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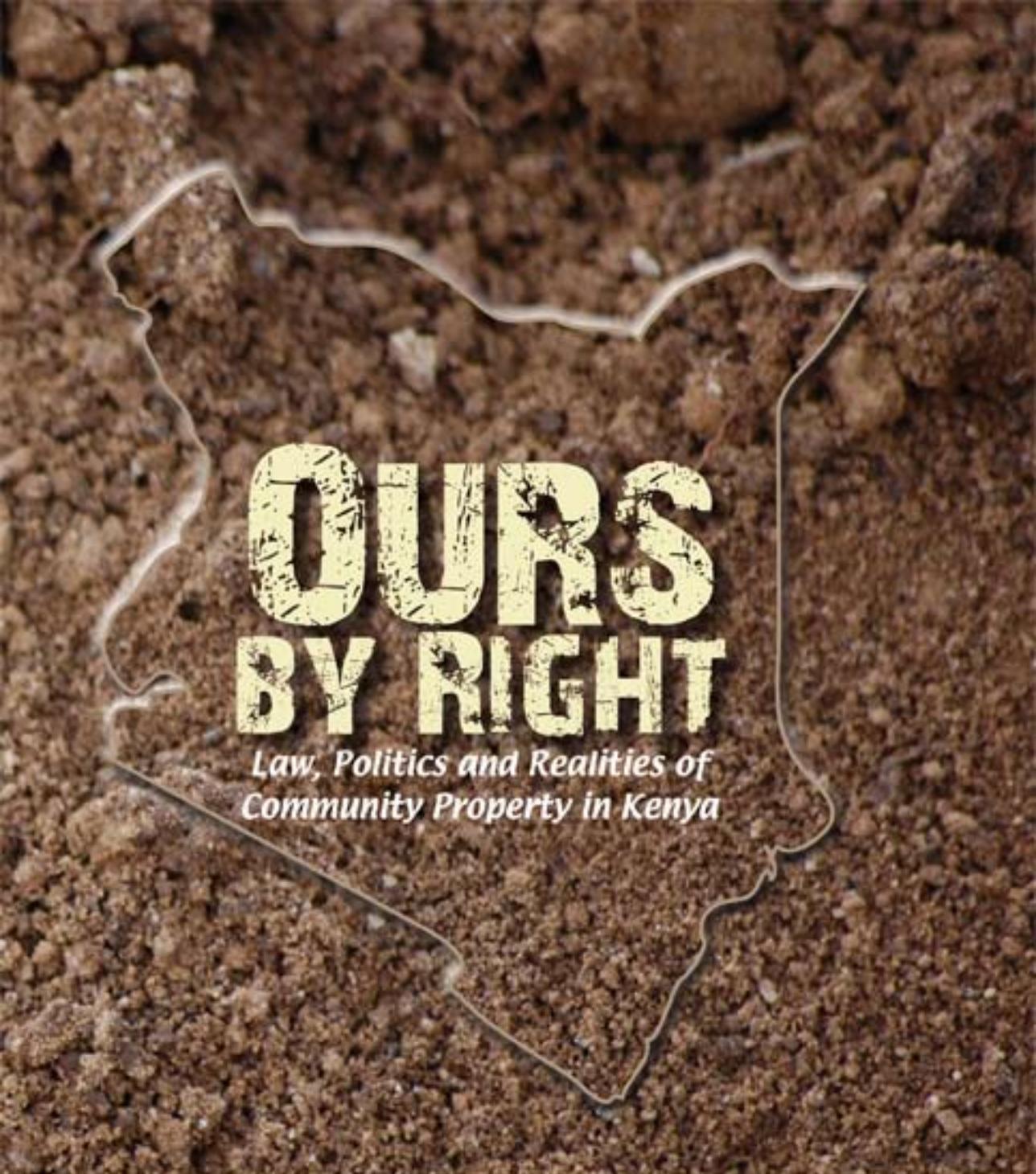
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LAW, POLITICS AND REALITIES OF COMMUNITY PROPERTY IN KENYA

Patricia Kameri-Mbote, C. Odote, C. Musembi and M. Kamande

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OURS BY RIGHT

*Law, Politics and Realities of
Community Property in Kenya*



Swarthmore University

PRESS

Patricia Kameri-Mbote • Collins Odote
Celestine Musembi • Murigi Kamande

**OURS BY RIGHT: LAW, POLITICS AND
REALITIES OF COMMUNITY PROPERTY IN
KENYA**

By

Prof. Patricia Kameri-Mbote

Dr. Collins Odote

Dr. Celestine Musembi

Wilson Kamande

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ABBREVIATIONS

ACHR:	American Convention of Human Rights
ACHPR:	African Charter on Human and Peoples' Rights
AIDS:	Acquired Immune Deficiency Syndrome
ASAL:	Arid and Semi-arid Land
CBD:	Convention on Biological Diversity
CBNRM:	Community Based Natural Resource Management
CERD:	Convention on the Elimination of all forms of Racial Discrimination
CLARA:	Community Land Rights Act
CLRM:	Community Land Rights Recognition
EIA:	Environmental Impact Assessment
FDA:	Forest Development Authority
FGD:	Focus Group Discussion
HIV:	Human Immunodeficiency Virus
IACHR:	Inter-American Court of Human Rights
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ILO:	International Labour Organization's
KWS:	Kenya Wildlife Service
LBDA:	Lake Basin Development Authority
NLC:	National Land Commission
NLP:	National Land Policy
NRT:	Northern Rangeland Trust
NGO:	Non-governmental Organisation .
PFM:	Participatory Forest Management
SCA:	Supreme Court of Appeal
UNDRIP:	United Nations Declaration on the Rights of Indigenous Peoples
USA:	United States of America
USAID:	United States Agency for International Development
VLA:	Village Land Act

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FOREWORD

This is a pioneering study on a critical, yet infinitely complex subject, in the setting of legal and constitutional rights in an African country: the subject of property rights. If the property-rights label appears clear-cut enough, and readily lends itself to market-oriented criteria of assessment, particularly in the industrialized world, it is quite the reverse in Africa and, especially, where *land* is concerned. It is clear from the Constitution of Kenya, 2010 which accords land a full Chapter¹, that this subject bears an elevated status over and above the Bill-of-Rights provisions on “protection of right to property²”.

Clearly, the Kenyan people in their constituent power, have perceived land as more than just property which readily converts to market value – with relevant injuries being recompensed conclusively with awards of damages. The Constitution sets out governing principles on *land policy*. Finite, yet socially, economically and culturally vital, land in Kenya has merited the declaration that it “shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable³.”

Public land, community land and private land are the three categorizations made in the Constitution; and *community land*, a core sphere of the instant work, refers to land attached, historically, socially and for beneficial use, to a distinct population group: an ethnic community, a cultural community, or some other social interest-group.

The Constitution, in its solicitude for social-group welfare, lays a foundation for policy, programming and juristic openings towards practical solutions. That a governance question so fundamental in a progressive constitutional order merits legal attention, is the obvious justification for the instant publication. The work devotes its attention to: community interests and the land question; Kenya’s experiences in relation to community land; and comparative experiences drawn from further a field.

The authors have drawn a notable distinction between land as a basis of defined *private rights*, as known in ordinary practice of law – on the one hand – and, on the other hand, land as a “bundle of rights”, of composite dimensions. In the latter case, as the authors remark, “land is critical to the economic, social and cultural development”; land is “linked to sovereignty”; “land is a politically sensitive issue [and is] culturally complex”; “[land] has spiritual and religious dimensions in communities that perceive it as a host of the spirit of the community and the residence of the deity”. From such a foundation, the authors have then considered the important question as to whether the bundle of entitlements centred on land should, as in the conventional property-rights system, vest in one person exclusively.

¹ Chapter Five: Land and Environment

² Article 40.

³ Article 60(1).

The authors make a notable contribution by proposing ways of unbundling the property rights attached to land, and by signalling lines of interpretation of the Constitution's intent, in relation to the community's welfare. The emerging issues, which are multi-dimensional, bring to the table of dispute settlement novel perspectives on the interpretation of law and of claims of rights founded on the new Constitution.

Thanks to the learned authors, Professor Patricia Kameri-Mbote and her colleagues, Dr. Collins Odote, Dr. Celestine Musembi and Mr. Wilson Kamande, legal scholarship in relation to community land-rights has been significantly enriched. This, by illuminating the paths of dispute settlement in the elevated context of rights under the Constitution, comes in aid of the courts' endeavours, and gives more scope for creativity in shaping the course of jurisprudence.

Jackton B. Ojwang
Justice of The Supreme Court of Kenya
September, 2012

Supreme Court Justices' Chambers
The Supreme Court of Kenya
Nairobi

LIST OF CONTRIBUTORS

Patricia Kamari-Mbote earned her doctorate from Stanford University in 1999 specializing in property rights and environmental law having earlier studied law in Nairobi, Warwick and Zimbabwe. She is a Professor of Law at the School of Law, University of Nairobi. She is also Professor of Law and the Chair of the Advisory Board of Strathmore Law School (Strathmore University, Nairobi) whose preparation, planning, initiation and launch she executed between 2009 and March 2012. She is an Advocate of the High Court of Kenya and has served as a Policy scholar at the Woodrow Wilson International Center for Scholars. She currently teaches and researches on property, environment and gender at the School of Law, University of Nairobi the University of Zimbabwe and Property Law. She has also taught international environmental law at the University of Kansas; Trade, Environment & Law at the University of Stellenbosch, Cape Town, South Africa. She has published widely in her areas of specialisation.

Celestine Nyamu Musembi is a lawyer with inter-disciplinary training in Legal Anthropology. She earned her LL.B degree from the University of Nairobi in 1993, her LL.M and SJD degrees from Harvard Law School in 1995 and 2000 respectively. She is currently a Senior Lecturer at the University of Nairobi School of Law. She previously served as a Fellow of the Institute of Development Studies, Sussex (UK) for six years. She teaches and researches in the areas of human rights and development; gender and politics; citizen participation in governance; family law; and property relations.

Wilson Kamande is a Lawyer having graduated from the University of Nairobi, School of Law with LL.B (Hons). He also holds a Post Graduate Diploma in Law from the Kenya School of Law. He has been a Research Assistant since his days as an undergraduate during which time he got the opportunity to work with Prof. Patricia Kamari-Mbote and Prof. Migai Akech in their publication entitled *Kenya: Justice Sector and the Rule of Law*. He has also engaged as a Research Assistant/ Intern for Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Open Society Initiative for Eastern Africa (OSIEA and Kituo cha Sheria (Centre for Legal Empowerment). He is currently a Legal Assistant at the firm of Mohammed & Kinyanjui Advocates pending his imminent admission to the Roll of Advocates. Apart from Environmental Law, he has great interest in Corporate Governance & Regulation of Financial Institutions which he is intent on pursuing for his LL.M Programme soon.

1.0 INTRODUCTION

Land is central to most African communities as a means of subsistence and a resource that embodies economic and social meaning. In Kenya, dependence on land is evident in the high percentage of persons engaged in agriculture and pastoralism. The main foreign exchange earners are agriculture (including horticulture) and tourism, both based on land. Vision 2030, Kenya's blueprint for transformation to a newly industrializing and prosperous nation, places a high premium on agriculture and wildlife-based tourism.⁴ The way in which land rights are organised is, therefore, central to Kenyans' aspirations to alleviate poverty and create wealth.

Colonialism not only imposed alien land tenure relations in Kenya, it also introduced conceptual, legal and sociological confusion in traditional tenure systems. As a result, African customary land tenure system and laws suffered far-reaching disruption. Colonial policy makers assumed that customary land tenure systems were unsuited to modern agricultural development.⁵ Customary law and its attendant rights were treated as inferior to the newly introduced formal private property rights based on English law. This necessitated the maintenance of a dual system of land law: English law applied in areas occupied by white settlers while native law and custom applied in the so-called "native reserves". The areas occupied by the settlers were more expansive, arable and habitable than those occupied by natives who were confined to areas not immediately required for European settlement. This created social and economic problems with poverty, disease, famine and ethnic tensions characterizing the native reserves.

When individualization of tenure in the native reserves started, the deliberate aim was to completely transform African communal tenure relations into individualized land holdings.⁶ The Registered Land Act⁷ was meant to extinguish claims to land based on African customary land law. Both the Trust Land Act⁸ and the Land (Group Representatives) Act⁹ were meant to transition customary to individual tenure in areas where immediate individualization could not be undertaken.

Land law in Kenya has thus systematically subjugated customary/community rights to land by emphasizing the role of the individual as the locus for property grant. This has adversely affected

⁴ Government of Kenya, *Kenya Vision 2030*, (Nairobi, Government of Kenya, 2007).

⁵ See Sorrenson, M. P. K. "Land Policy in Kenya 1895-1945" in Harlow, V. E., M. Chilver, and A. Smith, *History of East Africa* (London: Oxford University Press, 1965).

⁶ See Okoth-Ogendo, H. W. O. *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, Acts Press (1991).

⁷ Cap. 300 of the Laws of Kenya (Repealed by The Land Registration Act, 2012).

⁸ The Trust Land Act governs land in areas that were occupied by the natives during the colonial period and which have not been adjudicated and registered in individuals' or group names or taken over by the government. Such untitled land is placed in the custody of the local authority (county).

⁹ The Land (Group Representatives) Act creates and governs group ranches. It seeks to secure community land by: documenting and mapping existing forms of communal tenure; defining community; vesting community land in the community; laying out a clear framework and procedures for dealing with community land; and building capacity for communal land governance institutions and facilitating their operations.

the recognition and protection of customary rights. However, the resilience of customary land law is proof that assumptions regarding its modernization or extinction through formal law were not based on sound scientific theories. In fact, customary/community land tenure systems in Africa have withstood sustained subjugation, suppression and denial of juridical content in official parlance.¹⁰ Not surprisingly, therefore, Kenya's first ever National Land Policy (NLP) (Sessional Paper No. 3 of 2009) and the Constitution of Kenya (August 2010) have made provision for community land. The former notes that: customary land rights and traditional resource management institutions have been ignored and undermined; and that there has been widespread abuse of trust in the context of the Trust Land Act and the Land (Group Representatives) Act. The latter provides that community land shall vest in and be held by communities identified on the basis of ethnicity, culture or community of interest. It defines community land to include: land held by groups under the Land (Group Representatives) Act; trust land held by county governments on behalf of communities; and other land lawfully transferred to a specific community by any process of law. The Fifth Schedule of the constitution gives 18 months as the time within which legislation on land should be enacted and five years as the period for enactment of legislation on community land.

The process of coming up with legislation on community land rights justifies the need for background information to provide evidence and support for implementation of the provisions of the NLP and constitution. This book has been written to elicit different meanings of the term "community" and the understanding of "community rights" to land and related resources in Kenya. It is based on extensive research among selected Kenyan communities where customary land holdings are present and where lessons can be drawn. The main aim of the project was to generate knowledge to inform the framing of the community rights' law, institutions and procedures. The project was conceived at a time when policy reform around the world and across Africa has had to confront the shortcomings of monolithic discourse on property rights and land tenure,¹¹ focusing on the conversion of all tenure arrangements to private tenure which is perceived as economically efficient and providing the greatest security to the holder of rights to land and related resources.¹² Evidence¹³ demonstrates that in Africa, customary and/or communal land holding is a legitimate tenure category and in certain instances the most efficient tenure arrangement. Its recognition in policy is slowly spreading across the continent.¹⁴ Policy

¹⁰ Okoth, Ogendo, HWO, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion," Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, Usa River-Arusha, Tanzania, published in CIEL/LEAT/WRI/IASCP, *Amplifying Local Voices for Environmental Justice: Proceedings of the African Public Interests Law and Community-Based Property Rights Workshop* (USA, CIEL, 2002) pages17-29.

¹¹ See Cotula, L(ed), *Changes in "Customary" Land Tenure Systems in Africa* (IIED, 2007) pp 6-7; Clarke, R.A., *Securing Community Land Rights to Achieve Sustainable Development in Africa: A Critical Analysis and Policy Implications* 5(2) Law, Environment and Development Journal (2009) p. 130-150 at 132., available at <http://www.lead-journal.org/content/09130.pdf>

¹² Ogolla, B.D. and J. Mugabe, "Land Tenure Systems and Natural Resource Management" In Juma, C. and J.B. Ojwang. *In Land We Trust: Environment, Private Property and Constitutional Change* (Initiative Publishers and Zed Books, Nairobi and London, 1996) 85-116 at page 95and Migai-Akech, J.M., *Rescuing Indigenous Tenure from the Ghetto of Neglect*, (Nairobi, Acts Press, 2001) at page 1

¹³ Bruce, J. W. and Migot Adhola, S. , (1993) *Searching for Land Tenure Security in Africa*, Dubuque, IA: Kendall Hunt Publishing Company

¹⁴ See e.g. African Union, 2009, *Framework and Guidelines on Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods*

and law have lagged behind the practice in Kenya where these were expected to fall into disuse and be systematically replaced by private or "modern" tenure.

The book is divided into six chapters as follows: Introduction; Study Methodology; Conceptualizing Community Rights; The State of Community Rights in Kenya: Selected Case Studies; Protection of Community Rights: International and Comparative Perspectives; and Giving Meaning to "Community Rights" to Land and Related Resources in Kenya

2.0 STUDY METHODOLOGY

2.1 DESIGN

The design of the study was broadly qualitative combining both desk and field research. The field research focused on selected parts of Kenya where land is still held and managed under communal arrangements as these provided useful data, analysis and lessons. It focused on perceptions of community rights and claims, and their enforcement and enjoyment within different land use contexts such as pastoralism, fishing, agriculture and wildlife management.

2.2 SITE SELECTION

The Study was conducted in six areas in Kenya. In Samburu, the study focussed on the experience of the Northern Rangeland Trust, a choice made to represent pastoral land use and communities; East Mau in Njoro was selected to represent the experience of the Ogiek, a community that has represented public discourse and efforts to recognise community land rights in Kenya. Lamu in the former Coast province gave the team the opportunity to study and analyse the implications of the unique land issues at the Coast, while Kasigau gave comparable information of coast versus up-country debate in land issues around the Coast. It similarly was selected to enable discourses on the interface between community interests and wildlife habitat conservation. The last site chosen was Yala in the western parts of the country, due to the unique issues that surround tenure in lands which host wetlands.

The detailed descriptions of the sites are as follows:

- Samburu: This is pastoral community in an arid and semi-arid area where community rights are strong despite the establishment of group ranches. The communities have also established wildlife conservancies that sometimes consolidate different group ranches. Samburu County is sparsely populated with approximately 200,000 people 80% being the Samburu which, the main ethnic group and 20% unevenly shared by Turkana, Kikuyu, Mere, Somali and others. The county is Semi arid in nature and notable for its immense potential and contribution to the National Livestock industry particularly the slaughter stock.
- Kasigau: Located within Nyangala Division of Taita District, the area lies within Voi Constituency. According to the 2009 population census results, Taita District has 216,992 people and an area of 13,582 square kilometres hence a population density of 16 which indicates a sparse population ¹. The population is concentrated around hills, with the plains being taken up by large sisal plantations, ranches and the sprawling Tsavo National Park. Kasigau Location has a total population of 13,686.²
- East Mau Forest Block: The study focused on Nessuit Location in Njoro Division of Njoro District. The total population for Njoro Division (now district) is 78,886 while the total

¹ Kenya National Bureau of Statistics, *2009 Kenya Population and Housing Census*, Vol.1A (Population Distribution by Administrative Units) (August 2010), p.25.

² Kenya National Bureau of Statistics, *2009 Kenya Population and Housing Census*, Vol.1A (Population Distribution by Administrative Units) (August 2010), p.62.

population for Nessuit Location is 13,488.³ The area is inhabited by the Ogiek, a hunter-gatherer community living among agriculturists. Mau Forest is a major water catchment area for Kenya and other countries in the region. The land tenure regime is both public in the forest and private as individuals have been granted private holdings in the forest.

- Lamu: This is a coastal area where people have settled on government land. The total population is 101,539. Lamu hosts the Kiunga Marine Park⁴ and Lamu Town is a World Heritage site. It is proposed to be the site of the second sea port in Kenya.
- Yala: The site is a swamp that straddles former Western and Nyanza provinces and current Busia and Siaya counties within the devolved government structure. It lies on the north-eastern shoreline of Lake Victoria. The swamp is the third largest in Kenya and contains three freshwater lakes namely: Kanyaboli Sare and Namboyo. The population of Yala is 2715.

2.3 SAMPLING AND SAMPLING PROCEDURE

The study targeted communities drawn from across the country to elaborate specific issues on community land rights thus providing a holistic picture. Purposive sampling was applied to identify the study sites. Respondents were drawn from: community leaders; government officials; community members; civil society members; researchers; and individuals knowledgeable about community rights. Demographic variables including age, education, gender and marital status were not emphasized.

Study sites were identified then the relevant subjects were isolated randomly using a multi-level criteria based on the roles that the persons played in the community. Purposive selection was applied for all key informants and civil society members.

2.4 DATA SOURCES AND DATA COLLECTION TECHNIQUES

The research employed the following methods and approaches.

- (a) A survey was conducted among a cross-section of women, men and youth in one research site, balancing factors such as age, marital status, socio-economic status and level of formal education. The survey gauged the perceptions on community rights, entitlements, the expectations men and women have of community claims and their experiences in using community institutions, as well as ideas on how to secure community rights while protecting individual entitlements within the community.
- (b) Social mapping was done of entitlements, land uses and users and the norms guiding land uses and users, so as to identify the full range of stakeholders and interests.

³ Kenya National Bureau of Statistics, *2009 Kenya Population and Housing Census*, Vol.1A (Population Distribution by Administrative Units) (August 2010), p.161-162. At the time of the 2009 population census, Njoro District had not yet officially been carved out of the larger Nakuru District.

⁴ See Kiunga National Marine Reserve: Enchanted underwater world http://www.kws.org/parks/parks_reserves/KMNR.html (Accessed on: 1st September 2012)

- (c) Semi-structured interviews were held with key informants namely: national level officials in relevant agencies; local administrators and other local-level officials; leaders of communities; women's and youth groups; community leaders; and decision-makers in community governance institutions.
- (d) Focus group discussions (FGD) and workshops were held with selected groups of men, women and youth.
- (e) Observations were made of relevant processes such as local land dispute proceedings, family dispute proceedings or relevant deliberations by formal and informal local institutions.
- (f) The Human Rights Analytical Framework was used to interrogate rights to land and land-based resources, evaluate the rights and responsibilities of rights' holders and duty bearers, and explicate various norms and institutions that mediate the definition and realization of the rights in question.

2.5 DATA COLLECTION

Data was collected using a key informant guide, a focus group discussion guide and a theme guide developed to reflect the issues relevant to the study objectives. The purpose was to determine meanings assigned to: "community", the nature of community; resources in the community; holders of community rights; and the governance and regulation of community land.

In East Mau, life histories with respondents selected by age and gender were also collected. Four FGDs organized by gender and age (older men, older women, younger men, younger women) were held and a survey conducted using a structured questionnaire. East Mau is the only site from which survey data was collected. The survey covered a total of 300 respondents. Field work was done between April and June 2011. In Samburu, it was done in July 2011. Some members of the research team had worked with the conservancies in the area in different projects and were therefore able to draw on prior research findings. In Kasigau, research was carried out in November and December 2011. Some members of the research team had also been involved in field research there in connection with a 2003 study on citizen's participation in governance of natural resources. This study has therefore drawn from the proceedings of a Participatory Action Research workshop held in Kasigau in April 2003. In Yala, the field work was undertaken in September-October 2011 while Lamu data was collected mainly from documentation available on the SECURE project and other research work carried out by the team members.

2.6 DATA ANALYSIS, INTERPRETATION AND PRESENTATION

Various methods and techniques were applied to analyze the data collected depending on their nature. Qualitative tools and methods were applied on data elicited from FGDs and in-depth interviews to cross-check and corroborate data obtained from other sources. The data was interpreted using acceptable sociological and legal analytical models such as deduction from and triangulation with the reviewed literature. The findings contain appropriate illustrations and themes related to the study objectives.

2.7 LIMITATIONS OF THE STUDY

First, the study coincided with activities around the implementation of different aspects of the constitution. This limited the ability of the researchers to reach key stakeholders. Second, members of the civil society were very busy attending to activities to contribute to bills drafted to meet the deadlines set by the constitution. To overcome these limitations, the research team attended these meetings, examined and made inputs into the draft laws. The draft Community Land Bill is being worked on now and will benefit from the findings of the study

3.0 CONCEPTUALIZING COMMUNITY RIGHTS

3.1 KEY CONCEPTS

In conceptualising community rights, it is important to appreciate the context in which the term is used. In Kenya's Constitution (2010), community rights are used within the purview of a regime or approach for holding property rights in land. It is essential, therefore, that key terms around community rights are defined. These terms are: "community", "property", "rights' holding" and "land as property".

3.1.1 Concept of Community

Defining the term "community" is not easy. When looked at from the perspective of an entity capable of acquiring and retaining rights, the definitional challenges become even more pronounced. This challenge is traceable to developments within property literature that has, over the years, given prominence to private property as the ideal arrangement for owning and using land.¹ However, this position is not only fallacious; it is also unsupported by evidence. This realisation led to discourse on communal approaches to property relationship.² As part of those developments, terms were coined to describe relationships between communities and property. One is Community Based Natural Resource Management (CBNRM), an approach popularly associated with the CAMPFIRE Programme in Zimbabwe.³ Some scholars hold that CBNRM was limited in its approach since it proceeded from the standpoint that communities would participate in the management of natural resources but the land on which those resources were based would be under the ownership of the state.⁴ Consequently, these scholars coined the expression "community based property rights" to describe community-based tenure systems.⁵ They pointed out that such systems often included but were not limited to common property and are similar to but not the same as collective rights.⁶ These rights derive from the community and not the state. Further, within community rights exist collective and individual rights.

