adhered strictly to traditional birth control

A man was trained to be respectful; he kept away from his wife particularly if she had a small child. He lived separately from his wife. When the wife was ready for another child, she would send the elder child with a gourd of honey to the man; the man would know that the woman is inviting him to her house.⁵⁵

Children were born about five years apart and so a couple had between four and five children. Under Ogiek culture women are perpetual minors

Women in the community are children, what can children discuss with me? I do not see why we should bother them with issues of importance like land.⁵⁶

52 The Oasis, Issue No.3.october 2003.

53 Interview done on 16th October 2003.

54 Interview done on 17th October 2003.

55 Mzee Taptich, Interview done on 24th October 2003.

56 Mr. Taptich an elder, Interview done on 24th November 2003.

Despite this fact there are women who have tried their hand at politics. For instance, Helen Tieptoo Kiptiony was brave enough to take on seven men in the contest for councillorship in the 2002 election. Amongst the hurdles she had to face were the community's perception of women as property; the perception of a proper dress code for women which regarded wearing of trousers as a taboo; the belief that it is disrespectful for a woman to stand in front of men to address them; the belief that a young lady (she was 28 years) should not greet an older person; and lack of adequate financial resources to run an election campaign since she did not own any property; the fact that she professed to be a born again Christian and was told politics was a dirty game and strictly for men. In her words

It was a very difficult time in my life. I got encouragement from fellow women and I tried to overcome the taboos by always starting my speeches by apologizing to the men, particularly the elders, and asking for permission to address them, as for dressing, I forgot about the trousers.⁵⁷

She was motivated to join politics by her mother who taught her to be responsible and to stand up for herself. She also wanted to use her position to assist the community to access resources, particularly education. While Helen did not win the election, she made the point that a woman can run for election and she hopes to vie again in the future. She believes women in the community should be encouraged to overcome the cultural stigma that keeps them sidelined.

Life has changed for the Ogiek and their relationship with the forest needs to be reassessed in light of the changed times. While men continue to argue that they can manage the forest in the way they did it in earlier days, women are emphatic that the old lifestyle cannot work. The men continue to talk about the forest while the women who have become engaged in farming, consider it a better form of land use to hunting and gathering because they now do not have to wait for men for days to bring home food in the form of the spoils from hunting expeditions. In this respect, women appear generally to be more in touch with reality than men who are still holding onto their romantic idea of their life in the past. This is not to dismiss culture and the right to preserve it. This argument is based on the women's point of view, which in our view was the dominant voice. Indeed while men were willing to concede to the need for change and modernity, they still held onto the past. This illustrates how strongly men view their cultural identity. While the community is entitled to this claim, certain dynamics need to be looked into as they bring out the gender nuances of the claim to cultural identity which can result in discrimination against women.

B. The Concept of Ancestral Land Ownership

The issue of land ownership continues to be a very sensitive issue in Kenya. This sensitivity is discernible among the Ogiek.⁵⁸ Significantly, five of the women interviewed had titles to land in their own names, eight had joint titles with their husbands but the rest had none. Given that women appear to have adapted to the new lifestyle of farming and are mainly interested in putting up homes, their hard work is at risk of being appropriated by land owners if they cannot get title to the land. The issue of land allocation is not well understood among the Ogiek. They wonder what the purpose of excising and subdividing land into parcels to give to the Ogiek is. They compare such allocations to stealing a motor vehicle from someone and then giving them the logbook instead of the motor vehicle. They are of the view that the land belongs to them in the first instance and there is really no need to allocate it to them.⁵⁹ This position is diametrically opposed to the modern notion of tenure where the state grants and guarantees title to land.⁶⁰

Male respondents interviewed believed that women should not be given titles. One elder said that women who had title would leave their marriage or marry other men from outside the community. They were of the view that the titles should be in men's names. Others advanced the view that land should be communally owned and not vested in individuals through parcelling out and granting title deeds. The women's view was that if the land is registered in the man's name only, they could be reckless and may sell the land any time, giving the family no security in ownership, use and access. Women wanted direct control over the land and assurance that their farming efforts were not in vain but would contribute to uplifting their economic status and that of their families.

⁵⁷ OASIS of October, 2003.