¹ See Heller, M.A., "Critical Approaches to Property Institutions", 79 *Oregon Law Review* 417-434 (2000); and Heller, M.A., "The Boundaries of Private Property," 108 *Yale Law Journal* 1162(1999)

² See Bromley, Daniel W., 'Rights-Based Fishing: The Wrong Concept and the Wrong Solution for the Wrong Problem', in *Managing Marine Fisheries in the United States: Proceedings of the Pew Oceans Commission Workshop on Marine Fishery Management* 35, 35-39 (2001).

³ Bonger, R" 'The Campfire Programme in Zimbabwe: Institutional Innovation and Implications for Environmental Governance,' in Okoth-Ogendo- H.W.O and G.W. Tumushabe, *Governing the Environment: Political Change and Natural Resources Management in Eastern and Southern Africa* (Nairobi, Acts Press, 1999) pp 253-290.

⁴ Lynch, O.J and Harwell, *Whose Natural Resources? Whose Common Good? Towards a New Paradigm of Environmental Justice and the national Interest in Indonesia* (CIEL, 1992) page 2

⁵ *Ibid.*, page 5.

⁶ *Ibid.*, page 4.

The critical first step in understanding the full extent of community rights is to define the term community. Benedict Anderson⁷ makes the case that traditionally; language played a key role in defining communities. Commencing the discussion with the concept of nations and nationalism, he argues that a nation is an imagined political community which is both limited and sovereign.⁸ However, with modern developments, many definitions and identities of communities have been more imagined than real. The reason the community is imagined arises from a sense of comradeship, so that even if there is inequality and exploitation, one feels a sense of belonging.⁹ Our discussion on the different meanings assigned to community in the case studies below will illustrate how the sense of comradeship on the basis of local language, ethnicity and culture, for instance, masks other points of commonality between those included and those excluded.

Article 63(1) of Kenya's 2010 Constitution anticipates that community land rights may be claimed on the basis of ethnicity, culture or 'community of interest'. While the first two are intuitive, it is less clear what 'community of interest' means. Yet, as the discussion of the case studies below will show, this concept may hold the key to meaningful recognition of community land rights in the interest of national cohesion.

3.1.2 Concept of Property

Property has different meanings to different people. To the lay person, property is a thing represented in the physical *res*. But property can be seen as a legal concept, economic concept and as a social relationship.

a) Property as a Legal Concept

The law ascribes to property the meaning of a mental concept.¹⁰ In this view, only through the protection of law is one able, for instance, to enclose a field as property.¹¹ Thus property represents the legal relationship among people with regard to the *res* or even an intangible subject such as an idea (patent/copyright). It is also the relationship between an individual and the community with regard to the use and exploitation of resources and is dependent on enforcement mechanisms of the state.¹² Ownership of land historically constitutes one of the main categories of property rights conveying an array of rights upon the owner.¹³ Property rights in land exist against other people with regard to the land, not against other parcels of land.¹⁴

⁷ Anderson, B. *Imagined Communities: Reflections of the Origin and Spread of Nationalism* (Verso, London, 1991).

⁸ Anderson, B. *Imagined Communities: Reflections of the Origin and Spread of Nationalism*, (Verso, London, 1991)Page 6

⁹ *Ibid.* at p.7

¹⁰ Bentham – Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing that we are said to possess; in consequence of the relation in which we stand towards it.

¹¹ *Ibid*

¹² Kameri-Mbote, P. & Migai Akech Ownership and Regulation of Land Rights in Kenya: Balancing Entitlements with the Public Trust, Paper presented at the Conference on *Beyond the National Land Policy*, Organised by KIPPRA at KICC, 31st July 2008.

¹³ It confers the right to extract minerals from the land, to use and abuse and dispose of as the property holder wills. See ROBERT E. MEGARRY, *THE LAW OF REAL PROPERTY* (5th ed., 1984).

¹⁴ Joseph Blocher, Building on Custom: Land Tenure Policy and Economic Development in Ghana, Vol. 9 *Yale Human Rights and Development Law Journal*, 166-202 (2006) at 177.

In short, property is a legal relationship. By virtue of a claim backed by law, people then know what to expect: what they can or cannot do in view of another's claim over a thing or idea. Ownership of property is a creation of law in that a bundle of entitlements are sanctioned by law against all other persons. Property is that *bundle of rights and expectations in a tangible or intangible thing that are enforceable against third parties including the government*. These are entitlements to: possess; use; exclude; allow others to use; sell; give away; dispose of by will; recover from a thief; and receive compensation for damage. The law is concerned with providing clarity as to who holds any of these 'sticks' in the bundle of entitlements. It has long been presumed that individual private rights permit the greatest degree of clarity. With the encoding of this presumption into law and policy, collective/communal rights have been marginalized in Kenya and other countries. Official dogma has openly supported private individual rights and actively encouraged the transformation of community rights into private individual rights.¹⁵

b) Property as an Economic Concept

Economists¹⁶ opine that problems exist when resource allocations are inefficient or expected to leave future generations worse off. Inefficiency results from non-transferability in the market or absence of incentives to sustainably manage resources. In their view, the person with the strongest incentives should be assigned property rights to minimize transaction costs and maximize social returns. The expectation is that the market will balance competing uses and force participants to use property in the most efficient way. The assumption here is that all values ascribed to the property can be transacted in the market.¹⁷ With regard to land, it is critical to ask the question whether a burial site for a community's ancestors or the sentimental value associated with ancestral land can be transacted in the market. Moreover, environmental goods such as ecosystem services, which are indirectly related to land, are for the most part consumed directly as a public good and never marketed. This results in gross undervaluation of these services.

Individual private property is seen as the standard to aim for in stemming the so-called tragedy of the commons. Proponents of private property rights argue that market solutions prevent the tragedy of the commons that too often results when incentives to preserve common pool resources do not exist.¹⁸ Such arguments rely on the notion that property held in common encourage a rush to appropriate as much of it as possible while it lasts.¹⁹ This rush, the argument continues, is fanned by the fact that the negative effects of over-exploitation of the resource are not felt proportionately by any of the takers and consequently none of them feels personally compelled to stem the over-exploitation. Hence what is everybody's property is perceived as

¹⁵ See for example, R.J.M. Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya* (1954) [Hereinafter Swynnerton Plan 1954]. The plan was based on the assumption that in order for African agriculture to become productive, the tenure system needed to be converted from collective to individual so as to afford farmers incentives.

¹⁶ These incentives should include financial resources. See Rodger A. Sedjo & R. David Simpson, 'Property Rights, Externalities and Biodiversity', in TIMOTHY M. Swanson, ed., *The Economics and Ecology of Biodiversity Decline: The Forces Driving Global Change* 79, 86 (1995).

¹⁷ Kameri-Mbote P., *Property Rights and Biodiversity Management in Kenya*, ACTS Press, Nairobi (2002).

¹⁸ See Hardin. G., 'The Tragedy of the Commons', in Garret Hardin & John Baden eds., *Managing the Commons* 16 (1977).

¹⁹ Ostrom E., 'Collective Action and the Tragedy of the Commons,' in Garret Hardin & John Baden eds., *Managing the Commons* 173 (1977).

nobody's and becomes valued at a rate proportionate to its utility only after it has been individually appropriated.²⁰ In this sense, private property rights provide incentives to manage resources, reduce uncertainty and ensure predictability.²¹

The major thrust of this argument is that when property rights are assigned in these situations, the market acts to properly balance competing uses and forces the participants to use such property in the most efficient way. Private property rights in resources evolve only when demand for those resources makes the extra effort of defining and enforcing those rights worthwhile. They constitute the underlying basis for the operation of any economic system. The rights holders are able to acquire rights to property and benefit from economic returns from investment in their property.²² Community/collective rights are perceived as not capable of ensuring optimal returns because of the multiplicity of claimants and the presence of free riders.²³

c) Property as a Social Relationship

It is the duty of law, as the expression of the will of the people to provide mechanisms for the protection of property in the interest of all citizens. A Property law system therefore exists not simply to grant ownership rights to individuals, but also to regulate relationships among diverse rights holders.²⁴ A property law system both protects and curtails the exercise of rights by holders so as to ensure an environment in which the rights of property holders as well as the larger public interest are safeguarded. Thinking about property in this manner forces us to recognize that a property system plays a role in shaping social relations. It also lays emphasis on the idea that property is more than just a commodity over which the owner has an absolute say. The choices made in how to regulate property rights have impact beyond the owner, to shaping social relations in general.²⁵

Some constitutions have embodied this idea through inclusion of a clause that requires that all property, in order to enjoy legal protection, must fulfill a 'social function'. Examples include Brazil²⁶ and Ghana.²⁷

²⁰ See Ostrom, E., *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press 3 (1990).

²¹ See Baden J. & Richard Stroup, 'Property Rights, Environmental Quality, and the Management of National Forests;', in Garret Hardin & John Baden eds., *Managing the Commons* 229 (1977)

²² Walden I., 'Preserving Biodiversity: The Role of Property Rights', in T. Swanson, ed., *Intellectual Property Rights and Biodiversity Conservation*, Cambridge University Press 176 (1995).

²³ Hardin, *supra* note 18. However, this is a mis-reading of community/collective rights, which mean much more than 'open access', and which in most cases have internal rules for recognizing varying degrees of individual entitlement defined by type of use. See for example Celestine Nyamu Musembi, 'De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights' Vol.28(8) *Third World Quarterly*, 1457-1478 (2007) (hereinafter referred to as Musembi 2007).

²⁴ Joseph W. Singer, *The Edges of the Field: Lessons on the Obligations of Ownership*, Boston: Beacon Press, at 20 (2000).

²⁵ Joseph W. Singer, *Property Law: Rules, Policies, and Practices*, Boston: Little Brown and Company, at 20-21 (2010).

²⁶ Brazil's post-military rule constitution (1988) provides that land must fulfil a social function, which is elaborated in Article 186 to include compliance with environmental and labour laws in exploitation of the land.

²⁷ The Constitution of Ghana (1992) provides as follows in Article 36(8): "The state shall recognise that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the state shall recognise that the managers of public, stool, skin and family lands are fiduciaries charged with the

In dealing with collective interests, a crucial function of the law is to regulate the relationships around the property in question so as to ensure that those relationships are value-enhancing and that they promote fair distribution. This is what a new law on community land rights implementing the constitution and the National Land Policy will need to guarantee. We re-visit this issue in the final chapter, in reflecting on approaches to crafting an appropriate legal framework for accommodating community property rights.

3.1.3 Rights of the Property Owner

The holder of property rights over an asset has the ability to gain from that asset by direct consumption or by exchange. Constraint of uncompensated exploitation of the property right both increases and protects the value of that right. This ensures that the value of a right to property is not constant since it depends on the value attached to that property by members of the community among whom the holder of the property right lives, the owners' attempts to protect it, the desire of others to appropriate it and the state machinery put in place to ensure its protection.²⁸ Land tenure defines the methods by which individuals or groups acquire, hold, transfer or transmit property rights in land. It refers to possession or holding of the rights associated with each parcel of land. A search for the tenure system operative in a particular society is an attempt to answer the tripartite question as to *who* holds *what interest* in *what land*.²⁹ It ordinarily has at least three dimensions namely: people, time and space. In so far as people are concerned, it is the interaction between different persons that determines the exact limits of the rights any one person has to a given parcel of land. Yoram Barzel³⁰ notes that the weight attached to property rights is directly related to the amount of protection accorded to those rights in law. The definition and delineation of property rights is limited to the knowledge of the persons defining the rights. Since not all aspects of property will be known at the point that rights to land are given, flexibility is quintessential to the efficient allocation of property. For instance land may be reserved as a protected area from a community that has lived on it for many years. The value of the land may rise exponentially when commercially viable micro-organisms are discovered on the land. To argue that the community has no rights to the enhanced value may serve the purpose of keeping the property system efficient by not allowing external claims but it is unjust to the community.

3.1.4 Land as Property

The term "land" has a wide connotation both in African customary laws and under modern systems of law. Its subject matter includes the surface of the soil, the things on the soil enjoyed as part of the land (such as the air, water and growing trees) or artificially fixed attachments (such as houses, buildings and other structures). It also encompasses parts of buildings with the division anticipated to be either vertical or horizontal, and includes tenancies, easements, rights, privileges or benefits in, over or derived from land. The maxim *cuius est solum eius est usque ad*

obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin or family concerned and are accountable as fiduciaries in this regard."

²⁸ See Barzel, Y., *Economic Analysis of Property Rights*, Cambridge University Press (1989).

²⁹ See Okoth-Ogendo, H. W. O., *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, Acts Press (1991).

³⁰ Barzel, *supra* note 28 at p. 3

coelum et ad inferos (he who owns the land owns everything reaching up to the very heavens and down to the depths of the earth) underscores the sacrosanct nature of property rights in English common law which vest the owner of property with all the rights necessary for enjoyment of property. By virtue of the maxim, any conveyance of land includes all structures, fixtures, sewers, drains and water courses appertaining to the land. This was further amplified by the maxim *superficies solo cedit* (a building and other constructions become part of the ground). It is therefore not surprising that commentators like Blackstone should opine that

there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right to property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.³¹

This has been explained in the context of Kenya by Miller who notes that a land fever grips Kenyans intertwining modern and traditional values since it offers basic survival opportunities in an insecure situation where there is no welfare system and no other forms of wealth are available.³² This view colours the value of land and land use patterns. The question to ask at this point is whether the institution of property rights in land as currently enforced in Kenya enhances social relationships and whether it takes on board the social dimensions that have great implications on its efficiency and effectiveness. In answering that question, it is useful to look at some of the pointers to a working property rights system namely: predictability, stability, justice and fairness. Until the adoption of the constitution in 2010, land in Kenya was categorized as either government land, trust land³³ or private land. The most predominant mode of land holding was trust land which was managed by local authorities on behalf of communities. Trust land was further divided into two, that awaiting adjudication and registration under the Registered Land Act and that which was to remain as trust land. The process of adjudication and registration has not been completed and the management of trust land by county councils has over the years grossly undermined communities' rights and interests, hence defeating the original intention.³⁴ Tenure is not secure for people living in these lands.

Another category of land holding which traverses both community and private land holding has been the group ranch system whose status in Kenya was granted to a group of herders shown to have customary rights over the range or pastureland in question³⁵. Group ranches have

³¹ Blackstone, W. *Commentaries on Laws of England*, Forgotten Books (1809)

³² See Yeager R. & Norman K. Miller, *Wildlife, Wild Death: Land Use and Survival in Eastern Africa* State University of New York Press, 98 (1986).

³³ Trust land refers to land in areas that were designated as 'native reserves' during the colonial era. The Native Reserves were held in trust for the 'natives' by the colonial government, since the natives did not have formally registered title. Upon attaining independence, this trust over Native Reserves was passed on to local authorities (county councils) to hold in trust for residents, pending the adjudication and registration of the land by those residents. These lands are now referred to as trust lands, rather than native reserves.

³⁴ For a record of irregular dealings over trust land by county councils see Government of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, (2004), Nairobi: Government Printer (hereinafter referred to as Ndung'u report).

³⁵ See *Report of the East Africa Royal Commission of 1953-1955*, Cmd. 9475 Great Britain Parliament (1955) concluding the policy on land tenure in the East African Protectorate as Kenya then was, noted that while individualisation of land ownership should be the main aim, such ownership should not be confined to individuals but could also be extended to groups such as companies, co-operatives and customary associations of Africans.

progressively been converted to individual holdings and the land use changed from pasture land to agricultural holdings. This circumvents the original intention of keeping the integrity of the range; in some areas, it has impacted negatively on the conservation and management of wildlife.

While individual land holders, who comprise a minority of Kenya's population, enjoy predictable property rights, the competing contestations over property held under formal law has made such rights unpredictable. The contestations have arisen because of the following reasons:

- a) The creation of private land rights from trust land without consultations with the communities.
- b) The creation of private holdings in group ranch areas without considering the compatibility of land uses and the interests of the broader community.
- c) There may exist gross disparities in land holdings between people living in the same area.
- d) There are historical injustices that have lingered for a long time and perceptions of unfairness and wrongs in the creation of land rights nuancing any claims to these rights. The possession of a legal title to property in these circumstances has not guaranteed uninterrupted enjoyment of the property precisely because the legal title is laced with contesting claims. Land as a social relationship depends principally on the acceptance by one's neighbours of the legitimacy of their claims and it is this acceptance that makes people keep off. Where people perceive some inalienable rights in the *res* that is claimed as property by another, the costs of protecting the property rise exponentially.

The 'bundle of entitlements' over land is as extensive as is the importance of land in a country such as Kenya where land is critical to the economic, social and cultural development of the country. Land is linked to sovereignty and was a key factor in the struggle for independence. It is also a politically sensitive and culturally complex issue. In some contexts land is even viewed as having spiritual and religious significance, as the abode of deity. The question to be asked is whether given the importance of land, the bundle of entitlements should vest in any one person or entity. Decisions may need to be made about unbundling land entitlements and vesting diverse aspects in diverse entities while securing the broader public good over the land. The constitution and the NLP propose the individual, community or National Land Commission (NLC) as possible holders of the bundle of rights in the three categories of land respectively.

Actualising these proposals requires supporting legislation and a proper understanding of the nature of the rights to be held, the terms on which such rights can be held and clarity on the entity to hold the rights. While there will not be much debate on the private and public holdings, more clarity is required in the context of community rights.

3.2 THE NATURE OF COMMUNITY RIGHTS

Communities across Sub-Saharan Africa increasingly have an officially recognised role in managing communal land and local natural resources.³⁶ This has been predicated on increased recognition of communal land rights. Flowing from the definition of tenure as comprising the nature of the entity holding a defined right in a particular land resource, the recognition of

³⁶ Clarke, R.A, "Securing Communal Land Rights to Achieve Sustainable Development in Sub-Saharan Africa: Critical Analysis and Policy Implications," 5(2) *Law Environment and Development* (2009) 130-151 at 130.

communal land rights necessarily hinges on: determining the entity designated as the “community” in whom rights is vested; clarifying the quantum of rights; and delineating the space (land) that can be the subject of communal land rights.

Communal tenure arrangements are characterised by their diversity and complexity. However, certain defining characteristics are discernible. Before discussing these, it is critical to point out that the concept of communal tenure departs from the Western view. This has led some scholars to wonder whether there should be an African-based lexicon to better define land tenure within the African context³⁷ and move away from the view that a title deed is the hallmark of tenure conferring jurisdiction and exclusive control. Community land rights derive from indigenous property law based on customary rules and practices. It is as much a juridical system as it is an integrated social system. Its central bases are two-fold. First, access to land is an incident of membership in a specific community or social group.³⁸ The quantum and nature of access rights will, in turn, reflect specific resource use rights recognised by that group.³⁹ Second, control and management of land resources is vested in the governance organ of the community or group.⁴⁰ Thus community rights to land must take into account the social and political context of implementation.

As Ogendo⁴¹ argues, it is important to understand the meaning of property rights within an African perspective. He writes:

If, as I believe is the case, the idea of a right merely signifies the manner in which claims are asserted in particular fact or jural contexts, or in respect of specific things or objects, then the existence of a right is best understood in terms of a power which society allocates to its various members to execute a particular range or quantum of functions in respect of any given subject matter..⁴²

In the context of land rights, the double issues of power and control define the nature of property rights. In Africa, access to power (the right) and its control are distinct and are governed by diverse social and cultural rules.⁴³ It is not vested in one person and is determined by

³⁷ Bentsi-Enchill, K, “Do African Systems of Land Tenure Require a Special Terminology,” 9(2) (Summer 1965) *Journal of African Law* 114-139 (hereinafter referred to as Bentsi-Enchill 1965); Bohannan, P., “1963. Land, tenure and “land tenure”, in D. Biebuyck (ed.), *African Agrarian Systems* London: Oxford University Press for the International African Institute, at pp101-11. (1963) (hereinafter referred to as Bohannan 1963).

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Okoth-Ogendo, H.W.O., “Some Issues of Theory in the Study of Tenure Relations in African Agriculture,” 59(1) *Africa: Journal of the International African Institute* (1989) 6-17 (hereinafter referred to as Okoth-Ogendo 1989).

⁴² *Ibid.*, at p 7.

⁴³ Cousins, B. “Potentials and Pitfalls of Communal Land Tenure Reform: Experience in Africa and Implications for South Africa,” Unpublished Paper prepared for World Bank Conference on Land Governance in Support of the MDGs: Responding to new Challenges” 9-10 March 2009, Washington D.C. (on file with authors) (hereinafter referred to as Cousins 2009).

membership in a particular society.⁴⁴ Based on this, the key defining features of African land tenure, which would equate to community land tenure, would be as follows:⁴⁵

- a) Land rights are embedded in a range of social relationships and units, including households, kinship networks and various levels of ‘community’. The relevant social identities are often multiple, overlapping and therefore ‘nested’ or layered in character (for instance, individual rights within households, households within kinship networks and kinship networks within local communities).
- b) Land rights are inclusive rather than exclusive in character, being shared and relative. They include both strong individual and family rights to residential and arable land and access to common property resources such as pasture, forests and water.
- c) Rights are derived from accepted membership of a social unit and can be acquired through birth, affiliation or allegiance to a group and its political authority, or transactions of various kinds (including gifts, loans and purchases). They are somewhat similar to citizenship entitlements in modern democracies.
- d) Access to land (through defined rights) is distinct from control of land (through systems of authority and administration).
- e) Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access (e.g. trans-generationally) and resolving disputes over claims to land. It is often located within a hierarchy of nested systems of authority, with many functions located at local or lower levels.
- f) Social, political and resource boundaries, while often relatively stable, are also flexible and negotiable, given the nested character of social identities, rights and authority structures.⁴⁶

One of the greatest debates in tenure reform revolves around whether community rights (or customary land rights), should be formalised and codified and those holding such rights be issued with title deeds. In a ground breaking yet controversial publication, Hernando De Soto⁴⁷ makes a blanket argument for formal codification of property rights as the only way to guarantee security, without distinguishing between individual and collective rights. However, this view is countered correctly and strongly by African property scholars who demonstrate that formal codification without a contextual understanding of the multiple interests in, and the multiple meanings of land can actually generate insecurity instead.⁴⁸ The juridical content of a property system is aided by the country’s constitutional architecture.⁴⁹ To the extent that Kenya’s constitution of 2010 recognises community land rights, the juridical status of the rights has been clarified and strengthened.

⁴⁴ Okoth-Ogendo 1989, *supra* note 54 at p. 11.

⁴⁵ See Okoth-Ogendo 1989, *supra* note 54; Cousins, *supra* note 56.

⁴⁶ Cousins 2009, *supra* note 43. See also Sally Falk Moore, ‘From Giving and Lending to Selling: Property Transactions Reflecting Historical Changes on Kilimanjaro’, in Kristin Mann and Richard Roberts, eds, *Law in Colonial Africa*, London: Heinemann Educational Books (1991),.

⁴⁷ Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, (2000), New York: Basic Books.

⁴⁸ Musembi 2007, *supra* note 23.

⁴⁹ Okoth-Ogendo, H. W. O. O. “Formalisi http://fimbo.org/attachments/059_FORMALISING%20%E2%80%9CINFORMAL%E2%80%9D%20PROPERTY%20SYSTEMS.pdf undated.

Across Africa, two fallacies have accompanied tenure reform in relation to indigenous tenure. The first regards the notion that the formal process of documentation will strengthen indigenous tenure system through removal of its diffuse nature and help clarify its extent, nature and juridical content. The second regards the notion that only private tenure provides security of property rights essential for economic development. These fallacies were at the heart of numerous efforts across the continent to reform indigenous tenure regime, a reform process that was driven by legislative fiat and that sought to focus on creating private property rights. Collective rights were not recognised unless through indirect routes like group ranches, trusts or associations.

The recognition of community land rights in Kenya's constitution seeks to depart from this narrative. It puts community land rights at par with other tenure categories and focuses on the transformation and democratization of the basis of tenurial arrangements, and not just conversion of customary land holdings. This is in tune with modern thinking and writing on tenure reforms in Africa, which argue that the focus should be on how to recognize and secure land rights that are clearly distinct from private property and are 'communal' in character, but cannot be accurately described as 'traditional' given the profound impacts of rapid socio-economic and political changes since the colonial era.⁵⁰

3.3. COMMUNITY LAND RIGHTS IN KENYA

3.3.1 The Land Question

Colonial and immediate post-independence handling of land created many contestations over land. The Swynnerton Plan⁵¹ recommended 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. The tenure reform process coincided with a deteriorating political climate centred on the land issue as manifested in a number of factors.

The first factor was the granting of freedom fighters' land to loyalists during the Mau Mau revolt and the insulation of the ensuing land rights from contesting claims.⁵² For instance, a large part of Central Province was consolidated in 1956 during the state of emergency.⁵³ The net effect of

⁵⁰ Cousins 2009 *supra* note 43.

⁵¹ See Swynnerton, R.J.M. (1955). *The Swynnerton Report: A Plan to Intensify the Development of African Agriculture in Kenya*. Nairobi: Government Printer. (Hereinafter Swynnerton Plan).

⁵² African Courts (Suspension of Land Suits) Ordinance was passed in 1957 to bar all litigation to which the 1956 Rules applied.

⁵³ 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). See also M.P.K. Sorrenson, *Land Reform in the Kikuyu Country: A Study in Government Policy*, London: Oxford University Press (1967). 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.

these laws was to close avenues available to aggrieved landholders and dispossessed peasants. Subsequent laws on land tenure adopted these provisions.

The second factor was the resettlement programme through which the government allocated land to squatters in parts of the country other than where they emanated from, principally the Rift Valley and the Coast provinces. The perception that 'outsiders' had been brought to take land belonging to 'insiders' without taking into account the latter's rights and interests has made the 'outsiders' vulnerable as their rights to land are contested. The 'outsiders' comprise the resettled people and those who bought land either through land buying companies or private transactions.

The third factor is the failure of post-independence national leaders to craft a cohesive national polity hence people's reliance on their tribal/ethnic alliances to access resources including land. Successive governments, particularly the Kenyatta and Moi ones, used allocation of public land to reward supporters, gain favours or ensure political patronage.

The fourth factor is the persistence of customary practices and beliefs that marginalise and exclude women and the youth from land ownership. As a result of Human Immunodeficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS), many women and children have lost access to land to male relatives when their benefactors die because of the customary belief that women cannot own land and due to the minority legal status of children. The emergence of child-headed households necessitates a reconsideration of this situation.

Fifty years after independence, the land question is still unresolved due to the following factors documented as background to the NLP:

1. Over-emphasis on land as the major productive resource.
2. Rapid population growth resulting in severe land pressure and fragmentation of land holdings into sub-economic holdings. This is visible in central Kenya, eastern slopes of Mount Kenya and western Kenya.
3. The breakdown in land administration and land delivery procedures.
4. Over-centralized and inaccessible land administration and land delivery procedures.
5. Rapid unplanned urbanization and uncontrolled developments.
6. Diminishing forest cover and declining land carrying capacity.
7. The rise in the level of poverty due to lack of capacity to gain access to clearly defined, enforceable and transferable property rights.
8. The multiplicity of legal regimes on land and the confusion caused by involvement of unauthorized persons in land administration.
9. Emergence of environmental management legislation which requires the development of land to be carried out sustainably and demands a positive environmental impact assessment.
10. The gross disparities in land ownership, transfer and control with regard to gender and age.
11. The poor management of essential infrastructure (particularly roads, communications, power and water supplies) that inhibits sustainable development of rural areas.
12. The privatization of public land through wanton and illegal allocation to private individuals and corporations (land grabbing) in total disregard of public interest.

3.3.2 Land Tenure Regimes

Before the promulgation of the new constitution in August 2010, land in Kenya was categorized as individual/private, government and group or community (trust land and group ranches) each category being governed under respective laws.⁵⁴ Customary land rights were not given adequate attention in law.⁵⁵ However, the more policy and law sidelined customary tenure systems, the more resilient these systems became, hence raising the need to reform land relations in Kenya to match this reality.

Group/community ownership was dealt with under trust land and group ranches. The notion of trust land was a way of giving recognition to group and native rights. As pointed out in the introduction, trust land consisted of areas occupied by native Kenyans during the colonial period and which have not been consolidated, adjudicated and registered to an individual or group. Trust land is governed by the Trust Lands Act⁵⁶ and managed by local authorities designated as county councils. With respect to the occupation, use, control, inheritance, succession and disposal of any trust land, every tribe, group, family and individual has all the rights which they enjoy or may enjoy by virtue of existing African customary law or any subsequent modifications thereof.⁵⁷ There is an elaborate procedure to be followed in the event that the government or the county council wants to set aside trust land for public purposes. This procedure, if followed, protects the rights of residents from expropriation without compensation. The record, however, shows that this procedure has routinely been disregarded.⁵⁸

Tenure to trust land has increasingly changed from the trust status to ownership by individuals, legally constituted groups and the state. The implications of this are significant since the controls the council can exercise over the use of the land are eliminated. The application of customary law is ousted and the land is removed from the ambit of council control for conservation and development purposes. In instances where the state or individuals take over the ownership of the land, access for communities previously occupying the land is significantly curtailed.⁵⁹ Since the 2010 constitution has introduced counties⁶⁰ as units of devolved government, it remains to be seen how they will deal with community land under their jurisdiction.

With regard to group ranches, the report of the East Africa Royal Commission of 1953-1955, concluded that individualization of land ownership should be the main policy goal. The Commission noted, however, that such ownership should not be confined to individuals but could also be extended to groups such as companies, co-operatives and customary associations

⁵⁴ Kameri-Mbote P., "Land Tenure, Land Use and Sustainability in Kenya: Towards Innovative Use of Property Rights in Wildlife Management", in N. Chalifour et al. eds., *Land Use for Sustainable Development*, Cambridge University Press, New York (2007).

⁵⁵ Migai Akech J. M., *Rescuing Indigenous Tenure from the Ghetto of Neglect: Inalienability and Protection of Customary Land Rights in Kenya*, Nairobi: ACTS Press (2001).

⁵⁶ Chapter 288 of the Laws of Kenya. The repealed Constitution of Kenya (1983) also contained provisions regulating trust lands. See Sections 114-120.

⁵⁷ Section 69 of Trust Lands Act, Chapter 288 of the Laws of Kenya.

⁵⁸ See Government of Kenya, *Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land*, Nairobi, Government Printer (2004) (hereinafter the Ndung'u report).

⁵⁹ Section 68 of Cap 288 of the Laws of Kenya which saves the rights of the government to repossess trust land.

⁶⁰ Chapter 11, Constitution of Kenya 2010.

of Africans.⁶¹ The tenure reform process in Kenya has, however, emphasized control by the state and the individual with group tenure being recognized only in exceptional cases. Registration of group ranches in pastoralist communities marks one such exceptional case.

Group ranches gave a window through which group or community ownership could be exercised in Kenya. A group ranch is defined as a demarcated area of rangeland to which a group of pastoralists, who graze their individually owned herds on it, have official land rights. The operative statute in this regard is the Land (Group Representatives Act).⁶² A group, for purposes of the Act, is a “tribe, clan, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner”.⁶³

Such person has to have exercised rights in or over land which should be recognized as ownership under recognized customary law. Excluded from membership are those members who are under any kind of disability. The guardian of such a person is included to look after the interests of the ward.⁶⁴ The composition of group ranches was an attempt to formalize traditional community structures. The principle idea was to create a land unit smaller than the traditional section but larger than the individual. This smaller unit is not necessarily capable of maintaining economically viable livestock herds.

Group ranches have not worked well for two main reasons. First, the group representatives lack the authority of traditional leaders, and therefore with the questioning of their legitimacy comes disregard for group ranch rules. Second, government policy has tended to emphasize individual rights with a prevalent view that the group rights would eventually mature into individual ones. This has led to defensive subdivision and individual titling of land within group ranches to prevent encroachment by the government or other entities.⁶⁵

3.3.3 The Dawn of Community Rights

It is within the above context that both the Constitution of Kenya 2010 and the first ever land policy in Kenya – Sessional Paper No. 3 of 2009 - provided for the recognition of community rights to land. The two present an opportunity to craft new land laws for the protection of public, private and community land (Article 61). Already, parliament has enacted the Land Act⁶⁶ and the Registration of Land Act⁶⁷ that give legislative framework for management and dealings with private and public land. What remains is legislation governing community land which the constitution requires to be enacted within five years from August 27, 2010 when the constitution was promulgated.

⁶¹ Cmd. 9475:1955, *supra* note 35.

⁶² Chapter 287 of the Laws of Kenya, introduced as an Act of Parliament of provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act Chapter 284 of the Laws of Kenya.

⁶³ Section 23 (2) (a)

⁶⁴ Section 2

⁶⁵ Kieyah, J., and Patricia Kameri-Mbote “Securing Property Rights in Land in Kenya: Formal Versus Informal”, in Christopher Adam et. al., eds. *Kenya Policies For Prosperity*, Oxford University Press (2010)

⁶⁶ Act No. 6 of 2012.

⁶⁷ Act No. 3 of 2012.

The constitution vests community land in communities identified on the basis of ethnicity, culture or community of interest (Article 63:1). It provides that unregistered community land shall be held in trust by county governments on behalf of communities. Community land comprises: group ranches; land lawfully transferred to a specific community by any process of law; land declared to be community land by an Act of Parliament; land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or land lawfully held as trust land by the county governments.⁶⁸ Any disposition or use of community land is predicated on legislation specifying the nature and extent of the rights of members of each community individually and collectively.

But these provisions protecting customary or community rights to land also present a challenge. The parameters for identifying communities are very general. For instance, can community be derived from an amalgamation of the three identifiers or are the identities mutually exclusive?⁶⁹ These are interesting issues that will be dealt with in implementing the constitution. It is important to contextualize community rights within customary law defined as the law of small scale communities which people living in these communities take for granted as part of their everyday experience but which excludes outsiders.⁷⁰ Whether read about or narrated, customary law is once again removed from the source. Thus the written accounts of customary law are not direct accounts of community practice but the work of informants who, in recounting a particular rule, articulate their preconceptions and biases. It would be easy to understand the ramifications of customary law if it was only one. However, there are as many customary laws as there are tribal communities and despite the general consensus on certain fundamental principles, there are nuances that only one well versed with the community's way of life can identify.⁷¹

The NLP defines community land as “land lawfully held, managed and used by a given community as shall be defined in the “Land Act””. In the glossary, the NLP states that a community is a clearly defined group of users of land, which may, but need not be, a clan or ethnic community. These groups of users hold a set of clearly defined rights and obligations over land and land-based resources. The National Land Commission (NLC) Act (2012) defines ‘community’ as clearly defined users of land identified on the basis of ethnicity, culture or similar community of interest as provided under Article 63(1) of the constitution, which holds a set of clearly defined rights and obligations over land and land-based resources.

Communities are encouraged to settle land disputes through recognised local community initiatives consistent with the constitution⁷² which adhere to the constitutional imperatives of non-discrimination, participation, equity and fairness. The NLC is mandated to encourage application of traditional dispute resolution mechanisms in resolving land conflicts.⁷³ It is

⁶⁸ Article 63 (2)

⁶⁹ USAID, Kenya SECURE Project, *Legal Review of the Draft Legislation Enabling Recognition of Community Land Rights* (2012)

⁷⁰ Bennett, T. W., *Human Rights and African Customary Law under the South African Constitution* Juta (1999).

⁷¹ At about the end of the nineteenth century when colonialism began, it is recorded that Kenya had as many as 64 tribes. See D. T. Arap Moi, *Kenya African Nationalism* MACMILLAN (1986).

⁷² Article 60(1)

⁷³ National Land Commission Act, Section 5(1) (f)

required to ensure that avenues that community avenues for resolving land-related disputes are recognised, utilised and reformed to comply with the constitution.

The constitution and the NLP therefore provide a framework for the recognition of community land rights and for local communalities to hold property rights in land as communities.⁷⁴ It is worth noting that the NLP⁷⁵ identifies hunters and gatherers, pastoralists and subsistence farmers as vulnerable groups who require: facilitation in securing access to land and related resources; participation in decision-making over land and related resources; and protection of their land rights from unjust and illegal expropriation.

Of relevance to the East Mau case dealing with the Ogiek are paragraphs 198-199 of the NLP which deal with land rights of minority groups. These are groups defined as ‘culturally dependent on specific geographical habitats’⁷⁶ that have lost access to land and related resources critical for their livelihoods. The policy proposes that an inventory of existing minority communities be undertaken for a clear assessment of their status and land rights.⁷⁷ The Policy also deals with land rights of pastoralists.⁷⁸

3.3.4 Challenges in the Search for a Durable Community Land Rights Framework

a) Ethnicisation

The provision for community rights comes at a time when there is heightened ethnic awareness in Kenya following the 2007-2008 post-election violence which resulted in loss of lives, destruction of property and displacement of people. Allegiance to ethnic groups is much stronger and community claims to land could ignite ethnic tensions unless handled carefully.

The Panel of Eminent African Personalities appointed by the African Union to assist Kenya resolve the national crisis following the 2007/8 post-election violence identified the following as the issues that ignited the violence: stalled constitutional, legal and institutional reforms; poverty, inequity and regional imbalances in the distribution of resources and power; unemployment, particularly among the youth; lack of national cohesion and unity; the culture of impunity and lack of transparency and accountability; and historical grievances over land.⁷⁹

The 2007 post-election violence was not the first incidence of land-related violence witnessed during election time. Politically instigated tribal clashes invoking *Majimboism* (a type of federalism that promotes provincial autonomy based on ethnicity) have been witnessed in Kenya in the election years 1992 and 1997. Indeed 2002 was the only election year in which

⁷⁴ NLP p. 112.

⁷⁵ NLP Paras 194-197

⁷⁶ NLP Para 198

⁷⁷ NLP Para 199

⁷⁸ NLP Para 180-181

⁷⁹ Available

<http://www.dialoguekenya.org/Conference/KNDR%20Building%20a%20Progressive%20Kenya%202011.pdf>

Kenya did not witness violence since the re-introduction of multi-party politics in 1992.⁸⁰ These successive waves of politically instigated tribal clashes have a shared narrative of recovering “stolen” lands. People of Kikuyu ethnicity were evicted from the Rift Valley and Western Kenya, enabling Moi to gerrymander elections in 1992 and 1997. Though the report of the Justice Akiwumi-led Commission of Inquiry established to investigate the ethnic clashes after the 1992 elections⁸¹ attempted to sidestep land as the cause of post-election violence in 1992 and 1997, it found itself repeating the land connection severally⁸². It also points out that other reasons have been “proffered to conceal the real motive or reason for the clashes”.⁸³

Its findings on ethnicisation of land ownership were corroborated substantially by those of the Commission on Investigation of the (2007) Post Election Violence led by Judge Philip Waki whose report notes that the constitutional liberty to own land anywhere in Kenya is merely *de facto*.⁸⁴ Creation of districts is largely ethnic-based hence creating exclusive sub-national enclaves akin to “native reserves” in which there are “insiders” (ancestral land owners) and “outsiders” (migrants).⁸⁵ This state of affairs has been manipulated by politicians and is evident even in informal urban settlements such as Nairobi’s Kibera (predominantly Luo) and Mathare (predominantly Kikuyu) in Nairobi. The Waki report concludes that ethnic pursuit of homogeneity in land allocation and acquisition has led to a type of “residential apartheid” as Kenyans move into more ethnically homogeneous areas even within urban centres and towns.⁸⁶ The design of a legal framework for community land rights should recognise this dangerous trend, seek to depart from it, facilitate the movement of persons outside traditional ethnic community boundaries and foster inter-ethnic interactions. Unless properly thought through, the identification of communities on the basis of ethnicity, culture and community of interest can easily over-emphasise negative ethnicity, to the detriment of national integration, sustainable and optimal land use, as well as secure tenure.

b) Diversity of Community Rights

As noted above, there is need to tailor a community land rights framework to different manifestations of community. In determining issues of ownership and management of land within the meaning of the constitution, it is important to first answer the question on who owns community land. From the constitution and the NLP, the community does. But who is the community? Who does it include or exclude? The constitution and the NLP offer very little guidance on which of the three criteria (ethnicity, culture and community of interest) should be applied in defining the community in any specific situation.

⁸⁰ Kenya Human Rights Commission & International Federation for Human Rights, *Massive Internal Displacements in Kenya due to Politically Instigated Ethnic Clashes: Absence of Political and Humanitarian Responses*, No. 471/2, (2007).

⁸¹ See *Report of the Judicial Commission of Inquiry Appointed to Inquire into the Tribal Clashes* available online at www.scribd.com (last accessed 26th September 2012).

⁸² *Ibid.* (See p. 3: The causes of the clashes...[are] given as conflict over land ...[among others]

⁸³ *Ibid.*, p. 3.

⁸⁴ See Republic of Kenya, Report of the Commission on Investigation of Post Election Violence (CIPEV), October 2008 (available online at <www.kenyadialogue.org> (accessed on 1 November 2008).

⁸⁵ *Ibid.*, p. 31.

⁸⁶ *Ibid.*, p. 32.

The communities represented by the case studies discussed in this book coalesce around ethnicity and culture, but also around type of land use. It is, therefore, important to take account of similarity or compatibility of land use types in addition to ethnicity and culture as factors in defining 'community'. Sectional properties⁸⁷ in urban areas are good examples of created communities that have neither culture nor ethnicity as their bases but are predicated on community of interest. While each shareholder of the management company has designated private rights to the property, there are obligations that such private holder has to the community of residents as spelt out in the lease document. Given the many places where people from different Kenyan communities live together, such a model may work, especially where communities have settled from other parts and converged as a community that shares neither ethnic affiliation nor culture. A new culture emerges as the group crafts the rules under which they live and manage their land and resources on it. Legislation on community land rights must not reinforce the ethnicization of community. Rather, it must give full effect to the constitution by accommodating the multiple possibilities for the emergence of 'community' - in all its diverse meanings.

c) Democratising Community

Many communities linked by culture and ethnicity and governed by African customary law generally designate older male members as the authority figures, particularly in matters relating to land. Women and youth are often excluded from exercising authority over property relations. Even where women do play a major role in management of land and land-based resources, their exercise of authority is variously delegitimized.⁸⁸ In some societies, women are considered perpetual minors. Provisions for inter- and intra-generational equity should be crafted to make the community land rights laws compliant with the equality and equity provisions of the constitution. Ensuring inclusion of all members is critical. Equity will require taking special measures to protect the rights of groups that are marginalised to ensure: non-discrimination in access to land and protection of existing access; participation in the management and distribution of natural resources; establishment of mechanisms for accountability of duty-bearers; and observance of the rule of law and due process for right- holders.

The law on community land rights has to balance between respecting cultural norms and practices, attaining equality and non-discrimination (especially on grounds of gender), and guaranteeing meaningful involvement of marginalised groups in designing the community land rights regime, since all these potentially conflicting goals are contained in the 2010 Constitution.

d) Documenting and Learning from Practical Community Experiences

The resilience and survival of customary tenure despite successive official attempts on its life⁸⁹ provides very useful lessons for the design of a community land law. The NLP requires that existing forms of communal tenure be documented and their broad principles incorporated into

⁸⁷ Governed by *The Sectional Properties Act*, Act No. 21 of 1987. Revised edition 2009 (1987).

⁸⁸ For further discussion of this social delegitimization of women's exercise of authority over land see Celestine Nyamu-Musembi (2003), 'Why Engage with Local Norms and Institutions? The Case of Women's Property Rights in Rural Kenya', Vol.9 (2) *East African Journal of Peace and Human Rights*.

⁸⁹ Okoth, Ogendo, HWO, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion," Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, Usa River-Arusha, Tanzania, published in CIEL/LEAT/WRI/IASCP, *Amplifying Local Voices for Environmental Justice: Proceedings of the African Public Interests Law and Community-Based Property Rights Workshop* (USA, CIEL, 2002) pages17-29.

such a law. The next chapter discusses manifestations of community land rights in selected case studies in Kenya, highlighting emerging insights that should inform the exercise of crafting a community land rights legal regime.

4.0 THE STATE OF COMMUNITY RIGHTS IN KENYA: SELECTED CASE STUDIES

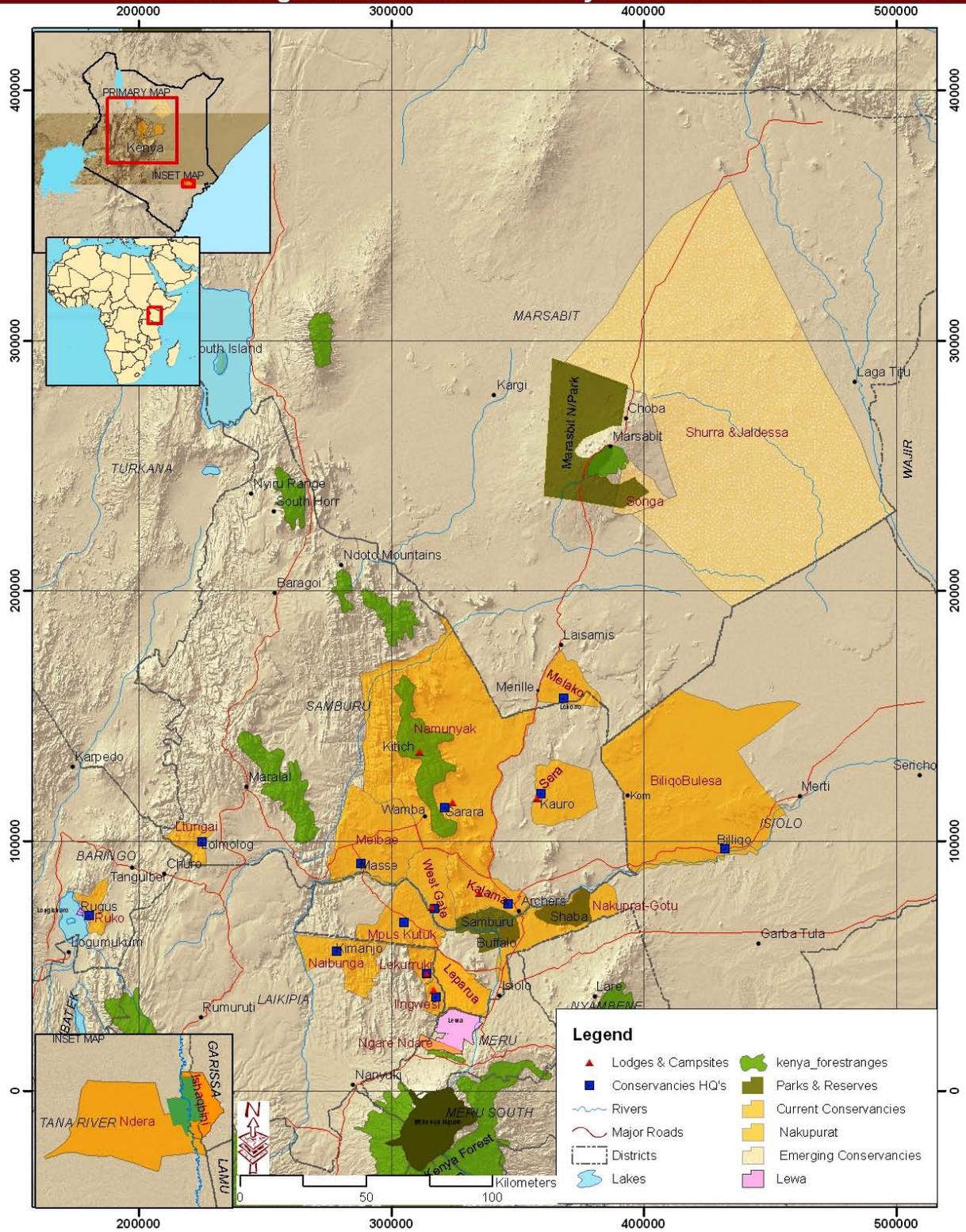
4.1 SAMBURU

4.1.1 Introduction

This case study is based on the experiences and practices of managing land in a communal manner within Samburu District. The district is classified as an arid and semi-arid land (ASAL) because it receives very little rainfall annually. The study was carried out in areas that have communal conservancies. Data was collected through visits to and discussions with officials and members of West Gate, Namunyak, Serra Kauro and Kalama conservancies which are part of the Northern Rangeland Trust (NRT). The map below captures all the conservancies under NRT, including those found in Samburu County.

Northern Rangelands Trust Community Conservancies

May 2011



NRT⁹⁰ consists of a number of conservancies⁹¹. It works with several community conservancies in Laikipia, Samburu, Isiolo, Marsabit and Baringo/East Pokot and Ijara districts covering an area of more than 5,000 square kilometres.⁹² It was established in 2004 as a partnership between the Lewa Wildlife Conservancy, the Government of Kenya and private and community conservation initiatives. It covers over three million acres in an area largely occupied by pastoralists.

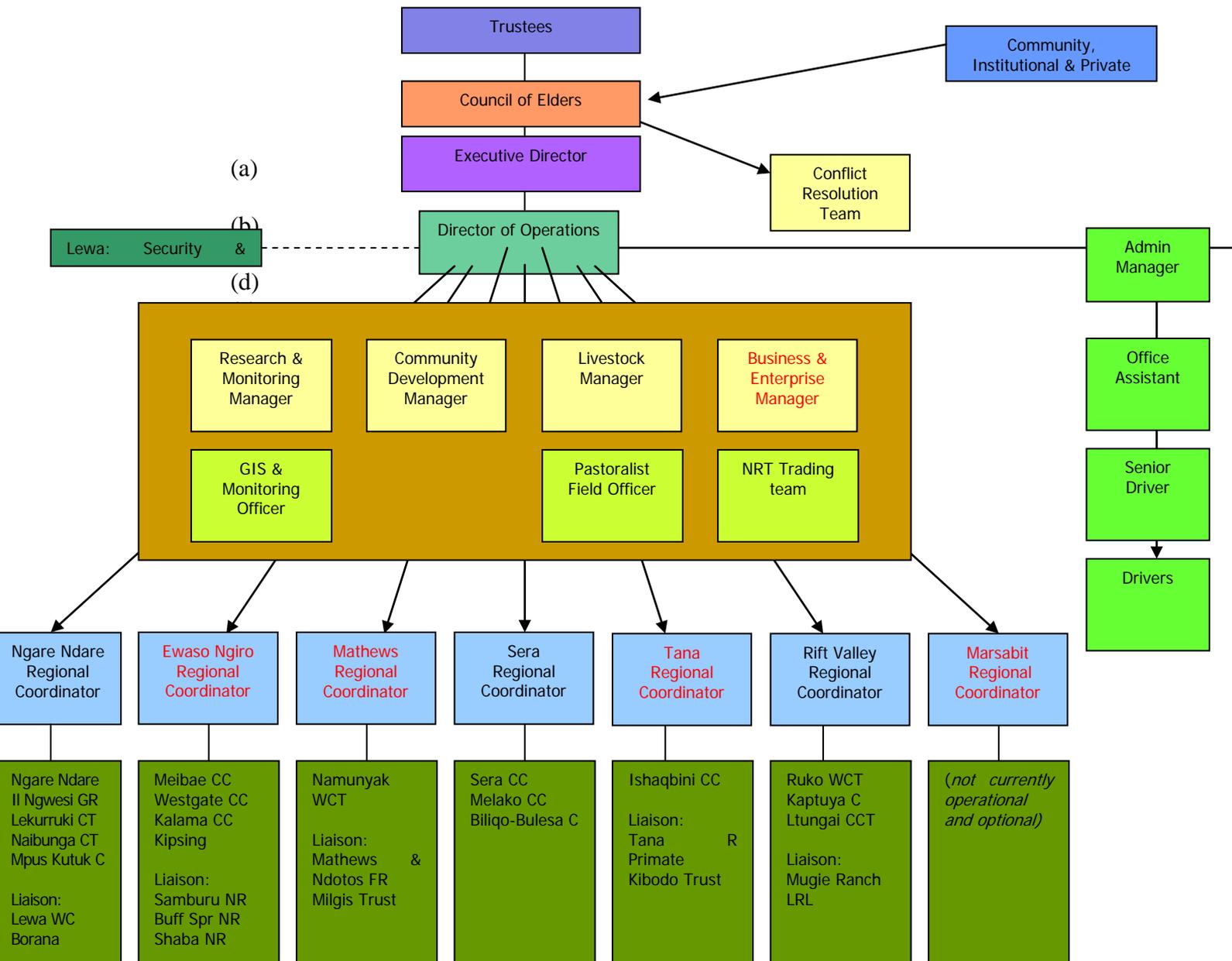
The current membership stands at 18 community conservancies which include: Biliqo-Bulesa, Ishaqbini, Il Ngwesi, Kalama, Lekurruki, Ltungai, Meibae, Melako, Mpus Kutuk, Naibunga, Namunyak, Ngare Ndare, Ruko, Sera and West Gate.⁹³ All these conservancies are located in northern Kenya and are home to approximately 60,000 pastoralists of different ethnic origins including Samburu, Rendille, Laikipia Maasai and Meru. The NRT provides these communities with a forum for exchanging ideas and experiences, and is a technical, advisory and implementing organisation. In addition, it develops the community organizations' capacity and self-sufficiency in biodiversity conservation, natural resource management and natural resource based enterprises. The top decision making organ is the Board of Trustees under which is the Council of Elders composed of representatives from each of the conservancies. The full organisational structure is depicted in Figure One below.