⁵⁸ 'Ogiek families were 'robbed' of their land', Daily Nation newspaper 5th October 2004, 5.

⁵⁹ Towett in an interview done on 3rd November 2003.

⁶⁰ That was the argument advanced by Mr. Sang on the government's effort to allocate land and title ownership to some Ogiek people.

At Nessuit, women had formed groups tilling a common group farm where they planted maize and vegetables and they helped each other to till their own land. The OWC has been instrumental in the women's progress in the Ogiek community, particularly in East Mau. Programmes run on the ground include formation of men and women's groups and encouraging those already existing to continue; improving socio-economic activities, like farming for women and keeping of beehives using modern technologies. Planting of trees is also encouraged particularly in the women's groups that prepare and maintain tree nurseries. As one of the programme officers says

We carry out environmental programmes and in addition we have realized women are keener on doing farming so we encourage them to grow maize and vegetables to boost their income, we are introducing new movable combs as opposed to the old ones and some women have shown interest in them.⁶¹

The men view activities along gender lines and believe they should concentrate on forest activities and leave farming to women since they consider it part of domestic work. Women are of the view that

Farming is better although we may not know the best ways but it is better than relying on a man to bring food which is not forthcoming; the hunting they talk about even in old days – men would go hunting for days and you waited for them, you either ate leaves or slept hungry. With farming, we can rely on ourselves.⁶²

The women identified their current problems as: lack of modern farming knowledge or training; lack titles to land; lack of finances, education or markets; lack of health facilities and essential services and absence of support from their spouses. In terms of land ownership, single women heading households appeared to have advantage over those living within the marriage as they had freedom to make more decisions.

C. International Instruments

Article 15 of the International Covenant on Economic Social and Cultural Rights (ICESCR) refers to the right of everyone to take part in cultural life, enjoy the benefits of scientific progress and its application and to enjoy the protection of literary or artistic works. Article 22 of the African Charter on Human and Peoples Rights (ACHPR) provides for rights to develop a cultural identity. Article 27 of the ICESCR talks of rights of a person belonging to ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion or use their own language in community with other members of their group. In 1992 the United Nations made a declaration on the rights of persons belonging to national or ethnic religious and linguistic minorities.⁶³

The Ogiek have identified themselves as an indigenous people, as defined in Article 1(b) of ILO Convention No.169 and the UN and the ACHPR have recognized them as such members.⁶⁴ Convention No. 169 stipulates that indigenous people shall have the right to retain their own customs and institutions where these are not incompatible with fundamental rights defined by the national legal systems and with internationally recognized human rights.

Rodolfo Stavenhagen has argued that cultural rights, particularly those pertaining to the preservation of cultural heritage, the cultural identity of a specific people and cultural development are in certain circumstances considered as 'people's rights'.⁶⁵ The states have obligations to ensure the respect, protection and fulfilment of each of these rights and these should be spelt out in the case of cultural rights and their various interpretations.

It would appear that cultural rights, by the nature of their description, could not be exercised individually but jointly with others within the community. It equally appears that these rights, if understood in the African concept, create more duties than rights. One appears to constantly relate one's behaviour to the expectations of the society demands.

Fighting for cultural rights and recognition by the Ogiek in terms of rights intertwined with the forest places upon them the duty to practice these rights to justify the continuance of the claims over the forest. . In a community

61 Mr. Keah, Interview done on 19 November 2003.

62 Mrs. Regina Kipkemoi says of their decision to engage actively in farming, Interview done on 4th December 2003.

63 General Assembly Resolution 47/135 of 18th December, 1992.

64 Kenya's Castaways: The Ogiek and National Development Processes in <http://minrights.org.dev.Kenya/mrg-pf.htm> (October 2003).

65 UNESCO, Cultural Rights: A Social Science Perspective, in UNESCO, *Cultural Rights and Wrongs* (1998).

where culture dictates that a woman is considered a child or property and female genital mutilation is practiced, creates the situation of discrimination of sexes. The issue of *de jure* equality as opposed to *de facto* equality comes into this claim to cultural rights. Article 5 of CEDAW, however, provides for member states to modify culture so as to avoid discrimination against women based on stereotyping of gender roles.