⁹¹ For a discussion on the meaning and importance of conservancies See Western, David and Wright, Michael., "The Background to Community-based Conservation" in Western David and Wright Michael (eds) *Natural Connections: Perspectives in Community-based Conservation*(Island press, Washington, D.C., 1994); Conservation Development Centre, International Institute for Sustainable Development and Saferworld, *Climate Change and Conflict: Lessons from Community Conservancies in Northern Kenya* (November 2009). Available at http://www.iisd.org/pdf/2009/climate_change_conflict_kenya.pdf.

⁹² *Northern Rangelands Trust: Community Conservation in Northern Kenya Fact Sheet – June 2009* Available online: <http://lewacampaign.org/uploads/NRTFactSheet.pdf> (Accessed on: 13/11/201), p. 1.

⁹³ See <http://www.nrt-kenya.org/conservancies.html>

Figure One: Structure of Northern Rangeland Trust



The objectives of NRT are:

1. Promoting conservation, management and sustainable use of natural resources within the Trust area.
2. Promoting and developing tourism and other environmentally sustainable income generating projects.
3. Promoting culture, education and sports.
4. Promoting better health of the residents through better health services and facilities.
5. Alleviating poverty through improved social services, provision of employment and establishment of community-based enterprises.

6. Promoting and supporting trusts, corporations, NGOs and other charitable organisations with similar objects to those of the Trust.

While NRT covers many districts, the case study is based on the experiences and land holding and management practices of the communities within the larger Samburu area, covering the original Samburu District.

4.1.2 Nature of Community

Discussions with local communities revealed that ethnicity and clan are the main criteria for determining who is or is not a member of a given community. Membership to the community is based mainly on clan membership. There are various avenues to this membership. The first is through birth (parents belong to community). The second is through marriage to a man who belongs to the community (rarely are men married to the community's women admitted). The third is through residence and assimilation. One who has stayed in the area for a long time and has been culturally assimilated qualifies to be a member.

There are several conservancies that own, hold and manage land in Samburu. The common practice is for members of a community conservancy to be registered. This is borrowed from the group ranches under the Land (Group Representatives) Act.⁹⁴ On registration, one attains membership with rights. In most cases, men are registered on behalf of their families by virtue of being heads of households. However, there is a requirement that officials of the conservancies should include females. This opens up an avenue for women to be part of the definition of the community. In certain instances, children may be registered as members.

The Samburu experience demonstrates the need to pay attention to the constitutional stipulations of gender equity in determining membership of the community. It also highlights the challenge of determining appropriate criteria and procedure for identifying members of a community. Beyond the numbers however, it is difficult to gauge the level and quality of participation of women in the groups.

4.1.3 Resources in the Community

a) Land

The main resource in the community remains land. Article 63 of the constitution defines what falls under community land. In Samburu, it includes land currently held as trust land, group ranches or government land. There is land in Samburu that is officially trust land held by the local county councils but which is sometimes also used by local communities as conservancies. A good example is in West Gate where part of the trust land has been occupied and used by the local community. A similar situation exists with regard to land officially reserved for the Livestock Marketing Department. Although this land could be viewed as public land, it has been used as community land. The largest portion that falls within the category of community land is land that is either already registered as group ranches, including that in Kalama, or land that is in the process of being registered, as evidenced by the land on which Serra and Kauro community conservancies stand.

⁹⁴ Chapter 287 of the Laws of Kenya.

b) Pasture

Samburu is largely a pastoral area. Majority of the communities practice “open-access” grazing and therefore require vast tracts of land. This creates conflict with wildlife. Through NRT, the community conservancies have tried to strike a balance between sustainable use of land for grazing and wildlife conservation by setting aside core livestock-free conservation areas within conservancies for wildlife and tourism. The dual approach aims to spread economic and financial risk, reduce vulnerability to stochastic events such as droughts, and increase food security through supplementary income generation.⁹⁵ It follows, therefore, that land is not just important for its own sake but is more important as grazing ground.

Rules on ownership and management of communal land require attention to the issue of pasture as part of the resources on the land whose use needs to be regulated. This approach will ensure recognition of the distinction between land and its derivatives.⁹⁶ It is based on this principle that the next resource useful within the context of communal tenure is water.

c) Water

Water is scarce in Samburu where water points are given special recognition and regulated through special community rules. Elders manage access during times of scarcity to ensure that all members get enough for their herds.

d) Wildlife

The last critical resource within the community is wildlife. Conservancies within Samburu have constructed lodges where tourists visiting to view wildlife are hosted. This promotes conservation and the economic livelihoods of the community. In the constitution, how wildlife will be dealt will follow classification of wildlife as public resources. The issue of interaction between the national agency responsible for wildlife and people whose land hosts wildlife resources needs to be well managed. This will not only minimize human-wildlife conflicts, it will also motivate land owners to have wildlife on their land.

Community land tenure has been criticised for not engendering conservation. Hardin⁹⁷ became the greatest proponent of this school of thought. While his postulation has been largely discredited as inaccurately depicting communal tenure as open-access regimes⁹⁸, there is evidence from Samburu that lack of proper control results in pressure on pasture due to large herd sizes. As part of implementing community land rights, it is, therefore, necessary that regulations set maximum allowable herd sizes in a particular size of land within pastoral areas to ensure sustainable use of land.

⁹⁵ *Northern Rangelands Trust: Community Conservation in Northern Kenya Fact Sheet* – June 2009 Available online: <http://lewacampaign.org/uploads/NRTFactSheet.pdf> (Accessed on: 13/11/201), p. 2.

⁹⁶ Barrow, E.G.C, “ Customary Tree Tenure in Pastoral Lands,” in Juma, C. and Ojwang, J.B. (Eds), *In Land We Trust: Environment, Private Property and Constitutional Development* (Initiative Publishers, Nairobi, 1996) pages 259-278.

⁹⁷ Hardin, G. ‘The Tragedy of the Commons’, 162/3859 *Science* 1243 (1969).

⁹⁸ See Okoth, Ogendo, HWO, “ The Tragic African Commons: A Century of Expropriation, Suppression and Subversion,” Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, Usa River-Arusha, Tanzania, published in CIEL/LEAT/WRI/IASCP, *Amplifying Local Voices for Environmental Justice: Proceedings of the African Public Interests Law and Community-Based Property Rights Workshop* (USA, CIEL, 2002) pages 17-29.

4.1.4 Holders of Community Rights

While the rights to community resources belong to the community, communal tenure recognizes several layers of rights belonging to different entities namely: the entire clan, political leadership, the family and individuals.⁹⁹ Tenure seeks to determine who owns what interest in what land and requires to be answered in the multi-layered context in which the conservancies operate. Firstly, the land under which the conservancies exist is under three separate legal regimes which influence the nature of the interests capable of being held and the legal owner. Secondly, in both instances, there is a legal and factual “owner” of the land. Thirdly, the issue of ownership of land must also consider ownership of related resources, the key ones being pasture, water and wildlife.¹⁰⁰

Land registered under the Land (Group) Representatives Act is normally registered in the name of a group of representatives who hold the land in trust for the community. County-held land is held in trust for local communities who are the real owners. However, determining who is a member of the community for registration purposes varies within Samburu. Registration affects the nature of rights that one is entitled to. In some areas, registration is family-based with the head of family being registered as a member on behalf of all the family while in some places all members have their names placed on the register. Non- members do not own land and related resources. However, the practice within the whole of Samburu is that even non-members are allowed access to pasture and watering points for livestock.

Elders within the community have political rights to control land resources and to settle related disputes. This model has been institutionalized in NRT through the Conflict Resolution Team appointed by the Executive Director and approved by the Council of Elders. The team consists of respected individuals who are tribally neutral and led by a retired senior chief and nine veteran elders well known for their traditional skills in conflict resolution. The team maintains peace through mediation, dialogue and advice. It also undergoes periodic formal training in mediation skills in order to address the diversity of issues it has to deal with. It is instrumental in dealing with predominant historical ethnic rivalries on access to natural resources. This is done through establishment and support of a collective and community-led conflict resolution mechanism that builds upon traditional systems and includes members from representative ethnic groups.

⁹⁹ See generally, Okoth, Obedo, HWO, “The Tragic African Commons: A Century of Expropriation, Suppression and Subversion,” Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, Usa River-Arusha, Tanzania, published in CIEL/LEAT/WRI/IASCP, *Amplifying Local Voices for Environmental Justice: Proceedings of the African Public Interests Law and Community-Based Property Rights Workshop* (USA, CIEL, 2002) pages17-29; and Cousins, B. “Potential and pitfalls of ‘communal’ land tenure reform: experience in Africa and implications for South Africa” Paper for World Bank conference on ‘Land Governance in support of the MDGs: Responding to new challenges’, Washington D.C., USA, 9-10 March 2009 http://www.fig.net/pub/fig_wb_2009/papers/trn/trn_1_cousins.pdf.

¹⁰⁰ Kameri Mbote P. & Collins Odote, “Implementing Community Land Rights: Lessons from NRT in Kenya,” unpublished report prepared for the Nature Conservancy, USA, 2011

4.1.5 Governance and Regulation of Community Land Transactions

The governance of community or customary lands has always been in the hands of a council of elders. The institution of elders exists, has been active and is instrumental in resolving disputes relating to communal land. The experience of Samburu tallies with the constitutional recognition of traditional dispute resolution mechanisms for general ¹⁰¹ and land-related disputes.¹⁰²

On regulating transactions within community land, several issues arose in discussions with local communities in Samburu. The first is related to long distances to surveyors and District Land Registration offices. The devolved government is intended to, amongst other things: recognize the right of communities to manage their own affairs and further their development; and facilitate decentralization of state organs, their functions and services.¹⁰³ Within this context, it is imperative that access to institutions responsible for documenting, registering and superintending over land transactions within community land is primary. At the minimum, the devolved institutions should be closer to the people and proactive in documenting and facilitating registration of communal lands. The second concerns the high fees for registration of communal lands. The current charge of 500 shillings per acre for regions irrespective of the nature of the tenure is unaffordable and disadvantageous in some cases. In Sera, for example, the local community is unable to process the title deed for its group ranch covering over 100,000 acres.¹⁰⁴ The third is the sale of community land to individuals, which is categorically opposed by communities in favour of preserving the land as communal land. The fourth issue, related to the third, is the co-existence of community lands with large swathes of private land owned by politically connected individuals. While these individuals' livestock accesses community land in times of drought, the private land owners do not allow reciprocal rights of access for community herds.¹⁰⁵

4.2 KASIGAU

4.2.1 Nature of Community

Community is about belonging. Being defined as an insider or an outsider makes all the difference when it comes to perceptions of entitlement to resources. The question of community and belonging is therefore made contentious due to the anticipated consequences that it carries. This is evident within the context of collective claims to land-based resources as the case study of Kasigau demonstrates.

The Kasigau case study demonstrates that perceived degrees of belonging and entitlement will expand and constrict depending on what interest is at stake: what type of resource is at stake and what the perceived threat is. For instance, mineral resources are perceived as a regional resource, therefore raising the issue of competition between the region and the national government. In

¹⁰¹ Article 159 (2) (d), Constitution of Kenya, 2010

¹⁰² Article 67, Constitution of Kenya, 2010.

¹⁰³ Article 174, Constitution of Kenya, 2010.

¹⁰⁴ Focus Group Discussion in Kauro in July 2011.

¹⁰⁵ *Ibid.*

such a context, the larger Taita ethnic identity will suffice to articulate and defend their claim. Establishing their community entitlement to pasture, on the other hand, seemed to call for a more restrictive, more localized identity: that of being 'Mkasigau'. The reason for this lies in the local politics of group ranches: although the people who own the ranches surrounding Kasigau hill are of Taita ethnicity, they are not from the local area (Kasigau location). Out of six ranches in Kasigau location, only one includes members from within Kasigau.¹⁰⁶ In asserting a distinct 'Mkasigau' identity, contrasted from the larger Taita ethnic identity¹⁰⁷, the local residents are tapping into grievances that have deep historical roots dating back to early colonial encounter in order to give legitimacy to a distinctly local sense of entitlement to resources.

In Kasigau, being a 'Mkasigau' is quite distinct from being of Taita ethnicity. A distinct 'Mkasigau' identity, and with it, a localized sense of entitlement to resources, has deep historical roots dating back to the colonial era. Being close to Tanzania, the Kasigau area became a battleground in the First World War between the British and Germans. Following a fierce battle in which the British suffered heavy losses, Kasigau residents were accused by the British of having aided the enemy. The colonial government responded brutally: in addition to forced conscription of 'Wakasigau' into the Carrier Corps (where many died of malaria and exposure), their leaders (including the legendary Chief Mwangojilo) were executed and the entire community exiled to Malindi. They were only allowed to return to their homeland after 1933, by which time large chunks of what they considered to be their lands (but officially Crown Lands) had been parcelled out to European settlers as sisal plantations. They also found their villages hemmed in around Kasigau Hill.¹⁰⁸ This reality has not changed: the villages are surrounded by ranches predominantly owned by non-Kasigau people, most of them holding leases on government land. There is therefore a deep-seated sense that more than any other Taita, the Kasigau have paid a heavy price for independence but gained nothing, as Kasigau is the poorest location in the district.

This very localized and restrictive identity persists whenever discussion of local resources takes place, in spite of the fact that people from other communities have gradually settled in the area. There is a significant Kamba population, for instance. The FGD held in November 2011 revealed

¹⁰⁶ 2003 Workshop Proceedings; interview with Harris Mwasawau Mwandigha, Interim Chairman, Nyangala Ranchers Association, November 29th 2011, Kasigau; interview with Livingstone Kidedela Boli, Interim Vice-Chairman, Nyangala Ranchers Association, November 29th 2011, Kasigau ; Focus Group Discussion, Kasigau, November 30th 2011.

¹⁰⁷ Only one source classified 'Wakasigau' (plural; singular 'Mkasigau') as distinct from 'Wataita proper' (see George Katama Mkangi, *The Social Cost Of Small Families and Land Reform: A Case Study of the Wataita of Kenya* Oxford: Pergamon Press at p. 21 (1983) (hereinafter cited as Mkangi 1983). The identity appears to have only a geographical rather than any ethnographic basis defined by lineage. It is also instructive that the entire Taita area was settled through waves of in-migration at various historical moments. The sequential Taita clan names (though the clan system has virtually disappeared) attest to this, for instance *wasadu* (the third people), *wanya* (the fourth people), *wasanu* (the fifth people) etc. See Mashengu wa Mwachofi., *'Land Reform in Taita: A Study of Socio-Economic Underdevelopment in a Kenya District'*, BA Dissertation, University of Nairobi (1977) at p. 23-24 (hereinafter cited at Mwachofi 1977); Mkangi 1983 at p. 22-23; James Gichiah Njogu, 'Community-based Conservation in an Entitlement Perspective', PhD Thesis, Rhodes University (2004) (hereinafter cited as Njogu 2004). A long history of inter-marriage means that no distinct group is in a position to claim indigenous roots to the area.

¹⁰⁸ Account based on oral narration at 2003 workshop and both FGDs (in Voi and Kasigau) in 2011. See also Njogu 2004; Mwachofi 1977). Mr. Mwachofi took part in the district level focus group discussion and referred extensively to his earlier work.

that the tension between this restrictive identity and the emerging cosmopolitanism is far from resolved. The researchers pointed out to the FGD participants that although they kept referring to *wenyeji* as the people who ought to benefit from local resources, they had not made explicit the meaning of *wenyeji*. The response that followed made it very clear that although the literal meaning of the term *wenyeji* is ‘residents’, here the term is clearly being deployed in a manner that suggests that the fact of physical residence by itself is not enough:

Distinctions are made all the time. Even in national law there is a distinction between ‘citizen by birth’ and ‘citizen by papers’ (naturalization). It is possible to sift between the categories without causing clashes. We are not saying that those who are not ‘waKasigau’ should automatically be excluded. We may have to screen the outsiders and scrutinize the process by which they acquired [existing] interests.¹⁰⁹

Those who have physical residence but not Taita ethnic identity are not automatically entitled. Their entitlement is contingent and subject to scrutiny. Thus, whereas a localized ‘Mkasigau’ identity is invoked so as to exclude the claims of other Taita who have acquired interests in the area, it is also invoked to further restrict entitlement to those who have both ‘roots’ in the area as well as Taita ethnicity. For these ‘Wakasigau’ inclusion into ‘community’ (and therefore entitlement to local resources) is automatic. For non-waKasigau however, inclusion into community is contingent, and the legitimacy of their entitlement has to be proven, upon clear negotiation of the terms of their inclusion.

By referring to scrutiny the FGD participants were likely referring to generally accepted traditional processes by which outsiders come to acquire rights in land. Interviews with some key informants were more explicit on the issue of respecting what they claimed were well-established customs for absorbing ‘outsiders’ into the community, which they felt had not been followed in many cases of settlement into the area.¹¹⁰ The above quote taken from the FGD in 2011 suggests that the recent recognition of community land rights in the 2010 Constitution is perceived as presenting the opportunity for digging up of histories of how perceived outsiders came to settle in the area. It provides the opportunity to revive these customs, possibly resulting in rigid application of what might have been quite flexible practices, and which in any case must have undergone change with time. In a climate of competition over resources such a process is likely to result in a tightening of the technical rules so as to disqualify claims already viewed as suspect or threatening.

Beyond Kasigau there exists a general tension between different bases for belonging. According to a key informant whose family has membership in Ngulia Ranch, the ranch’s Annual General Meeting is convened by the Ministry of Livestock. Throughout the ranch’s history, ministry officials have been unable to restrict the meeting to those who have bought shares in the ranching company. When meetings are called, virtually all the area residents show up because they perceive themselves to be ‘insiders’ entitled to a say in the affairs of the ranch on the basis

¹⁰⁹ Participant, Focus Group Discussion, Kasigau, November 30th 2011.

¹¹⁰ Interview with Livingstone Kidedela Boli, Interim Vice-Chairman, Nyangala Ranchers Association, November 29th 2011, Kasigau; interview with Harris Mwasawau Mwandigha, Interim Chairman, Nyangala Ranchers Association, November 29th 2011, Kasigau. For sources that document these customs see Mkangi 1983, *supra* note 112; Mwachofi 1977, *supra* note 112, who emphasize that the underlying principle was inclusion, so that no family was left landless.

of local residence. In their view, the land belongs to them, company membership (or lack of it) notwithstanding. The ranch's shareholders, on the other hand, perceive 'community' (who is included into the ranch) to mean those who have bought into membership through a formal process. The dynamics of determining the basis for entitlement to community resources, and the management of competing bases for entitlement cannot be brushed aside in formulating a law on community land rights.

4.2.2 Resources and Rights Holders

During discussions in the 2003 workshop and the 2011 FGD, community members identified water, forestry, minerals, pasture and farmland, and wildlife as important resources which they should benefit from and manage. This section discusses the perceptions of community members concerning entitlement to, and governance of these crucial resources.

a) Water

The main water catchment is Kasigau Hill, with streams draining off into all the villages except Jora. The communities use the water for domestic consumption and for livestock. There is no irrigation. Although the predominant perception is that the water belongs to the community, recent conflicts suggest that this community claim is precarious. In Bungule Village, which gets the largest share of the water, what started off as a community water project managed by a Community-based Organization (CBO) has been irregularly converted into an individually-owned water bottling company, taking advantage of internal wrangles within the project's leadership.¹¹¹ When the CBO members filed a court case to remove the leaders who had 'sold' the project to the private investor, the case was dismissed on grounds that the CBO had no capacity to sue since its registration was only through a certificate issued by the Ministry of Culture and Social Services.¹¹²

Community-based governance structures within the Water Act (2003) aimed at ensuring that communities of water users have a say are clearly not operating at all in the area. The FGD revealed that only the local councillor knew of these community-based structures (Water Resource Users Associations, Water Catchment Area Committees) in the first place. It was also clear that the process of obtaining a water extraction permit (which provides a period for other water users to raise objections) had not been followed and the new private owner hid behind an application that had been initiated when the enterprise was a community project.

A lot remains to be done on creation of grassroots-level awareness on the new structures that allow for community governance of water resources. At the same time, shortcomings in the Water Act (2003) will need to be remedied in order to clarify and secure community holding of rights to water resources.

¹¹¹ Focus Group Discussion, Kasigau, November 30th 2011 (contribution of local administrators and former officials of the Bungule Community Water Project).

¹¹² Focus Group Discussion, Kasigau, November 30th 2011 (contribution of local administrators and former officials of the Bungule Community Water Project).

b) Forestry

The Forests Act of 2005 creates community-level structures for the involvement of citizens in decision-making, citing as one of its objectives the promotion of ‘the empowerment of associations and communities in the control and management of forests’ (section 5(m)). The law creates Forest Management Committees, that have community representation, as well as Community Forest Associations to be set up by members of communities living within or adjacent to a forest area (Sections 46-49). However, there is little evidence that these structures have taken root.

Qualitative data from Kasigau also indicates an absence of effective engagement with communities in spite of the statutory creation of these community-level structures. Little effort has been made to tap into whatever community structures existed for governance of forest resources prior to the time when Kasigau forest was declared a protected area and the local residents barred from accessing it. The dominant perception seems to be that community members once had clarity on their claim to this resource but no longer do. In the living memory of the older generation (over 60 years old) is a system that was very clear on where firewood could be collected, what species of trees could be harvested freely, which ones could only be harvested with special permission of elders, and which ones could not be harvested at all (taboo to touch).¹¹³ However, since the declaration of the area as a public forest in 1941, this system has gradually fallen apart. People will obtain permission from the Forestry Department to cut trees that were previously protected through taboos, or to harvest timber on a scale that was previously unimaginable and is unsustainable. Further, the sanctions previously existing no longer hold any threat.

The on-going review of the legal and policy framework in the forestry sector to align it with the 2010 Constitution must also be co-ordinated with the enactment of the new law on community land, as the exercise definitely has implications for the content of community rights.

c) Minerals

The mining sector raises the issue of how local interests are to be balanced with larger national interests. Mineral resources, like water resources, are classified as part of public (not community) land (Article 62(1)(f)), and are therefore under the control of the national government.

Who holds rights to mineral resources within Kasigau and its environs is a controversial question. Minerals are found both inside the Tsavo National Park and in the ranches that hem in the Kasigau villages. But the most significant deposits are found within the Tsavo National Park. Applications for prospecting licenses and mining concessions are dealt with by the central government through the Commissioner for Mines and Geology. Mining within registered ranches requires the consent of the ranch in question. Prospecting licenses and mining concessions within the park, however, can only be authorized by the Kenya Wildlife Service (KWS). Participants at the 2003 workshop and the 2011 FGD were of the opinion that this effectively made KWS the owner of the mineral resources in the area, and doubted whether KWS really has this right.

¹¹³ See also Humprey Wafula Kalibo, *A Participatory Assessment of Forest Resource Use at Mt. Kasigau, Kenya*, MA Thesis, Miami University (Oxford, Ohio, 2004); Njogu 2004 *supra* note 107; Mkangi 1983 *supra* note 107 for clear documentation of this traditional system for managing entitlements to forest resources.

There is a strong feeling that the minerals ought to benefit the locals because they are ‘on our land’. They point out that 80% of mining concessions are in the hands of companies that have no ties to the locality.¹¹⁴ Locals only benefit in the form of unskilled employment in these companies, or as small-scale (mostly illegal) miners vulnerable to exploitation by middle-men. Complex and expensive application procedures were cited as one explanation for the absence of local residents from the mining sector. There was overwhelming feeling that granting mining concessions ought to be tied to land ownership, so that those with interests in the land, and communities whose ancestral claim to the land was unjustly taken away, get royalty. At the moment, community interests are not acknowledged.

One key informant raised the concern that acknowledgement of community rights to land in the 2010 constitution and inclusion of minerals under ‘public land’ may complicate the matter. For instance, what arrangement will be put in place with respect to minerals on ranches? And what happens to land which is categorized as community land but is subsequently found to hold mineral deposits?¹¹⁵

Article 66(2) requires parliament to enact a law to ensure that investments in property benefit local communities and their economies. Like the community land law, this proposed law is also assigned a five-year time frame for enactment, long after the main law on land has been enacted. The need for iteration across these various processes cannot be over-emphasized, especially since in the minds of ordinary people ‘on the ground’ these are all components of the same issue. For Kasigau specifically, and Taita district generally, the need for a law on these intertwined issues is made even more urgent by recent discoveries of new minerals such as iron ore, currently being prospected by Chinese firms.¹¹⁶

d) Pasture

Land in Taita Taveta has had a long history of disaffection and controversy, mainly because so little of it is available for settlement and use by the majority of the population. The bulk of the district’s land mass is taken up by the sprawling Tsavo National Park (62%). The remaining 38% breaks down as follows:

- 24%- ranches in the lowlands;
- 7%- small scale farming;
- 3.6% - sisal estates;
- 3%- bare land/rocks and water surface;
- 0.4%- forest reserves.¹¹⁷

In terms of land tenure type, the 62% that is Tsavo National Park is under the Kenya Wildlife Service as a special protected area. 26% is under the Government Land Act. The 7% under

¹¹⁴ Focus Group Discussion, Kasigau, November 30th 2011 (contribution of representative of Kasigau Small-scale Miners Association).

¹¹⁵ Interview with Christine Kilalo, Community Development Consultant and former parliamentary aspirant, December 1st, 2011, Voi.

¹¹⁶ Interview with Donald Mombo, Chair, Taita Taveta Wildlife Forum, December 1st, 2011, Voi.

¹¹⁷ Sources for this information: *Economic Survey*, Central Bureau of Statistics, Government Printer, Nairobi 2002; *Taita Taveta District Development Report* (1993); Njogu 2004, *supra* note 107; Mwachofi 1977, *supra* note 112; Mwangi 1983, *supra* note 107.

small-scale farming is former Trust land that was brought under private title following implementation of the tenure reform program in the 1970s and 1980s. The 3.6% taken up by sisal estates is privately owned former government land. The remaining 1% is Trust land, indicated as not available for smallholder registration, which means that it is utilised or set aside for public amenities, but it also includes some communal grazing areas.¹¹⁸

Currently, land within Kasigau is a mix of privately owned smallholdings, a special protected area (the tip of Kasigau hill), and government land. The privately owned small holdings are distributed across the village settlements that ring Kasigau hill. Historical records and analyses of the impact of the tenure reform program in Taita show that with growing population and land pressure around the hill, people began to utilize the lowlands. Initially they would use the lowlands only for seasonal grazing, but with increased pressure which saw pasture around the hill diminish and then disappear altogether, a more intense transhumance agriculture emerged: a pattern of cattle movement that would also involve relocating part of one's family to the lowlands, where they would also cultivate, returning to graze on the hills during long dry spells to take advantage of precipitation.¹¹⁹ Parts of Kasigau are currently witnessing a relatively recent trend of permanent settlement in the lowlands by new immigrants from other parts of Taita affected by land scarcity. This has resulted in intensive use of these arid lowlands for year-round cultivation, the new immigrants practising agricultural methods better suited to the high potential highland areas. This trend poses greater risk to the environment and also multiplies the potential for human-wildlife conflict¹²⁰, not to mention heightening tension in relations with those who have deeper roots in Kasigau.

.....

The government land is being utilized for ranching in a variety of legal arrangements¹²¹:

.....

(i) Public Community Ranches, meaning that the government has granted leases on government land to groups of people incorporated as companies, who maintain a register of members. The leases are issued for a period of 66 years. These ranches were set up under the Kenya Livestock Development Program launched in the late 1960s and are therefore directed by the Ministry of Agriculture. A ministry official always has to be on the board as a non-voting director, but he has a veto power over any decision that goes contrary to agricultural policy. These ranches are also referred to as 'DA Ranches', meaning Directed Agriculture Ranches.¹²²

(ii) Co-operative ranches: these are operated by groups registered under the Co-operatives Act. They are ranches on government land, but they do not have a lease. Rather, the Ministry issues the co-operative with a license to use the land under certain conditions.

.....

(iii) Unregistered community ranches: these are instances where community groups have initiated but not followed through with the formalities of establishing a ranch and obtaining either a government lease or licence to use the land as a co-operative. They have no

¹¹⁸ See Mwachofi 1977 at p.22 *supra* note 107; Njogu 2004 *supra* note 107.

¹¹⁹ See Njogu 2004 *supra* note 107 at p.75.

¹²⁰ See Njogu 2004 *supra* note 107 at p.87.

¹²¹ Besides ranching on government land, other types of ranches found within Taita district include group ranches under the Land (Group Representatives) Act and ranches privately owned by individuals or companies. Only five ranches in the entire district fall within the former category. The majority of ranches are on government land. See Njogu 2004 *supra* note 107 at p. 120.

¹²² Interview with Donald Bong'osa Mcharo, Chair, Taita Taveta Ranchers Association, December 1st, 2011, Voi. See also Njogu 2004.

documented claim to the land. Some of them remain unregistered on account of failure to understand the process, but others have had their attempts at official incorporation blocked through corrupt practices.

Kasigau residents feel ‘hemmed in’: they have few options for expanding their land holding because beyond their small holdings they are surrounded by government land, privately owned ranches (their owners pre-dominantly non-Kasigau) and the National Park. The shrinking of their land has roots in the colonial era, as earlier discussed.

.....
In 1984 a group of Kasigau residents got together and requested to be permitted to set up a group ranch on the government land around Nyangala Hill.¹²³ They were advised that registration of a group ranch was only possible on trust land, not on government land, and that their only option was a co-operative ranch. They initiated the process, but it seems that a combination of official delays and internal divisions stalled the process.¹²⁴ At the moment, therefore, although they claim rights as a community to the pasture land in question, there is nothing to show that they hold rights to it, or indeed that their claim would (or should) rank in priority to any other claim.

The 2011 FGD participants felt strongly that any new land law needs to have a clause for conversion of government land into other types of land, specifically community land, and that communities contiguous to that land should be given priority in the event of such conversion. The government has to give clear justification if it grants a lease to another entity, or converts government land into private land. However, in order for communities to take advantage of such a clause, community organizing will be crucial. If Nyangala Ranch, for instance, or any other community-organized ranch, already held a certificate, it would be well positioned to make a case for conversion of that certificate into community title under a new law on community land rights.

There was more emphasis on pasture than on farmland, the latter being seen as precarious because rain-fed agriculture has become unpredictable and unreliable. The 2011 FGD therefore centred on creating alternatives to dependence on agriculture. The sentiments of the participants were confirmed by the chair of the Taita Taveta Wildlife Forum.¹²⁵ From a study on comparative land use analysis for Taita Taveta County, he concluded that agriculture was fast becoming unviable due to recurrent droughts with little recovery/regeneration time, in addition to serious soil erosion.

His conclusion was that eco-tourism was the only viable and sustainable land use for the county. Inevitably there will be competing visions: between those in favour of alternatives to farming and those reluctant to accept change, particularly in the context of non-economic attachment to land. A community land rights regime will have to offer some guidance on balancing among competing visions of land use.

¹²³ Interview with Harris Mwasawau Mwandigha, Interim Chairman, Nyangala Ranchers Association, November 29th 2011, Kasigau.

¹²⁴ Focus Group Discussion, Kasigau, November 30th 2011 (contribution of participant who served as interim chairman, Proposed Nyangala Ranchers Association.

¹²⁵ Interview with Donald Mombo, Chair, Taita Taveta Wildlife Forum, December 1st, 2011, Voi.

e) **Wildlife and Tourism Revenues**

With regard to tourism revenues from the national park, there are no direct benefits accruing to the local community because Tsavo is classified as a national park. If it were a game reserve, the local county council would get a share of the revenue, which would then trickle down to local communities hosting the reserve. The holder of the rights to this resource is therefore the national government. Participants at the 2003 workshop and 2011 FGD considered this as gross injustice.

Besides the park, there are local conservation areas (Kasigau Hill, Nyangala Hill and the recently established and privately owned Rukinga Conservancy) which attract tourism revenues. Through partnerships with conservation organizations, Kasigau residents have reaped some limited benefits which have dissipated with the collapse of these partnerships. Since both Kasigau and Nyangala hills are host to rare species of birds and medicinal plants, the East African Wildlife Society, with funding from the United States Agency for International Development (USAID), worked with the six villages to establish community-managed accommodation facilities (*bandas*), one for each village in 2002. Their main clientele were students on educational trips, organized through a tour company owned by a private investor with whom the villages entered into a business agreement, each village having incorporated a company to manage the *banda*. This arrangement was still on in 2003 although under strain.¹²⁶ By the time of the 2011 FGD, two of the companies had collapsed, the *bandas* were vandalized and the remaining companies were struggling to meet basic expenses such as salaries, and to comply with tax and company law requirements.¹²⁷

4.2.3 Protection Principles

a) **Recognition**

For all the resources discussed, the claims being asserted by the communities to land and land-based resources are currently either not recognized at all or given inadequate recognition. In the first category would fit claims seen as having no legal basis. The claim for royalties from park-related tourism revenues fall here. Also in this category are claims to entitlement to access pasture in ranches that have already been transferred to private ownership or leased to group ranches with a defined membership.

In the second category fit the license issued to a co-operative ranch, in the sense that the license constitutes some recognition of a claim. But as the mechanism is only administrative, the recognition seems half-hearted and therefore insecure. Community claims to water resources would also fit in this category. There is a general feeling that communities' domestic and livestock use take first priority, but little has been done officially to secure them.

b) **Protection**

The degree of protection granted will flow from the degree of recognition accorded to the claim in question. Thus, members of a registered ranch have stronger protection of their rights than

¹²⁶ Report of Joint Workshop on Citizen Participation in Governance of Natural Resources, for Rukanga, Jora, Kitege, Makwasinyi, Bungule and Buguta Villages - Kasigau Division, Taita Taveta district, April 16th-17th 2003, ACK Moi Girls High School, Kasigau (on file with authors).

¹²⁷ Focus Group Discussion, Kasigau, November 30th 2011; also confirmed by interview with Donald Mombo, Chair, Taita Taveta Wildlife Forum, December 1st, 2011, Voi.

local residents who are non-members and whose claims are not recognized at all. Members of a co-operative ranch, though their interests have some kind of registration, have weaker protection because their licence can be cancelled without much ado, while shareholders in a company that has a lease on government land can expect due process before the lease is revoked.

c) Evidence of Rights

The discussion above indicates what is considered acceptable as evidence of one's rights or of a community's rights. First occupation and long residence seems to be a key factor. This is the basis for the Kasigau claim to land that is nonetheless officially registered as government land and therefore at the disposal of the central government's decision-making, including a decision to allocate or lease it to non-locals.

Social acceptance as a basis for rights is definitely implied in the argument made by the participants in the 2011 FGD. By arguing that there ought to be a 'screening' of the non-Kasigau claiming local pasture they are clearly reserving the right of the community to admit or exclude some claims. A distinction is clearly being made between those non-Kasigau who approached the community in an accepted manner and acquired their interests through channels considered socially legitimate, and those whose claims were perceived as contestable and irregularly acquired.

Documentary evidence obtained through formal processes is also seen as a crucial factor. However, with respect to some resources such as pasture (ranching) and minerals, these formal processes are viewed as inaccessible to or exclusionary of local residents. Therefore, holders of prospecting licences, mining concessions and formal membership in ranches will value this form of evidence of rights. But the majority of local residents will contest the legitimacy and justice of this form of evidence. The picture emerging is that of conflict between formal and informal bases for claiming rights - both individual and community - to land and land-based resources.

d) Land Use Planning Requirements

Land use planning seems peripheral to the discussion of access to and control of land and land-based resources. Yet it is central to determining what individuals and communities can or cannot do with the resources. That it did not feature at all in the discussions indicates that it has not been felt or is largely ignored. It only featured indirectly with respect to the Ministry of Agriculture's power to veto decisions of a public community ranch if such decisions contradict agricultural policy, regardless of the wishes of the majority of shareholders.

e) Compulsory Acquisition

The compulsory acquisition of community land by colonialists in the form of allocation of sisal plantations in the plains to ex-World War I personnel and the confinement of indigenous people to native reserves is seen as the origin of the land conflict in Taita Taveta.¹²⁸

There is also the long-running dispute between various communities in the district and KWS over the exact site of electric fences around the Tsavo National Park. The communities accuse KWS of engaging in unilateral extension of park boundaries in contravention of the 1948 agreement that the community claims to have negotiated when the park was established.

¹²⁸ Focus Group Discussion at district level, December 2nd 2011, Voi.

There is also perceived compulsory acquisition in the government's establishment of Buguta Settlement Scheme in the area despite objections by Kasigau residents. The government has been forced to abandon plans to create Phase II of the scheme. Residents observed that although some local residents were allocated land in the first phase, the scheme opened up allocation to non-Kasigau people, hence their opposition to it.

This context makes it likely that the government's power of compulsory acquisition will come into constant conflict with community claims to land. Therefore any law on community rights to land and land-based resources will need to have clearly defined criteria for such compulsory acquisition and provide for processes that balance local community interests with larger national goals.

f) Rights of Way

Issues of right of way did not arise in the Kasigau site. However, Kasigau lies between Tsavo East and Tsavo West national parks and is therefore an elephant migration corridor. Registered ranches in the area are entering into agreements with a local conservancy to convert all or some of their land into conservation areas to facilitate the free movement of wildlife. There was no indication of whether these will be officially registered as easements.

g) Private Rights in the Community Context

Although Kenya has now embodied official recognition of community rights, the reality is one of co-existence of private and community interests in both land and land-based resources. The discussion on pasture and water, for instance, brings out this co-existence, which is often (but not always) a source of conflict.

h) Public Rights in the Community Context

The discussion on compulsory acquisition is of relevance here. Central is the question of balancing the larger public interest with both individual and local community interests. Among the resources discussed, minerals and tourism revenues bring this issue into sharp focus.

However, the potential clash between local community interests and larger public interest is manifested in much more than just actual compulsory acquisition. As is evidenced from the Kasigau claims to resources such as pasture, and the larger district's residents' claim to royalties from tourism and minerals, these claims gravitate toward an ethnic narrative that becomes the only basis for exclusion or inclusion. In a way, the definition of 'community land' in Article 63(1) itself invites this narrow understanding of community as being only (or at least primarily) defined by ethnicity. National public policy based on an equal citizenship model may sometimes demand that in the national interest some claims that communities feel to be perfectly legitimate ought to be overlooked.

On this point, it was suggested by the local councillor participating in the FGD in Kasigau that perhaps one reason why there has not been official enthusiasm over the grant of a lease on government land to the proposed Nyangala Ranchers Association is that the list of proposed members submitted only had names like Mwanzige, Mwacharo and Mwasaru (i.e. people of Taita ethnicity) yet it is known that the area also has some Mutua's and Kyalo's (i.e. people of Kamba ethnicity). He suggested that perhaps intelligence reports (which are routinely referred to in applications of this nature) indicated that it would be contrary to a wider public interest to

grant the lease as it would effectively translate into a licence to evict ‘outsider’ communities from the area.¹²⁹

4.2.4 Governance and Regulation of Community Land Transactions

a) Enforcement of Rights: Including Individual Entitlements

There are defined formal mechanisms for enforcing rights for those whose land claims are documented, and their rights clearly defined, namely:

- holders of title to individually owned private ranches;
- shareholders in private company ranches;
- shareholders in public community ranches operated by companies holding 66-year leases on government land;
- members of group ranches registered under the Land (Group Representatives) Act; and
- those who have entered into formal tenancy agreements to access pasture on ranches that have formal registration.

Although members of co-operative ranches have a document establishing their claim, that document (land use certificate) is only a licence, which can be withdrawn at any time at the initiative of the issuer. Therefore, the ability to enforce the claim through the legal process rests on shaky ground.

For those relying on interests in unregistered community ranches, there is no formal mechanism for enforcing the claim to rights, because there is no official recognition of those rights in the first place. Similarly, with respect to other land-based resources, the options for enforcement depend on the legal status of the right claimed. With respect to minerals, for example, the holders of prospecting licences or mining concessions issued by the authorities are able to enforce their rights, while those who engage in small-scale informal mining with no documented rights, or with prospecting licences that have expired, have no avenue for enforcement of the claims.

With respect to water and forest resources, the strong belief in the existence of a legitimate and superior community entitlement is not matched by mechanisms that protect that entitlement. Faced with a challenge from individual or private interests, particularly when those are backed by official endorsement, the community entitlement proves insecure, as illustrated by the virtual disappearance of the once-revered traditional system for regulating forest access and use. The water experience in Bungule Village in Kasigau suggests that it takes a huge investment in collective action to secure community rights to a resource in the face of competing powerful individual interests. When that collective action proves deficient, the community interest becomes very vulnerable and difficult to protect. The dismissal of the court case on grounds of lack of legal identity points to a need to provide for legal mechanisms that actually enable the protection of the community interest.

¹²⁹ Focus Group Discussion, November 30th 2011, Kasigau.

b) Registration

In contemporary Kasigau (and the larger Taita District), land that fits the definition of ‘community land’ under the 2010 constitution is registered in a variety of ways. The registration of the ranches is spread across the Registered Land Act (which covers both privately owned ranches and those managed under the Land(Group Representatives) Act, the Government Lands Act and the Co-operatives Act.¹³⁰ These are community lands by virtue of Article 63(2)(a). The land under settlement and cultivation falls under trust land, which is held by the local county council, and also falls within the definition of community land by virtue of Article 63(2)(d)(iii).

The only types of community land which do not have an existing registration system are ‘ancestral lands and lands traditionally occupied by hunter-gatherer communities’ (Article 63(2)(d)(ii) and ‘any other land declared to be community land by an Act of Parliament’ (Article 63(2)(c). All the other categories are qualified by the word ‘lawfully’ (e.g. in Article 63(2)(b): ‘land lawfully transferred to a specific community by any process of law’) and therefore suggests that there must be some existing legal framework for their documentation. However, this state of affairs raises the following concerns:

- a) ‘Ancestral lands’: In the Taita region broadly, claims to ancestral lands are articulated to include land that is considered government land, as in the case of the Tsavo National Park. The communities contiguous to the park have a long-running dispute with KWS over allegations of gradual shifting of park boundaries with every phase of installation of the electric fence. The communities point to the *fighi* (traditional marking of boundaries by establishing shrines) that mark the boundaries agreed at the founding of the park and key landmarks, such as Irima Hill, which they claim used to be outside the park but have now been fenced in. Some of the claims also extend to land currently held by ranches on government land, and others to individually owned ranches that are alleged to have been illegally acquired by influential people. Thus, once the door to making claims to ancestral land is opened, the registration question is far from settled.
- b) Ranches: Particularly with respect to public community ranches, the issue of conflicting bases for claiming rights arises. On the one hand are those that claim on the basis of formal membership and investment in shares in the ranch. On the other hand are those who claim by virtue of belonging to the community of local residents. The latter have no official system for registering their claim, but poor handling of the conflict will (to a certain extent already does) threaten the security of the registered interests.

4.3 EAST MAU

4.3.1 The Nature of Community

In Nessuit Location (located in the East Mau forest block), there is a distinct ‘us and them’ narrative. The study focused on all three sub-locations of Nessuit namely: Nessuit, Mesipei and Sigotik. The first two are predominantly Ogiek, while the last is predominantly Kipsigis. Therefore reference to ‘community’ in each area in the context of entitlement to land and land-

¹³⁰ Note: the Registered Land Act and the Government Land Act have since been repealed by the enactment of the Land Act 2012 and the Land Registration Act 2012.

based resources is deliberately framed so as to include the speaker's community and exclude others. This is heightened by the history of Kipsigis settlement in the area, which dates back to 1994 when a settlement scheme was initiated, ostensibly for the benefit of the Ogiek families. Instead, by virtue of the influence of a powerful minister in the Moi regime, and a forest officer implicated in irregular excision of Mau Forest, the allocations went to Kipsigis imported into the area. This account is taken from several key informant interviews, life histories and FGDs, and is also confirmed by the official report of the Prime Minister's Task Force on the Restoration of the Mau Forest Complex.¹³¹

As there is official acknowledgment in the Mau Task Force report that the Ogiek have lived the longest in the forest (over 150 years), the Mau Task Force undertook an exercise to identify all Ogiek. This exercise all but confirmed that Ogiek will get preference in the proposed government policy of giving communities adjacent to the forest a strong role in community management of the forest, as part of the search for alternative livelihood strategies more compatible with forest conservation. So it is now of great benefit to prove Ogiek ancestry.

Under the auspices of the Mau Task Force a process of Ogiek lineage validation was undertaken at the grassroots level. The Task Force did this with the help of the Ogiek Council of Elders and the exercise appears to have enjoyed a lot of legitimacy among the Ogiek at the grassroots level. Therefore upon establishing Ogiek ancestry, one is then perceived as well positioned to claim land rights or preferential consideration in community forest management, or compensation for forfeited title. This will depend primarily on an official document- the register of Ogiek lineages. A government record has now become the primary (if not conclusive) document for defining community, belonging and entitlement; for validation of any claim to land or land-related resources in the East Mau forest block.

Yet being Ogiek is itself not an uncontested identity. On account of the various movements of the Ogiek and their interaction with other communities, the group has taken on the language of other communities and named their clans and individuals using other communities' names. While this may be seen as a consequence of interaction and adaptability, there is a survival narrative too. The mode of organization of the Ogiek with no organized formal institutions such as chiefs, clan leaders and formal councils of elders made them vulnerable.¹³² They have been perceived by successive governments (colonial and post-colonial) as elusive and uncountable bands of forest dwellers, hence the need to flush them out of the forest into the open space where they can be counted and organized. In a bid to organize the Ogiek, non-Ogiek have been appointed as local administrators, creating the openings that enabled opportunistic claims to Ogiek identity. With the loss of language and traditional way of life, governments and politicians have disinherited the Ogiek by exploiting the difficulty in identifying *bona fide* Ogiek.¹³³

¹³¹ See Government of Kenya, Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex, (2009). The report of the Task Force is available at www.mauforestrestoration.go.ke. (Last accessed September 17th 2012) (hereinafter cited as Mau Task Force Report 2009). The report contains a table summing up the status of settlement schemes in the Mau East Forest Block as of 2001 showing that with respect to Sigotik the settlement process has been halted due to disputes.

¹³² John Kamau, 'The Ogiek: The On-going Destruction of a Minority Tribe in Kenya' *Rights Features Service* (available at www.ogiek.org/report) (last accessed 26th September 2012) (hereinafter referred to as Kamau 2000).

¹³³ *Ibid*

The Ogiek have made sustained efforts, especially since the 1990s, to reclaim an ‘authentic’ Ogiek identity, in order to counteract the way in which they have historically been defined by others. During the 1969 census, for instance, the Ogiek were lumped together with other forest-dwelling tribes and collectively referred to as *Dorobo*. The name *Dorobo* is the Kiswahili derivative of the word *Il-Torobo* used by the Maasai to refer to a person who has no cattle and therefore lives a poor life by eating wild animals.¹³⁴ The Ogiek have used public forums at every opportunity to put forward their own narrative. The most notable efforts include submissions before the Njonjo Commission¹³⁵, in court cases¹³⁶, in the media¹³⁷ and through publications such as an atlas of Ogiek ancestral territories in the East Mau¹³⁸, and monographs authored by Ogiek activists.¹³⁹ The atlas presents a careful mapping of the clan boundaries, based on a combination of oral history and technical expertise. In addition, it presents genealogies of the respective Ogiek clans, and documents Ogiek knowledge of the Mau’s eco-climatic zones and the types of land uses that each zone supported. The atlas presents a distinctive narrative of Ogiek lifestyle (hunting and foraging) as being compatible with forest conservation and sustainable use, carefully omitting any reference to grazing or cultivation, which are currently dominant land uses in the area. In the court cases they present their livelihood as entirely dependent on the forest, and their culture as being about conservation of nature, and that even in modern times they never interfere with the natural environment except when necessitated by construction of schools, administrative and trading centres and houses of worship.¹⁴⁰

¹³⁴ Blackburn, R.H.. ‘Okiek History’, in B.A Ogot (ed) *Kenya Before 1900: Eight Regional Studies*. Nairobi, East Africa Publishing House, (1976) at p.53.

¹³⁵ See Government of Kenya, Report of the Commission of Inquiry into the Land Law System of Kenya (Charles Njonjo, Chair), (2000). [The submission by the Ogiek Welfare Council is reproduced at <http://www.ogiek.org/report/ogiek-app1.htm>] (last accessed 17th September 2012).

¹³⁶ The main case is *Francis Kemai & others vs. the Attorney General & others*, Nairobi High Court Civil Case No. 238 of 1999, in which a representative suit was filed by ten members of the Ogiek community on behalf of a community of 5,000 evicted from Tinet forest and living in diverse locations in East Mau. There is also *Joseph Letuya & Others vs. the Attorney General & Others* (Nairobi High Court Civil Case No.635 of 1997, in which the Ogiek successfully secured the injunction that halted the settlement scheme in Nessuit. In addition, there are several cases that show up as nondescript criminal charges of ‘trespass’ and ‘incitement’ mostly against Ogiek land activists and ordinary Ogiek who have engaged in self-help in land disputes with non-Ogiek neighbours. All these cases have provided opportunity for airing the narrative of an authentic Ogiek identity and ancestral entitlement.

¹³⁷ See Kamau (2000), *supra* note 138.

¹³⁸ Mosheim, J. & Albrecht Ehrensperger, , *Ogiek Peoples Ancestral Territories Atlas: Safeguarding Territories, Cultures and Resources of Ogiek Indigenous People In The Eastern Mau Forest, Kenya*, Nairobi:ERMIS Africa & CDE:. ((2009)

¹³⁹ See Kimaiyo, Towett J., *Ogiek Land Casess and Historical Injustices 1902 – 2004* (2004) Nakuru: Ogiek Welfare Council.; Sang, Joseph K., *From principles to practice: Indigenous peoples and protected areas in Africa - Case study 3: Kenya* (2001). Available online: <http://www.forestpeoples.org/sites/fpp/files/publication/2010/10/kenyaeng.pdf>. (last accessed September 17th 2012). See also Kenya Land Alliance, *Forest Dependence in Kenya: A Case Study of Hunter-Gatherer Communities in Kenya* (2009). Nakuru:Kenya Land Alliance.