Article 2 of the ACHPR provides for the enactment of legislation that prohibits harmful practices that endanger the health and general well being of women. This right is supported by the Protocol on women's rights in Africa which to date has not been ratified by Kenya. This in particular would apply to the female genital mutilation performed on the Ogiek girls.

D. Courts' Handling of Ogiek Resistance: Gender Blind Decisions

The cases filed include: Joseph Letuya & Others vs. the Attorney General & Others (Nairobi HCCC No.635 of 1997); Joseph Letuya & 21 Others vs. The Minister for Environment & Natural Resources, Nairobi HCCC NO.2280/01; Francis Kemei & 91 Others vs. Attorney General & 3 Others (Nairobi HCCC No.238 of 1999); Simon Kiwape & 19 Others vs. Muneria Naimodu & 2 others Civil Case No.19/97-Narok and Representatives vs. Ministry of Environment & Ministry of Lands, Nairobi HCCC No.421/02. We will lay out the facts in two of the cases as a basis for the discussions on the gender nuances.

1. Joseph Letuya & Others vs. the Attorney General & Others (Nairobi HCCC No.635 of 1997)

In this case, the community sued the government challenging the legality of the demarcation and alienation of their ancestral land. The decision will have to address the concept of ancestral land in Kenya, the issues of indigenous claims not only for the Ogiek but other communities, the government's ownership of land with customary claims by the community and the concept of legal pluralism. The recognition of a people's right to their culture and the need to consult them when dealing with natural resources available to them will also have to be addressed. Conflicting statutes on forest resources, environmental management and various legislations dealing with land ownership can be interpreted so as to address the reality on the ground rather than a theoretical framework. The environmental legislation includes a right to public participation in decision-making. It will be interesting to see how this works in this particular case. This case was unfortunately still pending when this data was compiled.

2. Francis Kemei & 91 Others vs. Attorney General & 3 Others (Nairobi HCCC No.238 of 1999)

The Ogiek living in Tinet Mau challenged an order for eviction from the forest. This case was determined at an interlocutory stage as it had sought a temporary injunction against the government. As a result, the ruling was based on legal arguments rather than *viva voce* evidence. The application was heard as a constitutional reference by a two-judge bench. On the argument that Ogiek were hunters and gatherers the judges said:

Hunting is illegal in Kenya. The eviction is for the purpose of saving the whole of Kenya from possible environmental disaster and it is being carried out for the common good within the statutory power since the Ogiek can make a living outside the forest.

On the issue of a claim of dependence on the forest as a source of their livelihood for bee-keeping, the judges said:

There is no reason why the Ogiek should be the only favoured community to own and exploit our natural resources, a privilege not enjoyed by or extended to other Kenyans.

No international instruments were referred to in the ruling and the judges did not address themselves to the fact that other Kenyans do not use the forest in the same way the Ogiek do. No argument on their knowledge of conservation was, for instance canvassed. Additionally, there were no women plaintiffs in any of the suits, and the pleadings were couched in gender neutral terms that covered the entire community. Gender as a variable has not been canvassed in the suits. This is a grave omission given women as women and as a constituent part of a marginalised community experience different forms of discrimination. The effect of constant eviction, lack of land ownership and the protection of rights of women to found a family and live in peace, their children's right to education and their right to live in safety and freedom from discrimination are not addressed. The cases proceed as though matters being decided involve men who are busy hunting and destroying the forest while the reality on the ground is that there are several settlements where women keep homes and children attend school.

E. Environmental Concerns: How Have Women Participated?

In East Mau, the rate of forest excision can be shown by statistics of forest cover over the years. The forest cover was 89 per cent in 1986; 81 per cent in 1990; 80 per cent in 1995; 50 per cent in 2000 and 47 per cent in 2003.⁶⁶ As noted above, in addition to excising the forestland for settlement, the government has also licensed big logging companies and small saw millers to carry out activities within the forest complex. These enterprises are largely owned and run by non-Ogiek.⁶⁷

It is interesting that though women interact very closely with environmental resources including forests, very few of them are forest officers. The *de facto* role of women as environmental managers is not matched by the *de jure* institution of forest management officers. At the Nessuit forest office for instance, a list of names of previous forest officers since 28 February 1950 posted on a notice board included only men. There was also not a single woman forest guard or forest officer in the area of research.

In terms of destruction of environmental resources, information from a forest officer in the area of research indicated that both men and women destroy the forest. Women collect firewood but men fell logs and burn charcoal. There is no planting of trees going on because of the settlement process and there are no particular programmes that target women.

The Ogiek feel that they are good forest managers and forest officers and their guards should not harass them because they are unlikely to destroy the forest. They view forest officers as uncooperative due to their insistence on following the law instead of dealing with issues as they are on the ground. Concerns for the environment through law have not underscored the role of women as environmental managers. Programmes on sound environmental management in the Mau Forest complex are aimed at all members of the community. The Kenya Forest Working Group (KFWG) for instance, conducts many workshops to sensitize the community in forest management including areas in the Mau forest. They mainly target community-based organizations, government officers, opinion leaders and women's groups. There is the view that though attempts are made to include women as participants in such workshops, women do not attend in large numbers either because of community beliefs on the place of women or too much work. KFWG has however had greater success with women's participation in areas where women have been sensitised especially where the Green Belt movement is operational. The main limitation of the KFWG however, is its lack of direct access to the community and having to work through the forest officers. The failure of the Forests Bill 2004 to become law has also meant that the operational policies are outdated and have not taken on board new issues such as community involvement in forest management.

The Environment Management and Coordination Act 2000 provides mechanisms for public complaints in instances of environmental degradation. The Public Complaints Committee, set up under section 31 of the Act, is concerned with investigation of complaints relating to environmental damage and degradation generally. They have received many complaints related to Mau forest on logging and excision which have not yet been processed. These have been brought mainly groups that are not disaggregated along gender lines. The mandate of the PCC is very wide and other than ensuring that the public complaints are attended to, gender representation is not a concern that they have given much attention. Local groups such as OWC which work on the ground in the target areas have endeavoured to incorporate women in their programmes keeping tree nurseries and learning new methods of farming.

It is apt to say that the use of the environment to preserve cultural and customary rights and natural resources for the protection of women is still a grey area in Kenya. The idea that women are good environmental managers is yet to be acknowledged and the obligation on the state to preserve the environment for them is not given priority. This is surprising given that Kenya has ratified multilateral environmental agreements that underscore the roles that women play in environmental management and exhort states parties to put in place mechanisms for facilitating women in the performance of these roles.⁶⁸ The Convention also requires state parties to respect, preserve and

⁶⁶ Source-Swiss National centre of Competence in Research North-South.

⁶⁷ Asked whether the Ogiek are part of the saw milling business, Mr Towett says: Never, the Ogiek are culturally trained not to fell trees, besides they are too poor to engage in such business. The one woman who had owned a sawmill was a non-Ogiek woman called Njeri. Her sawmill, Njeri Sawmill, was located near the town around the research sawmill and had been closed down. In most of the sawmills around the area, the employees are male because the work involves carrying huge logs and operating splitting machines and they are non-Ogiek.

⁶⁸ See Preamble to the United Nations Conference on Environment and Development: Convention on Biological Diversity, Rio de Janeiro, June 5, 1992, 31 I.L.M. 818 (1992) which states: Recognizing also the vital role that women play in the conservation and sustainable use of biological diversity and affirming the need for the full participation of women at all levels of policy making and implementation for biological diversity conservation.

maintain knowledge, innovation and practices of indigenous people embodying traditional lifestyles relevant for the sustainable use of environmental biodiversity.⁶⁹ Articles 21 and 24 of the African Charter on Human and Peoples Rights provide for the rights of people to the use and enjoyment of their natural resources.⁷⁰

The Protocol to the African Charter on Human and People's Rights on the Rights of Women, though not yet in force, has explicit provisions on the right of women to a healthy and sustainable environment at Article 18. States Parties are required under the Protocol to ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels and to protect and enable the development of women's indigenous knowledge systems. Article 19 further provides that women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties are required to introduce the gender perspective in the national development planning procedures; ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes; and promote women's access to and control over productive resources such as land and guarantee their right to property.⁷¹

These provisions provide a basis for linking women's rights to the quest for the Mau forest complex by the Ogiek. This link is critical because the clearing of the forest has general as well as gendered impacts on the members of the Ogiek community. These include rivers flowing from the escarpment having less water and some drying up which for women, means water scarcity and more work in terms of accessing water; loss of plant and animal species and the concomitant substitution of indigenous trees with exotic varieties; loss of species used for medicinal purposes, a pertinent issue for women given that health facilities inadequate and that there is no maternal health care in the area; and the loss of indigenous medicinal knowledge associated with the lost indigenous plant species.