¹⁴⁰ See judgment in *Francis Kemai vs. the Attorney General & others*, Nairobi High Court Civil Case No. 238 of 1999. The court does not buy into this narrative of continuity, citing the photographs presented in evidence to draw a sharp contrast between ‘the Ogiek of yesterday’ characterized by ‘simplicity of material culture’, whose home is a dome-shaped hut constructed from a frame of sticks, twigs and branches and thatched with leaves or grass’ and the modern Ogiek ‘with the modern houses of corrugated iron-sheet roofs and glass windows’. The latter must clear the forest to make way for market centres and agricultural activities, which ‘belies the notion that

So, how have the non-Ogiek occupants of East Mau responded to this narrative of Ogiek identity and claim to ancestral title? They are really more of an aggregation of individual claimants to land than a community as such. In the course of conducting the survey we observed that the Kipsigis in East Mau are mostly from diverse poor backgrounds in various parts of Baringo district (although many claim to have been evictees from Tinet forest so as to strengthen their claim for re-settlement). They make a passionate argument appealing to the government's commitment to poverty alleviation as the reason why they ought to be given land. In essence, this articulation of their claim to the land attempts to by-pass the ethnically defined basis for entitlement, and to appeal to a larger national project: poverty alleviation and enabling citizens to be self-sufficient. The Mau Task Force does take note of their concern, but most of their claims (particularly in Sigotik) are likely to fall under the category of irregular allocations, which would mean that barring some political solution, they will neither be considered for compensation nor relocation.

4.3.2 Resources in the Community

The most significant resource is the forest itself, and the products and services connected to it: timber, medicinal plants, grazing land and limited employment opportunities with the Forest Service. Associated with the forest are water resources. The communities settled adjacent to the forest also place a high value on farmland since there is heavy engagement in agriculture.

4.3.3 Holder of Community Rights

The Nessuit area is an uncompleted (in some parts irregular) settlement scheme. On paper are areas of land that are unallocated and therefore do not fall under individual ownership. In reality, however, there is no unclaimed area. All the land within the location is under the control of some individual or family.¹⁴¹ Thus when Ogiek respondents refer to 'our community land', they are referring collectively to the parcels that have so far been allocated to Ogiek individuals and families under the stalled settlement scheme. However, they also intend to include:

- a) land parcels settled by Ogiek families even though not officially allotted to them;
- b) land intended for Ogiek settlement but irregularly allotted to people from other communities;
- c) land outside of the settlement scheme boundaries (and therefore part of the forest), but which they claim is identifiable as belonging to the respective Ogiek clans; and
- d) all of the Mau Forest Complex land, to which the larger Ogiek community lays ancestral claim as the first inhabitants.

They view the holding of such community rights as vesting in the collective. It is instructive that the reason no Ogiek was issued with allotment letters when the settlement scheme was first initiated in Nessuit in 1992 was that community members initially refused to accept individual parcels and insisted on a block title for the community, which was not granted.¹⁴²

these people sustain their livelihood by hunting and gathering as the main or only way out to-day'. The court dismissed the Ogiek claim.

¹⁴¹ Interview with Assistant Chief, Mesipei sub-location, Stephen Mutarakwa, 26th May 2011, Nessuit.

¹⁴² Confidential consultation with a government official, Njoro district headquarters, June 2011. We also gathered this from a consultation with community/clan elders held at Nging'e Nursery, Nessuit, in September 2010.

4.3.4 Principles for Protection

a) Recognition

Activists among the Ogiek community are aware that recognition and protection of their claim to land adjacent to the forest, and to a priority position with respect to involvement of local communities in forest conservation activities, rest upon recognition of their claim to ancestral title to the entire forest area. This claim has been given a boost by the Mau Task Force report¹⁴³ which acknowledges that the Ogiek have lived in the forest the longest (150 years) and have endured successive evictions since the forest was gazetted in 1932.

Their grievance, however, is that although the various settlement scheme initiatives in the area have used the Ogiek as the justification for excision of sections of the forest for human settlement, Ogiek have not been given priority in the actual implementation. The result is that in Sigotik Sub-location Ogiek families constitute only about a quarter of those allotted land. In Nessuit Sub-location, the settlement was intended for 1,500 Ogiek families already resident in the area. Although majority of residents are Ogiek, it is acknowledged that a significant number of non-Ogiek managed to get land there too. Similarly in Mesipei Sub-location, there is a substantial presence of non-Ogiek even though the stated purpose was to settle 1,500 Ogiek families. The settlement activities have been stopped by a court injunction filed by the Ogiek Welfare Council in 1997 on account of these irregularities.¹⁴⁴

These activities point to a refusal by certain government officials and powerful political interests to recognize the Ogiek's prior claim to the forest-adjacent land, the forest itself and its related resources.

b) Protection

On account of the historical refusal of recognition, protection of the Ogiek's perceived rights to the forest-adjacent land and land-based resources has also been lacking. The current state of affairs is that there is a general insecurity of entitlement, whether claimed on the basis of formal title, an allotment letter or a general collective claim to ancestral title with respect to gazetted land within the forest. Title is insecure and the Mau Task Force recommends an audit to investigate all title deeds issued in this area so as to confirm regularly issued ones and revoke those issued irregularly (i.e. either the allotment date shown on the allotment letters predates the official legal notice of the settlement scheme, the allotment was done in contravention of the High Court injunction or allotment was not in line with the stated government purpose). Also to be revoked are titles giving one person more than one parcel of land, or a parcel larger than the designated five acres. Titles issued to bona fide intended beneficiaries of the scheme, but with respect to critical water catchment areas or biodiversity hotspots, are to be revoked and the holders relocated.¹⁴⁵ Protection of any claimed interest in the Mau, whether community or individual, is currently contingent on the completion of the conservation initiative pursuant to the Mau Task Force's report.

¹⁴³ See Mau Task Force Report 2009, *supra* note 137.

¹⁴⁴ *Joseph Letuya & Others vs. the Attorney General & Others* (Nairobi High Court Civil Case No.635 of 1997. See also Mau Task Force Report 2009, *supra* note 137, at p.37.

¹⁴⁵ See Mau Task Force Report *supra* note 137, at pp.46-47.

c) Evidence of Rights

Evidence of rights to land in East Mau is in a state of flux. Some people have title deeds, issued pursuant to the 1996 settlement scheme initiative in Nessuit Location. But all these title deeds will be subjected to strict scrutiny in line with the recommendations of the Mau Task Force. Barring any of the irregularities discussed above, a clean title will secure one's land rights, or at least a right to compensation or relocation by the government if the land parcel is located in a critical water catchment area or biodiversity hotspot. It is clear from the Mau Task Force report that a significant part of Nessuit and the neighbouring Mariashoni are considered critical water catchment areas, and therefore revocation and relocation are likely options for those with clean titles.¹⁴⁶

The vast majority of those within the settlement scheme have no title deeds. As the scheme was not concluded, all they have as evidence of entitlement to land are allotment letters ('green cards') which have expiry dates that have since elapsed. But since it is the only document in their possession, people continue to rely on it, and some even transfer using the green card, the expiry date notwithstanding.

Then there are those with no documentary evidence at all. These include both Ogiek and non-Ogiek that were not included in the list of beneficiaries of the settlement scheme at all, or intended beneficiaries whose allotment letters had not been issued by the time of the injunction. Nonetheless, they occupied pieces of land, in some cases land already allotted to someone else. During the survey in May/June 2011, the research team encountered numerous incidents of two or more families occupying the same five acre piece of land, each staking a claim and hoping to be recognized in future as the bona fide beneficiary.

There are also undocumented Ogiek claims to clan land. All the Ogiek respondents and key informants claimed to know the boundaries of such land. Indeed, a single mother living on land that was not within the settlement scheme boundaries claimed it was 'clan land', which she occupies by virtue of 'allocation' by her paternal grandfather with the consent of lineage members.¹⁴⁷

d) Land Use Planning Requirements

This is at the heart of the problem since the area is still protected forest land according to government records. As the Mau Task Force observed, in all of the settlement schemes in question, actual settlement preceded official gazettement, on account of political expediency. With the concerns about ecological degradation, the government has made it clear that reforestation of the Mau and conservation of the water catchment areas and biodiversity hotspots now take precedence. Yet this definitely puts the government's stated land use policy for the area in direct conflict with the forest-adjacent communities' pursuit of economic and livelihood activities.

¹⁴⁶ See Mau Task Force Report 2009, *supra* note 137, at p.63. Communities in the area informed a team commissioned by the Mau Task Force that 13 of the 32 streams that originate from the area had completely dried up.

¹⁴⁷ Life History of Rosalyn Chepkoech Jemis, interview conducted at Ngin'ge Nursery School, Nessuit, May 25th 2011.

The survey revealed that the vast majority of respondents (82%) were engaged in farming and livestock rearing. Added to those who are self-employed (11.8%) but in businesses that related to farming or use of forest products, this accounts for almost the entire survey sample.

The Task Force anticipates this, and devotes a substantial part of its report to discussing the need for the government to invest in alternative livelihoods for forest-adjacent communities. Key among the recommendations are options that complement the conservation efforts, such as strengthening Participatory Forest Management (PFM) and giving these communities a key role in conservation. They also include creating incentives for on-farm forestry to reduce forest dependence, and exploring the possibility of payment for environmental services so that communities involved in conservation do benefit.¹⁴⁸

e) Compulsory Acquisition

The Ogiek view the gazettement of the forest in 1932 and the successive evictions as compulsory acquisition of their community land without compensation. They take a similar view of the settlement schemes that have favoured outsiders and systematically displaced them.

However, adjustment to the current landholding in line with the Mau Task Force recommendations appears to be welcomed with a lot less suspicion by the Ogiek community. This is probably because there is explicit recognition of their claim to first occupation. They are therefore well positioned to be incorporated into PFM as the primary caretakers of the forest, a role they claim to be well prepared for.¹⁴⁹

f) Grazing and Farming Rights

There are no distinct areas set aside for grazing except on family parcels of land. However, some respondents referred to seasonal access to grazing land for sheep further up into the forest area, sometimes without any permission at all, and sometimes through informal arrangements with forest officials. There was also reference to illegal grazing on a large farm adjacent to the area, which respondents referred to as 'kwa Njeri'.

There is evidence of both farming on one's own parcel (or family's) and farming on leased land. Many non-Ogiek respondents claimed that the Ogiek (especially the men) have been slow to adopt crop farming, and so many of them leased out their land to outsiders to farm. In life history interviews and FGDs with older women, some Ogiek respondents admitted that this is the case, and that the amounts for which they were leasing out the land were too low due to ignorance of the real value of the activity taking place on the farm.¹⁵⁰

g) Private Rights in the Community Context

Depending on who the holder of private rights is, there is both hostility and accommodation of private rights in the community context. Private rights in the hands of Ogiek (e.g. those who have secured title deeds) will be accommodated by fellow Ogiek; but private rights in the hands

¹⁴⁸ See Mau Task Force Report 2009, *supra* note 137 at p. 66.

¹⁴⁹ Consultation with community/clan elders, Nging'e Nursery, Nessuit, September 2010; interview with Kimaiyo Towett, Ogiek Council of Elders, Nakuru, June 8th 2011; interview with Francis Kakwetin, community activist, formerly with Ogiek Welfare Council, Nging'e Nursery School, Nessuit, June 30th 2011.

¹⁵⁰ Focus Group Discussion, Older Women, Nging'e Nursery School, Nessuit, June 30th 2011.

of Kipsigis are viewed with hostility and inherent suspicion, due to the cloud of irregularity that surrounds Kipsigis settlement in the area.

However, the Ogiek themselves, especially those that have been actively involved in championing the community's claim to land and forest, are far from unanimous on the desirability of private rights in principle, or their compatibility with the pursuit of community rights. Some take the view that any accommodation of private rights claims, especially with regard to current and future demands for land and access to the forest, will dilute their claim to indigenous status. Their proposal, in view of the fact that 20 years of individualization of landholding is a reality they cannot run away from, is that the community should still insist on a block (group) title. Once a block title is secured, any sub-division to families and individuals should be an internal matter. Such internal sub-division would take into account the need to zone different land uses. They could designate areas for human settlement and small-scale cultivation (probably simply re-affirming the current holdings). For these areas, the relevant community-based authority would issue something akin to land certificates to individual families. The community would then retain the remaining land undivided and zoned into grazing and bee-keeping areas. The undivided areas would be regulated according to the well recognized clan rules and conventions, with the government giving backing to the community-based authority to do this.¹⁵¹

Others take the view that private ownership is the only viable option, because there is no remaining land for future allocation that can be relied on to serve as community land. The only potential 'community land' is either land to be hived off the forest (an unlikely option in view of the policy focus on restoration of the forest) or to be re-possessioned from non-Ogiek communities (a political powder keg). They also invoke standard arguments in favour of private title: more opportunity and incentive for personal development, ability to raise collateral in order to access credit, and fewer disputes since private holdings can be fenced off. They argue that communal land holding would be untenable as there are now diverse interests and ways of life, some incompatible.¹⁵²

h) Public Rights in the Community Context

East Mau represents a sharp illustration of a clash between a variety of local community interests and the larger national public interest. The larger national public interest in the Mau is clearly the conservation of the water tower and biodiversity. The Mau Task Force report makes it clear why this must be the priority, without compromise. In summary, the Mau Forests Complex is the largest of five water towers in the country, with the largest forest cover. Rivers originating from Mau drain into lakes Victoria, Nakuru, Turkana, Baringo and Natron. All but one of the rivers in the west of the Rift Valley originate from the Mau.¹⁵³ It supports some of the most important national wildlife reserves, such as the Maasai Mara National Reserve in Kenya and the Serengeti National Park in Tanzania. It also hosts a rich variety of plant and animal species of

¹⁵¹ Interview with Francis Kakwetin, community activist, formerly with Ogiek Welfare Council, Ngini'ge Nursery School, Nessuit, June 30th 2011. See also interview with Kimaiyo Towett, Member, Ogiek Council of Elders, , Nakuru, June 8th 2011.

¹⁵² Most respondents in the survey, both Ogiek and non-Ogiek when asked about how to address the land title issue in East Mau did not depart from the current individualized holding pattern to suggest community title. See also interview with Joseph Sang, founder member of the Ogiek Welfare Council, Nakuru, June 29th 2011.

¹⁵³ Mau Task Force Report 2009, *supra* note 137 at pp.55-56; 61.

international conservation concern. The national public interest is therefore in conserving the resource for the benefit of a larger network of beneficiaries regionally, nationally and internationally. In such a context, it is quite clear that whatever local community or private rights can be established must be balanced against the larger national public interest.

The Ogiek community has been astute about positioning its claim in terms compatible with the clear direction that the government is taking towards forest conservation. Articulating its identity primarily as one of caretakers of the forest, whose way of life will not threaten conservation efforts, is a prudent move. It remains to be seen how this will be reconciled with the reality that a significant number of the Ogiek have adopted farming, a form of livelihood not that different from those of the non-Ogiek.

Another issue of national concern in the larger public interest is the highly charged ethnicized tension in the Mau generally, which is quite palpable in East Mau.¹⁵⁴ No amount of rationalization of the Mau Task Force's categorization of the various types of claims on the basis of the degree of irregularity will deter the perception that one community is being targeted for eviction while another is being favoured. Politicians have already made mileage out of this. Thus, while the record may be very clear (and the Mau Task Force has documented it diligently), the government may be forced, in the interest of national cohesion, to give a soft landing to communities that have benefited from illegalities in the past.

4.3.5 Governance and Regulation of Community Land Transactions

a) Enforcement of Rights: Including Individual Entitlements

On paper, one would expect that those who can produce title deeds should expect more secure options for the enforcement of their claims. However, the fluid situation in East Mau currently is such that all rights' claims to land have been rendered tentative. The security or insecurity of different types of claims is only relative. The so-called sanctity of title has been opened up for scrutiny.

Arguably, the most secure claim at the moment is the claim to Ogiek identity. This identity will position claimants well in the event that the settlement scheme is revived and regularized, and irregular beneficiaries 'weeded out'. It will also position claimants well if it is determined that the Ogiek will be the preferred forest-adjacent community when it comes to implementing PFM, which appears a likely direction in the Mau Task Force report.

b) Registration

Some people have clearly given thought to the form of documentation that community land rights would take. As discussed above, some prominent Ogiek land activists have maintained that the community should insist on a block title, then leave any determination of individual or family interests to an internal process guided by recognized custom.

¹⁵⁴ As a research team we experienced this tension first-hand. We had to hire two different teams of enumerators for the survey after we realized that in the tense atmosphere Ogiek enumerators would not be well received in non-Ogiek areas, and vice versa.

c) Relationship with County Government

There is a mixture of optimism and suspicion about the role that county governments are given in relation to community land within the devolved government structure under the 2010 constitution. Among the Ogiek, the devolved structure will only deliver guarantees if a framework that gives them a distinct political voice as a minority is implemented. Thus the constitutional provisions on special representation of minorities in the county assembly are being read with a lot of interest. In the absence of such recognition, their minority status will mean that their voice will be diluted and their interests (including the claim to ancestral title in the Mau) disregarded once more in majoritarian democracy.¹⁵⁵

4.4 LAMU

4.4.1 Introduction

Lamu County is located in the coast of Kenya and constitutes two constituencies (Lamu West and Lamu East). Part of it is in the 10 mile coastal strip of East Africa. The land issues here are to be considered within the history of the Arab conquest in the 1600s and the agreements made between the Sultan of Zanzibar, who controlled this part, with the British when they annexed Kenya. At independence, the coastal strip was transferred to the government. All rights to land were vested in the government except private property.¹⁵⁶ As early as 1902, the Registration of Documents Act (Cap 285) had been enacted to facilitate registration of documents relating to private land in the area. In 1908, adjudication was carried out to separate private property from government, then Crown, land. The Land Titles Act, Cap 282 of 1908 was passed for this purpose and individuals who proved their ownership of private rights were granted freehold certificates of ownership or mortgage. It is important to note that this process only confirmed the existing rights and did not grant new ones.¹⁵⁷ Today, most of these titles have been converted to either the Registered Lands Act (Cap 300 of 1963) or the Registration of Titles Act (Cap 281, of 1919).

The net effect is that most indigenous coastal communities have no ownership rights over land. The situation was exacerbated by the settlement, voluntary or through government schemes for landless Kenyans from other parts, in the coastal area after independence. Some were settled in Lamu under the Squatter Settlement Scheme (Agriculture Act Cap. 318). The process of settlement under this scheme continues to date and is managed by the Department of Land Adjudication and Settlement in the Ministry of Lands. The scheme deals with the settlement of landless citizens and operates in many parts of Kenya.

The NLP ¹⁵⁸ notes that the land question within this region is potentially explosive owing to the peculiar historical and legal origins. No systematic efforts have been made to resolve these problems. The Land Titles Act (Cap 282) radically altered the concept of land ownership under African customary tenure and created biases in land adjudication against indigenous

¹⁵⁵ Interview with Francis Kakwetin, community activist, formerly with Ogiek Welfare Council, Ngin'ge Nursery School, Nessuit, June 30th 2011.

¹⁵⁶ Mwanyumba, 1999

¹⁵⁷ Ibid

¹⁵⁸ Sessional paper No. 3 of 2009

communities. The abuse of the Land Titles Act has had a great negative impact on coastal land leading to the area having the largest single concentration of landless indigenous people. Specifically, this is manifested in the phenomenon of “squatters” on government land, absentee land owners, tenants-at-will, idle land, mass evictions and lack of access to the sea.¹⁵⁹ The slow land adjudication and delay in finalization of settlement programmes have denied the locals secure access to land.

4.4.2 Nature of Community

In implementing community land tenure arrangements under the Constitution of Kenya (2010), the case of Lamu is instructive as the area epitomises coastal land issues. In the bulk of the area, the government owns the land alongside large private land owners, some of whom are absentee landlords. Indigenous communities that have stayed in the area for ages are technically squatters. Taking the constitutional definition of a community on the basis of ethnicity, culture or community of interest, the question within the context of Lamu is the criterion to be given greater focus. Indigenous groups in Lamu are comfortable with focus on ethnicity. However, some communities are not seen to be indigenous yet they have adopted the culture of those in Lamu. This category would be happy with the culture criterion. Those settled in Lamu during President Kenyatta’s era would be happy with the criterion of community of interest.

The upshot of the above discussion is that within the larger Lamu, using one criterion exclusively would yield different results. It points out the fact that the community within Lamu is not homogenous and the law should apply the three criteria depending on the region. The second issue is the need to map the particular areas within the country where communal land practices are prevalent and document the nature of communities so that the criteria adopted are relevant.

4.4.3 Resources in the Community

The NLP recognizes the uniqueness of Lamu but decries the negative effects of current land management practices. It states that:

Lamu Island is a famous World Heritage site. It also hosts the Kiunga Marine National Park. Unfortunately, current land use and ownership practices are undermining the sustainability of the heritage and the park. In addition, land transactions are now taking place on the island with the result that many local inhabitants are rendered landless.”¹⁶⁰

The land in Lamu is partly beach land, which is attractive to investors and has touristic value. The proposal to build a port in Lamu has raised concerns among the local inhabitants as well as conservationists. But it has been justified from the perspective of generating employment for the youth. Lingering concerns about the impact of such large infrastructural development on the World Heritage site and the continued existence of the park have not been addressed.

¹⁵⁹ Ministry of lands, *Issues and Recommendations Report*, 2006

¹⁶⁰ Government of Kenya, *National Land Policy*, Sessional Paper number 3 of 2009(August, 2009) paragraph 192 page 46.

The bulk of land referred to and used as community land is actually government land which would, under strict application of the constitution, be converted to public land although the NLP recommends conversion to community land.¹⁶¹ The policy specifically makes a case for inventorising “all government land along the 10 mile coastal strip and other parts of the province where the problem of squatters is prevalent and come up with a framework for conversion to community land for eventual adjudication and settlement.”¹⁶²

The issue in Lamu is to devise mechanisms for converting public land to communal land tenure. There are also beaches, forests and fish that will also form part of the resources and that communities desire to have access to. Rules will be needed to address the terms under which communities with tenure can relate to these shared resources taking into account the imperatives of sustainable utilisation and management.

4.4.4 The Community Land Rights Recognition Model 163

It is encouraging to note that the complex context of community land rights in the coastal area has been considered and a model developed. The Community Land Rights Recognition Model (CLRRM) was developed by the Kenya SECURE Project funded by USAID Kenya and implemented by Tetra Tech ARD. It involved officials from the Ministry of Lands, four targeted communities in Lamu County, local administration and other stakeholders. It is cast within the context of processes used by the ministry to adjudicate land rights for coastal communities under the Squatter Settlement Scheme (Agriculture Act Cap. 318). The model was informed by the fact that this scheme does not recognize land rights of existing communities and only recognizes the rights of private persons, government and local authorities.¹⁶⁴ It therefore provides steps and processes that facilitate divestiture of land from government land to community land.¹⁶⁵ The model¹⁶⁶:

- acknowledges that community land rights are layered and may include overlapping claims, all of which must be considered;
- recognizes the potential for conflicting land claims that require resolution;
- adopts the NLP’s proposal for community land boards to deal with community land governance in the devolved system;
- provides a framework for establishing community land boards; and
- recognizes the importance and centrality of alternative dispute resolution (ARD) mechanisms and institutions and the need to build the capacity of community land dispute resolution processes.

The model proposes a six-step process for recognition and registration of community lands presented in Figure Two.

¹⁶¹ *Ibid*, paragraph 193, page 46

¹⁶² *Ibid*.

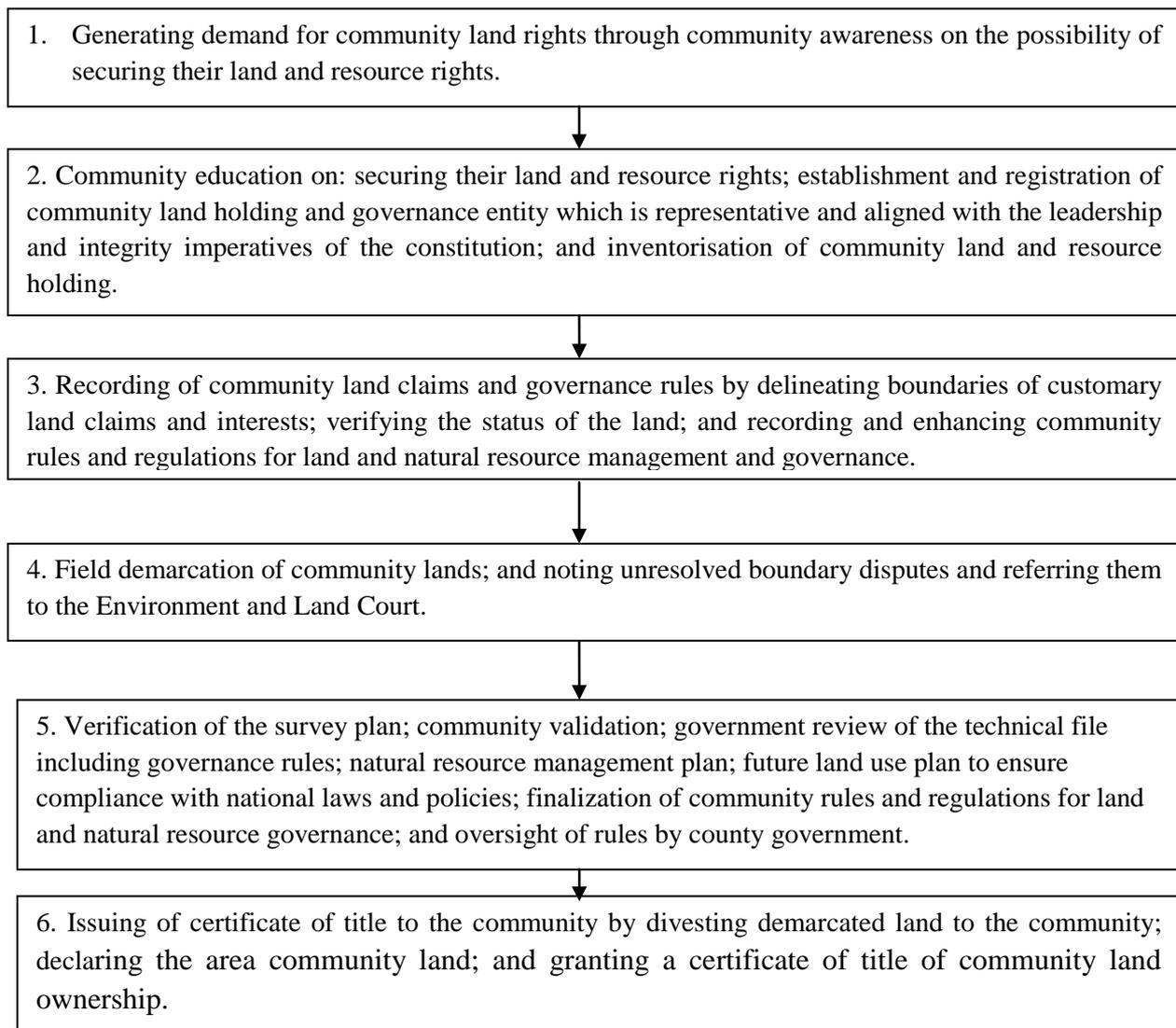
¹⁶³ Ministry of Lands, Community Land Rights Recognition (CLRR) Model, *For the Recognition, Protection and Registration of Community Rights to Land and Land Based Resources*, September 2011.

¹⁶⁴ *Ibid* at page 19

¹⁶⁵ *Ibid* at page 1

¹⁶⁶ *Ibid* at page 4

Figure Two: The Community Lands Right Recognition Model



This sole attempt to implement community rights in a specific context conforms to the constitution and the NLP. It can offer valuable lessons for implementing community land rights in other contexts. In the search for a viable community tenure system, the determination of who holds what rights in what land needs to be answered and the step-wise approach facilitates that without preconceptions. This is very important given the dynamism of community and property rights. The model is yet to be implemented; but it should be used as a reference point in coming up with a community land law. Though developed in a very specific context, it can inform the search for the content, process and locus for community rights to land and related resources.

4.5 YALA

4.5.1 Introduction

Yala swamp straddles former Western and Nyanza provinces and the current Busia and Siaya counties within the devolved government, on the North-eastern shoreline of Lake Victoria. Some reports suggest that it covers an approximate area of 38,000-52,000 hectares. But the more accurate figure is 17,500 hectares. It forms the mouth of rivers Nzoia and Yala and is the third largest swamp in Kenya, after Lorian and Tana Delta. The swamp contains three freshwater lakes namely: Kanyaboli, Sare and Namboyo.¹⁶⁷ It is Kenya's largest freshwater habitat¹⁶⁸ and is bordered by Lake Victoria to the west and Yala River to the south.

Wetlands have habitat, ecosystem and aesthetic values.¹⁶⁹ As Daniel Davis, the former Secretary General of the Ramsar Convention Bureau has written, the assets of wetlands include "economic benefits ...through fishery..., the maintenance of water tables for agriculture, water storage and flood control, shoreline stabilization, timber production, waste disposal and water purification, and recreational activities."¹⁷⁰ Others are discharge of ground water; and source of useful products like medicine and food.¹⁷¹

Yala wetland is specifically important as a source of livelihood for the surrounding communities, habitat for important biodiversity and a possible agro-industrial site.¹⁷² It supports a large population that relies on it for income from fishing, hunting, construction materials and agricultural production, is home to several endemic species and is nationally important as one of the few habitats where the threatened Sitatunga antelope (*tragelaphus spekeii*) is found.¹⁷³ The swamp is part of the most densely populated parts of Kenya.¹⁷⁴ But unlike other swamps in Kenya, it does not have a protected status.

¹⁶⁷ See Abila, R. "Utilisation and Economic Valuation of The Yala Wetlands, Kenya," In Gawla, M. Ed., Strategies for Wise Use of Wetlands: Best Practices in Participatory Management, *Proceedings of a Workshop Held for the Second International Conference on Wetlands and Development, November 1998, Dakar Senegal*, (Wetlands International, Global Series No. 8) pages 89-96 at 89.

¹⁶⁸ Otieno, M., *Mapping Landscape Characteristics of Yala Swamp*, MSC Thesis, Moi University, 2004.

¹⁶⁹ See Mcbeth, D. "Wetlands Conservation and Federal Regulation: Analysis of the Food Security's Act's "Swampbuster" Provisions as amended by the Federal Agriculture Improvement and Reform Act of 1996" 21(1) *The Harvard Environmental Law Review*, 1997, 201 at 204-9. A more detailed discussion on the functions and values of wetlands is undertaken in section 2.8.1, *infra*.

¹⁷⁰ Daniel, Navid, "The International Law of Migratory Species: The Ramsar Convention, 29 *Natural Resources Journal* (Fall 1989) 1002, 1003.

¹⁷¹ Mcbeth, *Ibid.* See also Shine and de Klemm, *Supra* note 11 at page 7-8; Richardson, C.J., " Ecological Functions and Values in Wetlands: A Framework for Assessing Forestry Impacts," Vol14 (1), *Wetlands* 1-9(March 1999), available at <http://www.springerlink.com/content/4011xw1537213726/fulltext.pdf> (accessed on 23/10/10).

¹⁷² Abila, R., "Utilization and economic valuation of the Yala swamp wetland, Kenya" in Gawler, M. Ed. *Strategies for Wise Use of Wetlands: Best practices in participatory management*. Proceedings of a workshop held at the 2nd International Conference on Wetlands and Development, November 1998, Dakar, Senegal, Wetlands International (IUCN, WWF Publications No 65 Wageningen, the Netherlands) pp 96-104

¹⁷³ *Ibid.*

¹⁷⁴ See national population census, 2010 results.

4.5.2 Land Tenure and Use

a) Land Tenure

There is a multiplicity of tenure regimes within Yala Swamp Complex. The main land holdings are private land, trust lands and customary lands. Private land is governed by the Registered Land Act¹⁷⁵ and the Registration of Titles Act.¹⁷⁶ Trust lands, on the other hand, are governed by the Trust Land Act¹⁷⁷ under which land is vested in county councils in trust for local communities. In the case of Yala Swamp, these lands are vested in the Bondo, Siaya and Busia county councils. There is also land that traditionally belonged to certain communities and which the communities continue to hold and use according to their customs. However, these communities do not have titles. Furthermore, the influence of traditional institutions has waned.

The existence of the land held under the three tenure categories has resulted in conflicts arising from past disregard of customary tenure arrangements and the misuse of trust lands. The situation has been worsened by efforts to use the swamp for large scale agriculture.

b) Wetlands Uses

Yala has been subject to reclamation since 1960s principally to give way to agricultural activities. The reclamation seems to have proceeded along the lines that wetlands are only useful if converted to other uses. This view was amplified by the late Hon. Peter Okondo, a politician who hailed from Busia, when he quipped that Yala Swamp was useless.¹⁷⁸

In 1954, Sir Alexander Gibbs and Partners was commissioned under the Kenya Nile Water Resources to investigate the development potential of Yala Swamp among other areas in the Lake Victoria Basin. The study recommended irrigated agriculture. In 1963, the Kenyan government requested the United Nations (UN) for assistance to execute the recommendations. The request was granted and the Food and Agriculture Organisation reclaimed Area I (2,300 ha) in the period 1965-1970. Areas II and III were left under water. In 1972, the Ministry of Agriculture commissioned a Dutch consulting firm, ILACO, to investigate the possible development options of the swamp. It recommended the reclamation of a further 9,200 ha, bringing a total of 11,500 ha under development and leaving only 6,000 ha (Area III) to act as a buffer zone (35% of the wetland).¹⁷⁹ However, only the original 2,300 was used by the Lake Basin Development Authority (LBDA) on behalf of the government¹⁸⁰ mainly to produce cereals, pulses and horticultural crops. The most recent reclamation took place for the benefit of Dominion Farms Limited, a subsidiary of Dominion Group of Companies based in Edmond, Oklahoma USA. In 2003, Dominion entered into an agreement with LBDA for Dominion to engage in rice production in Area I.

¹⁷⁵ Chapter 300, Laws of Kenya Kenya (Repealed by The Land Registration Act, 2012).

¹⁷⁶ Chapter 281, Laws of Kenya (Repealed by The Land Registration Act, 2012).

¹⁷⁷ Chapter 285, Laws of Kenya

¹⁷⁸ Okondo, P., The Yala Swamp is Useless, *Resources* 1:11-14 (1989)

¹⁷⁹ See Dominion Farms Limited, *Environmental Impact Assessment Report, Phase II (Submitted to NEMA, November, 2005)*; and Ezekiel Okemwa, *Independent Environmental Impact Assessment*, (Commissioned by Ujamaa Centre, 2006).

¹⁸⁰ See Friends of Yala Swamp, *Report of Mapping Exercise for the Local Based Civil Society Organizations Around Yala Swamp Catchment Area, 2009*, (Unpublished, on file with authors.)

In addition to the original 2,300 ha, Dominion got a lease for another 4,600 ha from Area II. The 25-year leases were obtained for the total 6,900 ha of land from Siaya and Bondo county councils since the land on which the swamp stood was trust land. However, controversy has surrounded the legality and duration of the lease agreements, sometimes pitting residents against fellow residents, residents against the county councils and county council against county council.

An environmental impact assessment (EIA) was commissioned for irrigated large scale rice production and a license issued in 2004.¹⁸¹ Instead of concentrating on rice cultivation, however, Dominion embarked on additional agricultural and development activities including construction of irrigation dykes and weirs, water drilling and construction of an airstrip and road. It expanded its activities to what it referred to as “an integrated project” including a multi-purpose dam, aquaculture and industrial development projects. For this, it proposed that part of 9,200 ha be reclaimed from Area II.

Due to the changed nature of activities, the company was requested, in compliance with the Environment Management and Coordination Act, to carry out a further EIA, which it did in 2005.¹⁸² The National Environment Management Authority approved Phase Two of the project in May 2006 with conditions. Since then, the project has faced a lot of opposition revolving around: negative impact of the agricultural activities on the environment and health; interference with grazing areas; obstruction of public roads; privatization of part of Lake Kanyaboli; and encroachment on the ecosystem. One of the greatest challenges from activities around Yala Swamp, and which is the subject of this case study, is the impact on and interference with tenure security of local residents.

4.5.3 Community Land Tenure

The communal aspect of land tenure around Yala Swamp is intricately linked to the nature of the swamp and its utility. The importance of the swamp was originally under-estimated as most people considered wetlands to be nothing more than wasteland and breeding grounds for insects and diseases.¹⁸³ A lot of efforts were put in reclaiming part of the land for resettlement purposes in the 1940's and 1950's. However, there was change in the nature of land tenure, including registration of individual titles through adjudication and registration. Despite this and the existence of holdings under trust lands, local communities still operate as clans and view the land as communal. This raises the issue about the relationship between the legal reality and the practical situation in the process of tenure conversion. This portends for dissonance between the law and the obtaining reality, an issue that has to be avoided if the tenure categories, especially communal tenure, have to be given constitutional meaning.

Because of the challenges that the local community has faced due to the acquisition of its land, whether owned privately or through county councils, there is unanimity within the local community that communal land tenure would best serve its interests and promote the sustainable

¹⁸¹ See generally, NEMA, *NEMA Technical Advisory Committee on The Proposed Yala Irrigation Project PhasII in Yala Swamp, Nyanza* (Review Report, 7th April, 2006).

¹⁸² *Ibid.*

¹⁸³ Golding, S.L.T., “Beyond the Ramsar Convention: A Proposal for the International Protection of Wetlands Through Binding Regional Agreements,” 3(1) *Colorado Journal of International Environmental Law*, 359-380(1992) at page 361.

management of the wetland. This conclusion from discussions with local communities is in tandem with the nature of wetlands as a public resource subject to the public trust doctrine. The community believes that registration of the land in the name of individuals has worsened the conflict, with Dominion playing them against each other. To register the land in the name of the community would reduce the conflicts.

As regards control over the land and decision-making, discussions with local communities pointed out that traditional decision-making structures have almost collapsed to the extent that one cannot talk of an effective traditional leadership system. Instead, the proposal was made to link with the institution of village elders under the devolved system and give them powers over community land but democratize their decision-making powers and processes. The community also pointed out that people used to sell or lease their land without regard to wider societal interests. Afterwards, their children would come and demand the land back hence creating conflicts. To avoid such problems, the community suggested a provision in law against selling communal land individually. Instead, communal land should always be available and be dealt with communally. Should there be need to sell the land, the law should determine a clear process and list circumstances under which that sale could take place.

On implementing communal land tenure, there is need to have a register of membership so that it is clear who is and who is not a member of the community. Further, it is important for the law to require regular community meetings for public consultations and decision making. The records of such meetings must be accurately kept. In addition, the law should ensure that decisions by the community are made in a consultative manner. For example, the community suggested mandatory attendance to community consultative meetings and fines in default.

In terms of defining a community, group discussions concurred with the criteria in the constitution but emphasised the community of interest criterion. In this case, communities that derive their livelihood from the catchment area form the “community” for purposes of tenure. In their view, this approach would have enabled them as real holders of tenure rights to negotiate the Memorandum of Understanding developed between Dominion and the county councils.

4.5.4 Lessons for Land Legislation on Communal Land

This case study confirms that certain resources like wetlands should be managed under communal tenure arrangements. This will recognize and protect the rights of local communities deriving livelihood from such resources and enhance sustainability of critical ecosystems. The case study also highlights the importance of giving prominence to the criteria of community of interest in identifying local communities for registration purposes. It further underscores the need to democratize and document procedures for public participation and consultation so as to ensure that community decision regarding the control and use of the land is made by the community as an entity

5.0 PROTECTION OF COMMUNITY RIGHTS: INTERNATIONAL AND COMPARATIVE PERSPECTIVES

5.1 INTRODUCTION

In efforts to develop a framework for implementing community land rights as a tenure category under the Constitution of Kenya 2010, useful lessons can be drawn both from international legal frameworks and other countries that have legislative enactments governing community rights to land and related resources. This chapter discusses these with a view to highlighting lessons for Kenya.

5.2 INTERNATIONAL INSTRUMENTS

Kenya is signatory to many international legal instruments that guarantee various rights and oblige the government to promote their realization . As a member of the UN , Kenya has an international legal obligation to provide for equal rights to everyone as provided for in the Universal Declaration of Human Rights. Kenya is also party to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In the context of community rights, these instruments are critical because they form the basis for recognition of group rights. A common feature in the ICCPR and ICESCR is the unequivocal recognition of the right of all peoples to self determination.¹

While this right provides the basis for the discussions of communal rights within the international sphere, there are four other contexts within which communal rights are recognised and viewed. Consequently, community rights are discussed in five different forms in international law: right to self determination; as an aspect of the right to development; rights of indigenous peoples; protection from racial discrimination; and protection of traditional knowledge and practices on sustainable use of biodiversity.

5.2.1 Right to Self-Determination

Community rights to land and other resources in the international realm can be understood within the context of indigenous peoples' rights. The ICCPR and ICESCR recognize that all peoples have a right to self-determination, and by virtue of which to freely: determine their political status; pursue their economic, social and cultural development; and dispose of their natural wealth and resources. Can the right be enjoyed within a state? Does the right have any bearing on recognizing the right of indigenous peoples to their land and natural resources? The Human Rights Committee which is in charge of monitoring the implementation of the ICCPR

¹ ICCPR and the ICESCR have a common Article 1 which provides:
'1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based on the principle of mutual benefit, and international law. In no case a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of non-self-governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

has had occasion to consider the first question. Commenting on a report by Canada in 1999, the committee affirmed that the right to self-determination can indeed be enjoyed within a state. It stated:

The right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence. The committee recommended that the practice of extinguishing inherent aboriginal rights should be abandoned because it is incompatible with Article 1 of the Covenant.²

On the second question, there are instances where the right has been found to have a link to the right of indigenous peoples over their natural resources.³ In his dissenting opinion in the East Timor case⁴ before the International Court of Justice, Judge Weeramantry argued that that the people of East Timor had the right to “determine how their wealth and natural resources should be disposed... [and that] any action which may in fact deprive them of this right must thus fall clearly within the category of acts which infringe on their right to self-determination”.⁵

The finding as to whether the right of indigenous communities to freely exploit and dispose of their wealth and resources ultimately depends on the meaning of the word ‘peoples’ as used in the common Article 1 of ICCPR and ICESR. The tie between the right to self-determination and the right over resources has also been supported by many authors. For example, Yoram Dinstein argues that the right over natural resources is simply a right closer to the right to self-determination.⁶ The argument, therefore, is that communities can have control and decision making powers of their resources including land.

5.2.2 Right to Development

Community rights in the international arena can also be seen within the context of the right to development. This right is traceable from the Declaration of the Right to Development adopted by the UN in 1986.⁷ The content, nature and status of the right is contested by scholars and the international process for reaching consensus on its practical meaning and implementation is highly politicised, mainly pitting developed countries against developing countries. But there are key elements that constitute this right. These include the facts that: the right recognises that human rights are at the centre of development; the process of development should respect all other human rights, especially the right of participation; development should promote social

² U.N. Human Rights Committee, Concluding Observations, Canada. U.N. Doc./CCPR/C/79/Add.105. (1999), para. 8. Available online at: <http://hrlibrary.ngo.ru/hrcommittee/canada1999.html>

³ See Barume Albert Kwokwo, *Land Rights for Indigenous Peoples in Africa: With Special Focus on Central, Eastern and Southern Africa*. Copenhagen, International Work Group for Indigenous Affairs., (2010) p. 241

⁴ International Court of Justice, Case Concerning East Timor (*Portugal v. Australia*) Judgment June 1995. Available online: <http://www.icj-cij.org/docket/index.php?sum=430&code=pa&p1=3&p2=3&case=84&k=66&p3=5>

⁵ See Barume, *supra* note 3.

⁶ See Yoram Dinstein, “Collective Human Rights of Peoples and Minorities”, *25 International and Comparative Law Quarterly* 25, 102 (1976), p. 110.

⁷ Sengupta, A., “The Right to Development as a Human Right,” available at http://www.harvardfbcenter.org/resources/working-papers/FXBC_WP7--Sengupta.pdf

justice; and states have responsibility for realising the right at the national level through appropriate international policies and cooperation.⁸

The declaration recognises that:

development is a comprehensive economic, social, cultural and political process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from⁹

It affirms that this is a right both of nations and individuals who occupy those nations. Article 1 declares that the right inheres in all human beings and that it includes the right to self-determination and sovereignty over natural resources. The declaration urges, in Article 8, all states to encourage popular participation in all spheres of life. The same article calls for equal opportunity for all in accessing basic resources. States are consequently urged to undertake social reforms to eradicate all social injustices.

5.2.3 Rights of Indigenous Peoples

Community rights can also be viewed as rights of indigenous people. Article 27 of the ICCPR on cultural rights is seen as the ‘most prominent protection provided by international law to land rights of indigenous peoples’, since there has been established a direct link between indigenous peoples’ land and their cultures’.¹⁰ This link is expressly provided by General Comment 23 on Article 27 by the Human Rights Committee thus:

With regard to the exercise of the cultural rights protected under Article 27, the committee observes that culture manifests itself in many forms, including a particular way of life associated with use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.¹¹

The states parties therefore have an obligation to respect, protect and take all appropriate legislative, administrative, budgetary, judicial and any other measures for the full realization of the right to culture as provided for in Article 27. In *Lubicon Lake Band* case¹², the Human Rights Committee held that Article 27 requires the state to protect indigenous peoples’ ways of expressing their culture. It found that Canada had violated the article by allowing the commercial exploitation of natural resources on Lubicon Cree lands since the activity threatened the way of life and culture of the local community.

⁸ See Piron, Laure-Helen, “The Right to Development: A Review of the Current State of the Debate for the Department of International Development” April 2002, available at <http://www.odi.org.uk/resources/docs/2317.pdf>

⁹ Yoram, *Supra*, note 6

¹⁰ See Barume *supra* note 3, p. 243

¹¹ U.N. Human Rights Committee, General Comments 23, para. 7 (1994a)

¹² Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

In addition, the Convention on the Rights of Indigenous Peoples¹³ adopted by the UN General Assembly in 2007 recognises and protects community rights as rights of indigenous peoples. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁴ affirms that all indigenous peoples are equal to all other peoples, even as it recognizes the right of all peoples to be different, to consider themselves different and to be respected as such. Since it is a declaration, it is not binding and Kenya is among the 11 states that refrained from signing it.

In Article 3, the declaration affirms the right of indigenous peoples to self-determination and its derivatives. This is buttressed by the provisions of Article 5 which gives them the right to maintain and strengthen distinct political, legal, economic, social and cultural institutions as well as participate fully in those of the state, if they choose to do so. Article 20 builds on this and includes the aspect of development by guaranteeing indigenous people the right to be secure in the enjoyment of their own means of subsistence and development and to engage freely in all their traditional and economic activities

Article 26(1) of UNDRIP provides that indigenous peoples have the right to the lands, territories and resources they have traditionally owned, occupied or otherwise used. Furthermore, it provides for the right of indigenous peoples to control, develop or use these lands, and requires states to give legal recognition to such lands, territories and resources with due respect for the customs, traditions and land tenure systems of indigenous peoples. Article 27 requires states to establish procedures by which indigenous peoples' customs and land tenure systems can be recognized, with the participation of indigenous peoples. Article 28 addresses the issue of compensation for lands of which indigenous peoples have been dispossessed. The combined importance of articles 26, 27 and 28 lies not only in the recognition of the rights to land, territories and natural resources but also in the protection and recognition of indigenous peoples' traditions, customs and land use systems. Article 11 provides for effective redress for past dispossession of property, including cultural, intellectual, religious and spiritual property while Article 20 deals with redress for deprivation of means of subsistence and development.

The International Labour Organization's (ILO) Convention No. 169 is a legally binding which deals specifically with the rights of indigenous and tribal peoples.¹⁵ Kenya has not ratified it. The convention does not define indigenous and tribal peoples but provides criteria for describing the peoples it protects. Self-identification is an important criterion in identifying indigenous and tribal peoples. Other criteria include: traditional lifestyles; culture (ways of making a living, language, customs); own social organization; and traditional customs and laws. For indigenous people, living in historical continuity in an area or before others invaded or came to the area is also important.

5.2.4 Protection from Discrimination

Community rights can also be viewed within the context of the provisions of international law addressing racial discrimination, especially as enshrined in the International Convention on the

¹³ http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

¹⁴ United Nations (UN). 2007. *United Nations Declaration on the Rights of Indigenous Peoples*. New York. U.N. Doc. A/ RES/61/295.

¹⁵ <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>

Elimination of all forms of Racial Discrimination (CERD).¹⁶ The convention requires states parties to take necessary action in order to diminish or eliminate conditions that help to perpetuate discrimination as defined in Article 1. The Committee on CERD has on various occasions stated that the non-recognition of indigenous peoples' rights to land is a form of racial discrimination.¹⁷ In its 1997 General Recommendation XXIII, CERD stated the following:

Discrimination against indigenous peoples falls under the scope of the convention. The committee especially calls upon states parties to recognize and protect the rights of indigenous peoples to own, develop, control, and use their communal lands, territories and resources.¹⁸

CERD has endeavoured to seek elimination of discrimination of minority indigenous communities by requiring states parties to provide more information on the steps taken to ensure that indigenous and minority communities enjoy rights to their territories. For example, in 2003 CERD made the following concluding observation on the second to tenth periodic reports by Uganda:

The committee is concerned by reports of difficult human rights situations of the Batwa people, particularly in relation to the enjoyment of their rights over lands traditionally occupied by them, and requests information on their situation in accordance with General Recommendation XXIII.¹⁹

Article 3 of the ILO Convention No. 169 seeks to protect indigenous and tribal peoples from discrimination and provides for their right to enjoy 'the full measure of human rights and fundamental freedoms without hindrance or discrimination'. It also guarantees them enjoyment of the general rights of citizenship without discrimination.²⁰ Article 3 makes the convention applicable equally to male and female indigenous persons.

5.2.5 Protection of Traditional Knowledge and Practices on Sustainable Use of Biodiversity

The Convention on Biological Diversity (CBD) is an essential instrument in the protection of indigenous peoples' rights regarding, *inter alia*, their traditional knowledge and practices related to land and natural resources, and protected areas.²¹ In particular, Article 8(j) affirms that

¹⁶ Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19.

¹⁷ Barume Albert Kwokwo, *Land Rights for Indigenous Peoples in Africa: With Special Focus on Central, Eastern and Southern Africa*. Copenhagen, International Work Group for Indigenous Affairs., (2010) p. 257p. 249.

¹⁸ CERD, General Recommendation XXIII Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), adopted on August 18, 1997.

¹⁹ CERD, Conclusions and Recommendations, Uganda, U.N. Doc. CERD/C/62/CO/11 (2003) para. 14. 1; other countries such as Tanzania and Botswana have been required to provide similar information regarding the state of minority communities in their countries.

²⁰ Article 4 of the ILO Convention No. 169

²¹ Barume Albert Kwokwo, *Land Rights for Indigenous Peoples in Africa: With Special Focus on Central, Eastern and Southern Africa*. Copenhagen, International Work Group for Indigenous Affairs., (2010) p. 257p. 257

each contracting party shall [...] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”.²²

The Nagoya Protocol²³, a supplementary agreement to CBD, provides for the fair and equitable sharing of benefits arising out of the utilization of genetic resources and a transparent legal framework for effective implementation of the objective. Its concern is with fairness, equity and reciprocity where those who nurture genetic resources share them with others.

In 2007, the *Akwe: Kon* guidelines²⁴ were adopted to provide a framework for governments, indigenous and local communities, decision makers and managers of developments for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. The guidelines also provide a framework to ensure that cultural, environmental, social, traditional knowledge, innovations and practices and interests of indigenous and local communities would be properly taken into account as part of environmental, social and cultural impact-assessment processes, with due regard to the ownership of and the need for the protection and safeguarding of the knowledge, innovations and practices.