The law is unable to deal with these issues adequately. For instance, the Forest Act neither provides for the rights of the local community nor guarantees their rights to use the forest and its products. The Act has not only vested the ownership of the forest in the state but has made provision for supervision so as to exclude communities by designating certain forms of access to the forest as unauthorised and illegal. It has excluded the community and women particularly from participating in forest management since the forest managers are all male and furthermore, male who are government employees and not community members.

The Environment Management and Coordination Act, which came into effect in 2000, has equally not sufficiently addressed the issue of indigenous and women's rights. Since the operative Constitution does not recognize indigenous rights, when the Ogiek fight for conservation of the forest they do so as any other interested party rather than people defending a resource vital for their existence and livelihood.

The legal framework enumerated above places a responsibility on the government to preserve the forests and the environment and to engage the communities that live within them to practice proper use. However, lack of policies that include indigenous people and women and the failure to tap on the Ogiek knowledge on conservation, are examples of policies that remain only on paper.

V. CONCLUSION, RECOMMENDATIONS & WAY FORWARD

A. Concluding Remarks

Land and resource tenure laws and policies have marginalised the Ogiek, impacting on the livelihood of this forest-dwelling community. The dominant paradigms of state and individual ownership have had difficulty conceding to rights of communities. Moreover, the conception of resource conservation as an activity removed from the

⁶⁹ *Ibid.* at Article 8.

⁷⁰ African Charter on Human and Peoples' Rights, Adopted by the eighteenth Assembly of Heads of State and Government, 27 June 1981 - Nairobi, Kenya, OAU Doc. CAB/LEG/67/3 rev. 5; 21 I.L.M. 58 (1982), entered into force 21 October 1986.

⁷¹ Optional Protocol to the African Charter on Human and Peoples Rights of Women in Africa. July 2003.

community and carried out through state agency has preempted the enlistment of the Ogiek community in the conservation and management of the Mau forest.

State ownership of the forest occupied by the Ogiek and the manner it has dealt with replacing indigenous trees with exotic varieties have no medicinal value, hampers beekeeping activities from which they earn their living, destruction of the forest that has destroyed their legacy and denial of land ownership, lends credence to the Ogiek complaints against the state.

Constant evictions are not genuine if the same government excises the same forest to allocate it to individuals who are not members of the community and without giving them first priority or recognizing their customary rights of ownership. The eviction has also exposed them to what they term human rights abuses because it has denied them the right to peace, property, culture and education or any development programmes.

This research looked at the Ogiek claims from a gender perspective, particularly from a women's law perspective, and data collected was done so with a view to finding the women's voices, We have seen that part of the claim for the forest is so that the community lifestyle of hunting and beekeeping is continued and preserved but women in the community do not hunt or keep honeycombs nor is there any intention to incorporate them into these activities.

In the search for cultural identity and recognition, communities are rallied together against a common enemy, in this case the state. Issues of intra-community inequities are put aside as all attention is focused on eliminating a common enemy. The Ogiek as a polity seek to preserve the forest as an embodiment of their culture. Some current cultural practices are detrimental to the well-being of women. The negative practices need to be discarded and the positive practices promoted. This however is not seen as an immediate concern in most communities fighting a single enemy. It is not unusual to have rites that impact negatively on a particular group being promoted in the quest for ethnic identity in the face of threats from agents external to the ethnic polity. For instance, the initiation into adulthood for girls is a mutilation of the body, which is life threatening and breaches a girl's right to life. Her belonging to the society is predicated on her going through the rite and failure to abide to the expectation could result in her being ostracized for failing to conform. Yet Ogiek ethnic identity is premised on the maintenance of cultural practices such as this and the concept of women as minors or as property which leads to discrimination on the ground of sex and the dominance of sexes. The claim for cultural rights in this scenario then becomes purely a restatement of patriarchy and entrenchment of patriarchal norms.

A claim for land is a noble claim but how will women benefit if they are regarded as minors and property in the community? We have seen that women are ready to embrace modernity and have ready to learn new farming methods. All they need now is encouragement and access to resources in terms of land; skills and finance. Women find that engaging in farming gives them a better economic position where they can take care of the family. In a way, gender roles have changed and most women have become the family providers.

This chapter illustrates that in terms of marginalization of the community, the women fully supported the complaints but the problem is the emphasis on the public utilities required. Health, for example, was seen by men in terms of putting up a dispensary but did not think of adequate maternity health care. It may not be enough to put up schools if the community is not ready to give the girl child the freedom to learn. .

B. Recommendations

The excavation of women's rights in a traditional community such as the Ogiek requires more than legal interventions. The dominant paradigm is that of male dominance over women and unless this is debunked, reforms will remain cosmetic. For instance, there are women among the Ogiek who have moved out of traditional domains and ventured into territories perceived as primarily male preserve. Narratives on these women should be used to begin a process of social engineering. In challenging dominant paradigms, law can be used to promote narratives that provide space for indigenous people and women among such people to enjoy their rights and free themselves from the shackles of discrimination. The constitution is very useful in this regard and it should expressly provide for indigenous and group rights but with a rider by adopting the protocol of the African Charter on Women⁷² to promote positive cultural practices and discard the negative ones and to include the right to own property.

⁷² *Ibid.* at Article 17.

Domestication of international instruments would amplify and further buttress constitutional provisions by reinforcing the state's duty to recognize and protect these rights. In particular the Protocol of the African Charter on Women is a useful instrument that should be given full effect within our laws. Local legislation on land should equally be aligned with provisions of equality contained in international conventions.

To ensure that the rights provided for are enjoyed, mechanisms for community participation should be put in place. Incentives should be put in place for the community to participate in conservation measures through benefit-sharing schemes and access and use rights. Management committees should include women as a matter of course. In carrying out community management programmes, the government should tap the indigenous knowledge of the people in preserving forests. Government projects should target areas with no development projects to ensure, as much as possible, equality and equity amongst all citizens. This can be done in formulating policies with affirmative action. In the allocation of land to the Ogiek, the government should involve only *bona fide* members of the community and ensure gender balance in title issuance. Community spokespersons should include men and women.

Access to justice is critical to the realisation of rights to land and resources. In this regard, the Ogiek have several cases pending before the court. Priority should be given to the expeditious and judicious finalisation of these cases.

C. The Way Forward

The government has no development programmes in most areas occupied by the Ogiek. Nessuit is one of the forests forming part of Eastern Mau complex and there is in place a fully-fledged forest station complete with forest guards. This is surprisingly the only presence of an organized government infrastructure in the area. According to the elders in the group discussion, in their many years of living in that area, the only government programme they have seen is the destruction of the forest and allocation of land to 'foreigners'. To build positive relationships between the government and the Ogiek, the following should be done:

1. Recognition of the Ogiek as a tribe

The Ogiek claim that the government has not given them recognition, and according to the Chief Rotich:⁷³

Official Kenyan tribes have for a long time been 42 and each has a code number. The Ogiek are not amongst them. We are now fighting to be included. The number should be 43 or more, this is being sidelined.

Article 25 of the draft United Nations Declaration on the Rights of Indigenous Peoples states:

Indigenous peoples have a right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources whether they have traditionally owned or otherwise occupied or used them and to uphold their responsibilities to future generations.

Article 6 of the same draft requires that the government include indigenous people's participation at all levels and seek their opinions while dealing with natural resources considered belonging to them. The government should recognize the Ogiek as a tribe and accord them rights as indigenous people.

2. Education

The level of illiteracy in the community is high and this relates to the government's constant threats of eviction and closure of schools. At independence few Ogiek were going to school but the number of schools in Mau forest increased, mostly put up by the Catholic Church. In 1987 the government closed several schools in the area and it was only towards 1992 in the dawn of multiparty politics that the schools were reopened. No secondary schools serve the community and the primary schools are scattered at distances of about 12 Kilometres.

Measures should be put in place to assure the Ogiek of education especially in light of the free education programme. This should be coupled with provision of more schools and ensuring that children remain in school by stemming early marriages. Indeed the lack of schools is not the only issue hampering the education of the Ogiek children.

⁷³ Interview done on 24th October 2003.

Part of the problem is cultural practices like initiation ceremonies that place emphasis on adulthood. Young boys who are still school going age begin to take up adult responsibilities and girls are often pressurised to marry. The high level of poverty makes most parents get their daughters betrothed at an early age, some as early as 10 years. This hinders the progress of women in areas that require education.⁷⁴

Article 26 of the UDHR and article 13 and 17(1) of the ICESCR gives the state an obligation to provide for education for its citizens. Article 10 of CEDAW and article 28 of CRC specifically makes that provision for education of both women and children. At the local level, the Children's Act makes it mandatory for the government if the immediate family is unable, to ensure a child's education. Clearly, this obligation both at international and local level has not been met.

In terms of legal awareness, Regina (42 years) said she was not aware of any women's rights or child maintenance. Others shared her sentiment. They take their cases to the chief and go back home with them as they claim the chief is biased against women. There have been no groups sensitising women about their rights and many have no idea what type of family cases they can take to court or whether there is such a thing as court fees or legal expenses. There is clearly need for sensitisation on rights.

3. Employment opportunities

According to the chief, the Ogiek are part of Nakuru district, which has many other tribes who have either come for employment or left their own ancestral homes to settle there. When issues like employment opportunities arise and there is a quota for each district, the other tribes tend to gain both in Nakuru district and their home districts. The Ogiek, whose only homes are within Mau, are outnumbered and stand no chance of getting into the district quotas.

On politics, the highest politicians from the Ogiek community are two councillors who are men. It is clear that the marginalisation of the Ogiek in politics has direct implications on women's discrimination. Few women are recognized as community representatives. Access to employment opportunities for the Ogiek generally and women particularly is critical to advancement of the Ogiek agenda and quest for their land rights.

4. Health

Article 12 of CEDAW specifically requires that state parties provide adequate health facilities for the women but, as already stated, the Ogiek occupied area lacks health facilities and women depend mainly on herbal medication. There is for example no maternity facility within Nessuit area and according to Jane Machani, the OWC gender representative; most women rely on traditional birth attendants. The inherent health risks and the need to address these cannot be overemphasised.

5. Right to freedom from harassment and discrimination

Evictions and constant harassment are clearly a violation of the Ogiek human dignity and a right to life. Articles 1 and 2 of the UDHR and articles 2 and 4 of the ACHPR and articles 2 and 6 and 9 of the ICCPR are relevant here. They provide for freedom from discrimination, equal treatment and freedom to life and human dignity. The evictions have also interfered with the women's right to form and found a family because of constant disturbance. These need to cease.

6. Other Problems

One of the weaknesses of the Ogiek community in terms of fighting against marginalization, as the chief says, is that community development has been difficult because they are a small group, yet scattered. Lack of exposure has not seen them unite. Groups like OWC may be making progress but the community looks at them as a source of employment and financial assistance rather than as groups that need their grassroots support.

While the women shared with the men the view that they were marginalised, they felt that their men were partly to blame because

⁷⁴ Mzee Koros, an elder, Interview held on 9th of December 2003. he opined that though the Ogiek life is changing, special consideration should be given to them by the state in terms of education for their children, loans, and training, employment and development projects.

Most of our men are uncooperative, they have refused to adopt to the new lifestyle after the forest has been destroyed, they spend most of the day doing nothing, they have refused to farm and so the children do not go to school because of lack of support from the husbands, how do you expect to progress if you have no education?⁷⁵

According to the women, the men are burying their heads in the sand thinking about hunting and keeping bees while these have become impossible. They are not facing reality and have refused to learn farming methods, leaving the full burden to the women. Another weakness on the part of the men in our view is the failure to include women in the fight for their rights. To quote Sembene Ousmane a renowned Senegalese novelist and film maker:

Women are the future of Africa. Yet too often they are ignored.

Often the silent person may hold the solution to a problem. Women make good agents of sensitisation in the community. Including them may open certain paths, even if these may come in form of outside assistance to the women, the whole community stands to gain. It is imperative that their voices are hearkened in the Ogiek quest for justice.

⁷⁵ Regina Kipkemoi, Interview done on 9th December 2003.

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