5.3 REGIONAL INSTRUMENTS

5.3.1 African

The African Charter on Human and Peoples’ Rights (ACHPR) accords unqualified recognition to peoples’ rights.²⁵ It takes an innovative approach in recognizing a wide range of peoples’ rights including those that had not previously been recognized by any treaty. In addition to other internationally recognized civil, political, economic and cultural rights, it recognizes collective rights such as the right: of all peoples to self-determination²⁶; freely dispose of their natural wealth and resources²⁷; development²⁸; national and international peace²⁹; and environment³⁰.

²² Article 8(j) of the Convention on Biological Diversity.

²³ The Nagoya Protocol on Access & Benefit Sharing (ABS) was adopted on 29 October 2010 in Nagoya, Japan. Full Text of the protocol available at: <http://www.cbd.int/abs/text/> (Accessed on 1st September, 2012)

²⁴ Secretariat of the Convention on Biological Diversity, CBD Guidelines, Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (2007)

²⁵ Solomon A. Dersso, *Peoples’ Rights under the African Charter on Human and Peoples’ Rights: Much ado about nothing?* Available online: http://www.saifac.org.za/docs/res_papers/RPS%20No.6.pdf, P. 2

²⁶ Article 20,

²⁷ Article 21

²⁸ Article 22

²⁹ Article 23

ACHPR also provides a means for the enforcement of the rights. It establishes the African Commission on Human and Peoples' Rights to promote the rights and ensure their protection.³¹ The commission has been called upon to consider communications lodged before it alleging the violation of various collective rights against minority communities. The decisions of the commission in the *Ogoni*³² and *Endorois*³³ cases have shown that the ACHPR's collective rights are indeed enforceable.

a) Ogoni Case

In this case, the Government of Nigeria was found to have violated Article 21 of the ACHPR by allowing oil exploitations on Ogoniland without giving the people of Ogoni an opportunity to fully benefit from the advantages derived from their natural resources.³⁴ The court further found that the government had violated Article 4 (right to life) since the land degradation that had resulted affected the sources of livelihood of the Ogoni people. The state was also found to have violated the rights to property, a general satisfactory environment and health. On the enforceability of collective rights, the commission stated the following:

Clearly, collective rights (peoples' rights), environmental rights and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.³⁵

b) Endorois Case

In this case, a complaint was filed by the Centre for Minority Rights Development and Minority Rights Group International, on behalf of the Endorois community against the Government of Kenya. The complainants alleged violations of the Endorois' rights to their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well denial of the overall process of development³⁶. The complaint stated that the government was in breach of articles 8, 14, 17, 21 and 22 of the African Charter.

The community asserted that they were and had been accepted by other communities as the *bona fide* owners of the land around Lake Bogoria and that they had continued to occupy and enjoy the undisturbed use of the land under the British colonial administration, although the British

³⁰ Article 24

³¹ See Article 30; see also Article 45 for the specific functions of the Commission.

³² Communication 155/96; Decision handed down at the 30th Ordinary session of the Commission held in The Gambia. Available online: <<http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>> (last accessed: November 30, 2010)

³³ Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya

³⁴ Nwobike, *Second and Third Generation Rights under the African Charter* p. 139. Available online: <http://africalawinstituteorg.web.siteprotect.net/ajls/vol1/no2/Nwobike.pdf>,

³⁵ Ogoni case, para.68 (Emphasis added).

³⁶ Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, para 1.

claimed title to the land in the name of the British Crown.³⁷ They further stated that they enjoyed customary land rights to the Lake Bogoria land for centuries and practised a sustainable way of life which was inextricably linked to their ancestral land³⁸ until the government gazetted it in 1973.

They asserted that they had been denied access to their ancestral land from 1978 until they filed a suit³⁹ against two county councils responsible for the lake. However, they were granted limited access to the land 'for grazing their cattle, religious purposes, and collecting traditional herbs after the suit.'⁴⁰ The community's lack of legal certainty surrounding access rights and rights of usage rendered the Endorois completely dependent on the game reserve's authority to grant these rights on an *ad hoc* basis.

Complainants sought: restitution of their land, with legal title and clear demarcation; and compensation for loss suffered through the loss of their property, development and natural resources, but also freedom to practice their religion and culture. After considering the merits of the submissions made by the complainants and the respondent, the commission found that the Government of Kenya was in violation of the right to property, right to take part in the cultural life of a community, freedom to practice religion, right to freely dispose of a people's wealth and natural resources, and right to development. As regards the right to freely dispose wealth and natural resources, the commission found that the Endorois did not have a special attachment to rudy, but all the natural resources contained within their traditional lands vested in them. The Endorois therefore had the right to freely dispose of their wealth and natural resources in consultation with the Government of Kenya. The commission therefore found that the land from which they had been evicted was their traditional land and they had not received any adequate compensation or restitution of it thus the government was in violation of Article 21 of the charter. On whether the Endorois' right to development had been violated, the commission found that the government had failed to create conditions favourable to their development by failing to provide adequate compensation and benefits, or suitable land for grazing and had thus violated Article 22 of the charter.⁴¹

5.3.2 Latin America

The Inter-American Court has over the years progressively contributed to international human rights through its ground-breaking and precedent-setting decisions. Several decisions by the court have considerably expanded the interpretation of peoples' rights as enshrined in various human rights instruments. In particular, the court has expanded the interpretation of Article 21 of the American Convention of Human Rights (ACHR) dealing with the right to property so as to recognize the property rights of indigenous and tribal peoples to their ancestral land and resources that affect them as a people. The court has consistently been developing an evolving body of law that recognizes collective rights and in particular the rights of indigenous peoples to land and natural resources. It has made crucial decisions to the effect that the ACHR guarantees

³⁷ *Ibid*, para 4

³⁸ *Ibid*, para 3

³⁹ William Yatich Sitetalia, William Arap Ngasia et al. v. Baringo Country Council, Nakuru High Court Civil Case No. 183 of 2000.

⁴⁰ Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, para. 15

⁴¹ *Ibid*, para. 50

every person the international human right to enjoy the benefits of property. This right includes the right of indigenous peoples to the protection of their customary land and natural resources. It was the first international court to hold that a state must protect the rights of indigenous communities to their ancestral lands.

The first landmark decision was made in the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*⁴² in 2001. The court adopted a progressive interpretation of human rights instruments to conclude that the possession of ancestral land by indigenous communities was sufficient to create legal rights of ownership under Article 21 of the ACHR. It observed that the right to enjoy the benefits of property, particularly as affirmed in the ACHR, includes the right of indigenous peoples to the protection of their customary land and resource tenure. It further held that the State of Nicaragua violated the property rights of the Awas Tingni community by granting to a foreign company a concession to log within the community's traditional lands and failing to otherwise provide adequate recognition and protection of the community's customary tenure. It ordered Nicaragua to demarcate and grant title to Awas Tingni's traditional lands in accordance with its customary land and resource tenure patterns, refrain from any action that might undermine the community's interests in those lands and establish an adequate mechanism to secure the land rights of all indigenous communities of the country. An interesting aspect of the decision was the court's observation about the link between indigenous communities and land. It observed that indigenous communities' "close ties ... with the land must be recognized and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival."⁴³

The *Awas Tingni* decision set a precedent for the consistent expanding interpretations of Article 21, with the Inter-American Court of Human Rights (IACHR) occasionally finding that indigenous communities have rights to the natural resources located within their traditional lands⁴⁴. In the *Yakye Axa v Paraguay*⁴⁵ case, the Inter-American Commission on Human Rights filed an application against State of Paraguay seeking a determination whether Paraguay had breached several articles of the ACHR, including Article 21 on the right to property as relates to Yakye Axa indigenous community of the Enxet-Lengua people and its members. The community⁴⁶ had alleged that the state had violated their right to life by depriving them of their traditional means of livelihood.

The commission's case was that the state had failed to ensure that the ancestral property rights of the Yakye Axa indigenous community and its members were guaranteed and enjoyed by them despite the fact that the community's land claim had been processed since 1993. The court held that Paraguay had failed to adopt adequate measures to ensure that its domestic law guaranteed the community's effective use and enjoyment of their traditional land and hence violated the rights to property and court protection, as well as the right to life, since it had prevented the community from access to its traditional means of livelihood. The court was also concerned by

⁴² Inter-Am. Ct. H.R. (ser. C) No. 79 (31 August 2001),

⁴³ Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79 (31 August 2001), para. 149

⁴⁴ Case of the Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125 (17 June 2005)

⁴⁵ Ibid

⁴⁶ The Yakye Axa community is a Paraguayan indigenous community belonging to the Lengua Enxet Sur people.

the inhumane treatment accorded to the community after eviction from its traditional land. The evicted members had lived on the side of a road across from the land they claimed, without adequate access to food, health services and education. 16 died as a result. It consequently ordered the state to demarcate the traditional land, submit it to the community at no cost and provide basic goods and services necessary for the community to survive until it recovered its land.

The court extended its progressive jurisprudence in another crucial decision in 2005. In June 1997, a petition was lodged before the Inter-American Commission on Human Rights by a human rights organisation on behalf of residents of Moiwana Village after the extrajudicial execution of more than 40 residents of the village and the intentional destruction of their property by members of the army of Suriname. The people on whose behalf the petition was filed were members of one of Suriname's maroon communities. The commission found the petition admissible and forwarded it to the IACHR. In its decision⁴⁷, the court observed that the N'djuka tribe had "a profound and all-encompassing relationship to their ancestral lands", since the community had inhabited these lands "in strict adherence to N'djuka custom" for over 100 years. It concluded that it had to follow the precedent it had set with regards to indigenous communities by finding that the communal rights to property under Article 21 of the convention applied to members of the N'djuka tribe. As a result, the court ordered Suriname to grant formal legal recognition of N'djuka tribe's right to own and occupy its land.⁴⁸

The court is also on record as being the first international tribunal to hold that a non-indigenous minority group has legal rights to the natural resources within the lands it has inhabited for centuries. In the case of *Saramaka People v Suriname*, the court recognized that the Saramaka had communal property rights to their ancestral lands as well as over the resources on the land that were relevant to their cultural and material survival as a people. The community had filed a petition against Suriname before the Inter-American Commission on Human Rights which then submitted it to the court contending that Suriname had violated, *inter alia*, Article 21 of the ACHR. In this case, the people of Saramaka were concerned that logging and mining concessions on their traditional lands had been granted by the state without consulting the community. The court observed that the community had a right to refuse any activities on their lands that would affect their use and enjoyment of resources relevant to their cultural development and survival. The case established that the government had to consult with and get free, prior and informed consent from an indigenous or tribal community before it could deal with any resources on the community's ancestral land.

The court further ruled that there were exceptional circumstances where indigenous and tribal peoples' property rights may be restricted by states such as by granting permits for development or investment within or affecting their territories. However, such restrictions are permissible only when they are: a) previously established by law; b) necessary; c) proportional; and d) with the aim of achieving a legitimate objective in a democratic society. The court also observed that another crucial factor to be considered is whether the restriction amounts to a denial of indigenous and tribal peoples' traditions and customs in a way that endangers the very survival of the group as a people. Survival in this context was physical *and* cultural.

⁴⁷ Case of the Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124 (15 June 2005)

⁴⁸ *Ibid.*, para. 197

5.4 COMPARATIVE PERSPECTIVES

5.4.1 International – Selected Countries

a) The United States of America

There are 562 federally recognized tribal governments in the United States of America (USA). In 2000, in a population of 281,412,906 inhabitants, 4,119,301 persons were American Indians or Alaska natives (1.5% of the total population).⁴⁹ Under Public Law 83-280, state governments have an obligation to recognize and protect the rights of native Indians in their jurisdiction. Section 1162 (b) provides as follows:

Nothing in this section shall [...] deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping or fishing, or the control, licensing or regulation thereof.⁵⁰

Courts in USA have dealt with this issue under two broad categories, one as tribe's fishing rights and the other as aboriginal title rights.

1. Tribes' Fishing Rights

In *United States v. Winans*⁵¹, the United State Supreme Court upheld the tribe's fishing right, even when the "usual and accustomed places" were outside reservation boundaries and were owned by non-Indians. This was one of the first Supreme Court cases to uphold Indian fishing treaty rights in general. The court noted that the right to fish and to access traditional fishing grounds was not a special right granted by the government. The treaty in question only acknowledged a right the Indians already possessed and reserved it for their future use. The court expressed that private ownership of land did not exclude native Americans from accessing waters which were adjacent to that land. Indeed, the court held that Indians had exclusive fishing rights on reservation and equal fishing rights off reservation.

Mr. Justice White, in his dissenting opinion in the case, wrote that:

the right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed."⁵²

⁴⁹ U.S. Census Bureau. *The American Indian and Alaska Native population: 2000*. Census 2000 Brief. February 2002. Available online: <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf> Accessed on 21 October 2010

⁵⁰ Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360). Available online: http://www.tribal-institute.org/lists/pl_280.htm Accessed on 19 October 2010

⁵¹ (1905), 198 U.S. 371. Available online: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=198&page=371> Accessed on 19 October 2010

⁵² Ibid

Later, in the case of *Menominee Tribe v. United States*⁵³ the Supreme Court ruled that the tribe's hunting and fishing rights retained by treaty could not be abrogated by the Termination Act without a clear, unequivocal and explicit statement to that effect by Congress.

Indeed, Justice Douglas, delivering the opinion of the court⁵⁴, expressed that “nothing was said in the 1854 treaty about hunting and fishing rights.” The court added that “the essence of the treaty [...] was that the Indians were authorized to maintain, on the new lands ceded to them as a reservation, their way of life, which included hunting and fishing.” So tribes retained reserved rights to hunting and fishing unless expressly ceded by treaty and these rights survive termination. Later, Federal District Judge George H. Boldt's 1974 decision⁵⁵ (called the "Boldt decision") ruled that the State of Washington had violated the Indians' treaty fishing rights. Indeed, he recognized that western Washington treaty tribes have a right to take fish "in common with" non-Indians from off-reservation waters. The Supreme Court later upheld Judge Boldt's major ruling that Indian tribes have a right to take as much as 50 percent of the harvestable fish in waters off the reservation in that “fair share” meant “equal share”. The court affirmed in *Washington v. Washington State Commercial Passenger Fishing Vessel*⁵⁶ that treaties guaranteed the tribe “so much as, but not more than, is necessary to provide the Indian with a livelihood – that is to say, a moderate living”

2. Aboriginal Title

The case of *Johnson v. M'Intosh*⁵⁷ denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."⁵⁸ According to Justice Reed in the *Tee-Hit-Ton Indians v. United States*⁵⁹ case, as Congress did not intend to grant the Tee-Hit-Ton any permanent rights to the occupied lands but had given them permission to occupy it, “Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law”. Justice Reed explains that this position of the Indian has long been rationalized by legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. The distinction between recognized and unrecognized title remains significant in jurisprudence in USA to the extent that such distinction provides a basis on which to deny a right to compensation.⁶⁰ The recognized Indian title is a right to use the

⁵³ (1968), 391 U. S. 404. Available online: <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=391&invol=404>. Accessed on 19 October 2010

⁵⁴ Ibid

⁵⁵ 384 F. Supp. 312 (1974). Available online: <http://www.narf.org/events/06/boldt.htm> Accessed on 20 October 2010

⁵⁶ 99 S.Ct. 3055 (1979). Available online: <http://www.animallaw.info/cases/causfd443us658.htm> Accessed on 20 October 2010

⁵⁷ 21 U.S. 543 (1823). Available online: http://lawschool.courtroomview.com/acf_cases/8617-johnson-v-m-intosh Accessed on 20 October 2010

⁵⁸ Ibid

⁵⁹ 348 U.S. 272 (1955). Available online: <http://supreme.justia.com/us/348/272/> Accessed on 20 October 2010

⁶⁰ Herne, Stephen Charles. *A jurisprudence of difference: the denial of full respect in the Australian law of native title*. Thesis (Ph.D.) University of Western Australia, 2007 Available online: <http://theses.library.uwa.edu.au/adt-WU2008.0262/public/01front.pdf> Accessed on 20 October 2010.

land as the occupant sees fit.⁶¹ Indian title is proven by historic “exclusive”⁶² occupation of land, and can be protected by an action of ejectment⁶³ or damages for trespass.⁶⁴ The case *Lee v. Glover*⁶⁵ held that domestic law protects Indian title as it protects any other right to property.

b) Canada

With an estimated population of 31,240,000 inhabitants, it is believed that there are 1,172,790 Aboriginal individuals (or 3.8% of the population) in Canada.⁶⁶ The community land rights of these Aboriginals are protected by the Canadian constitution and jurisprudence that, case after case, has built a protection around Aboriginal titles and rights. The Constitution Act of 1982 recognizes and affirms the "existing" Aboriginal and treaty rights in Canada. Section 35 of the constitution states:

- (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
- (3) For greater certainty, subsection "treaty rights" include rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in Sub-section (1) are guaranteed equally to male and female persons.⁶⁷

1. Aboriginal Land and Fishing Rights Cases

In 1984, the Supreme Court of Canada stated for the first time in *Guerin v. The Queen*⁶⁸ that the government has a fiduciary duty towards the First Nations of Canada. The principle of "fiduciary duty" is part of the interpretation of Section 35 of the Constitution Act of 1982 which protects aboriginal rights. It obligates the Crown to exercise its regulatory powers in a manner consistent with its honour and with constitutional protection of aboriginal and treaty rights. In *R. v. Sparrow*⁶⁹, also involving Section 35 of the Constitution Act, the court held that aboriginal

⁶¹ 21 U.S. 543 (1823) Available online: http://lawschool.courtroomview.com/acf_cases/8617-johnson-v-m-intosh Accessed on 20 October 2010

⁶² United States as Guardian of the Hualpai Indians of Ariz. v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941). Available online: <http://ftp.resource.org/courts.gov/c/US/314/314.US.339.23.html> Accessed on 20 October 2010

⁶³ Marsh v. Brooks, 49 U.S. 223 (1850). Available online: <http://supreme.justia.com/us/49/223/> Accessed on 20 October 2010

⁶⁴ Oneida Indian Nation of N.Y. State v. Oneida County, 414 U.S. 661 (1974). Available online: <http://supreme.justia.com/us/414/661/case.html> Accessed on 20 October 2010

⁶⁵ 8 NYR 189 (SCNY, 1828)

⁶⁶ Statistics Canada. 2008. *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census*. Accessed on 21 October 2010 (online) Available: <http://www12.statcan.ca/census-recensement/2006/dp-pd/tbt/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=837928&GK=0&GRP=1&PID=89122&PRID=0&PTYPE=88971,97154&S=0&SHOWALL=0&SUB=0&Temporal=2006&THEME=73&VID=0&VNAMEE=&VNAMEF=>

⁶⁷ Subsections 35 (3) and (4) were added by the Constitution Amendment Proclamation, 1983.

⁶⁸ [1984] 2 S.C.R. 335. Available online: <http://scc.lexum.umontreal.ca/en/1984/1984scr2-335/1984scr2-335.html> Accessed on 19 October 2010

⁶⁹ [1990] 1 S.C.R. 1075. Available online: <http://scc.lexum.umontreal.ca/en/1990/1990scr1-1075/1990scr1-1075.html> Accessed on 19 October 2010

rights, such as fishing, are protected under the Constitution of Canada and cannot be infringed upon without justification on account of the government's fiduciary duty to the aboriginal peoples of Canada.

Probably the most important and famous leading decision of the Supreme Court of Canada in relation to aboriginal land rights is *Delgamuukw v. British Columbia*.⁷⁰ Even though the court made no decision on the land dispute in question, it directly addressed the issue of aboriginal title by holding that aboriginal title is a right to the land itself, not just to user rights. The court sought to distinguish aboriginal title at common law and that under the purview of Section 35. The upshot of the discussion was that Aboriginal title at common law was recognized well before 1982 and was accordingly protected in its full form by Section 35(1). The constitutionalization of common law aboriginal rights, however, did not mean that those rights exhausted the content of Section 35(1). The existence of an Aboriginal right at common law is sufficient, but not necessary, for the recognition and affirmation of that right by Section 35(1). This case was the first authoritative definition by the courts of aboriginal title and its purview.

Other cases had dealt with aboriginal rights in terms of the right to use the land for traditional purposes such as hunting or fishing like in *Simon v. The Queen*.⁷¹ But aboriginal title is a property right that goes much further than aboriginal rights of usage. It acknowledges indigenous peoples' ownership of the land and the right to use it in ways it had not been used traditionally. For example, mining could be a permitted use, even if mining was never a part of the First Nation's traditional culture.

c) Australia

Aboriginal and Torres Strait Islander peoples comprise approximately 2.5% of the total Australian population. In 2008, there were 520,350 indigenous people living in private dwellings, of whom 90% identified as aboriginal only, 5% identified as Torres Strait islander only and 5% identified as being of both aboriginal and Torres Strait Islander origin.⁷² Litigation about native title did not occur in Australia before the 1970s. The concept of aboriginal title was adopted by Brennan J. of the High Court of Australia in *Mabo v. Queensland*⁷³ where he said that native title included the recognition of rights and interests unknown to the common law: rights not necessarily analogous to common law rights "are assumed to be fully respected".

In 1996, a concern about pastoral leases was raised. The High Court, in *Wik Peoples v Queensland*⁷⁴, held that pastoral leases do not extinguish native title. Indeed, the court determined that exclusive possession was given to the lease holder. The Aboriginal Land Rights Act of 1976 established a procedure that returned approximately 40% of the Northern Territory to aboriginal ownership. The Anangu Pitjantjatjara Yankunytjatjara Land Rights Act of 1981 had

⁷⁰ [1997] 3 S.C.R. 1010. Available online: <http://scc.lexum.umontreal.ca/en/1997/1997scr3-1010/1997scr3-1010.html> Accessed on 19 October 2010

⁷¹ [1985] 2 S.C.R. 387. Available online: <http://scc.lexum.umontreal.ca/en/1985/1985scr2-387/1985scr2-387.html> Accessed on 19 October 2010

⁷² Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey, 2002*, ABS series cat. no. 4714.0. Available online: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4714.0/> Accessed on 21 October 2010

⁷³ *Mabo v. Queensland*, 175 C.L.R. 1 (1992). Available online: <http://www.mikeadkins.com/article/mabo-v-queensland-no-2-hca-23-1992-175-clr-1-3-june-1992/> Accessed on 21 October 2010

⁷⁴ (1996) 63 FCR 450

a similar effect in South Australia. In response to the *Mabo* decision, the Australian Parliament passed the Native Title Act 1993 codifying the doctrine and establishing the National Native Title Tribunal. Two years after the *Wik* decision, parliament passed the Native Title Amendment Act 1998 (the "Ten Point Plan") which extinguished a variety of aboriginal land rights, provided security of tenure to non-indigenous holders of pastoral leases and other land title and gave state governments the ability to follow suit.

5.4.2 Regional – Selected Countries

a) South Africa

The post-1994 period saw a rapid and intensive process by the state to fulfill constitutional requirements to provide land tenure security to all South Africans, regardless of their social or economic status.⁷⁵ The South African land regime is based on righting wrongs of the past. Like Kenya for a long time, South African tenure can be characterised as a dual system with customary tenure derived from African customary law on the one hand, and individual tenure derived from western law on the other.⁷⁶ The Bill of Rights in the constitution⁷⁷ guarantees existing property rights; but it simultaneously places the state under a constitutional duty to take reasonable steps to enable citizens to gain equitable access to land, promote security of tenure, and provide redress to those who were dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices. Hence, the constitution seeks to achieve a balance between the protection of existing property rights on the one hand, and constitutional guarantees of land reform on the other. The equality clause also provides clear authority for a programme aimed at achieving substantive equality.⁷⁸

Land ownership in South Africa has long been a source of conflict. The history of conquest and dispossession, forced removals and a racially-skewed distribution of land resources, has left the country with a complex and difficult legacy. To address the consequences of this legacy, the drafters of the South African constitution included the following three clauses:

1. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.
2. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
3. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.

⁷⁵ Leap (2005) *Perspectives on Land Tenure Security in Rural and Urban South Africa; An analysis of the tenure context and a problem statement for Leap*

⁷⁶ Ownership in customary systems is socially embedded in ways that are very different from the Roman-Dutch derived tenure system. Customary ownership is firstly inter-generational in the sense that the family, past, present and future, has an active stake in the land and secondly, is linked to a notion of belonging to a particular piece of land that is ritualized through highly gendered practices of ancestral worship.

⁷⁷ Constitution of the Republic of South Africa, 1996

⁷⁸ *Ibid* , Section 9;

The above were translated into a land reform programme whose three key elements were: restitution⁷⁹, redistribution⁸⁰ and tenure reform⁸¹ as part of the programme, legislative enactments on community land have been passed, including the Community Land Rights Act (CLARA).

1. The Community Land Rights Act

This was an attempt by the government to implement the constitution by rectifying the situation in apartheid South Africa which failed to give recognition and protection to community land rights.⁸² The core of the Act deals with: transfer of land title from the state to traditional communities; registration of individual land rights within 'communally owned' areas; and use of traditional council or modified tribal authority structures to administer the land and represent the 'community' as owner.⁸³ Its legal effect is to transform and recast customary law and traditional councils.⁸⁴ The Act thus employs three broad strategies to achieve its objects:

1. *Corporatisation of land administration*: Communal land is transferred to, and registered in the name of the resident community who must govern and administer tenure relations in terms of community rules.⁸⁵ The rules must be adopted at a democratic meeting and comply with the requirements of the minister.⁸⁶ They are binding on the community and its members.⁸⁷ This also applies to situations where a community already has ownership rights in the land.⁸⁸
2. *Individualisation of communal rights*: Security of tenure is promoted by individualising rights, record and registration.⁸⁹ Certain old order rights are defined and registered as new order rights in the names of individuals or communities in the deeds office.⁹⁰ The content of new order rights are to be determined by the Minister of Land Affairs in terms of Section

⁷⁹ Land Restitution covers cases of forced removals which took place after 1913. They are dealt with by a Land Claims Court and Commission, established under the Restitution of Land Rights Act, 22 of 1994. Land tenure reform is addressed through a review of present land policy, administration and legislation to improve the tenure security of all South Africans and to accommodate diverse forms of land tenure, including types of communal tenure.

⁸⁰ Redistribution aims to provide the disadvantaged and the poor with access to land for residential and productive purposes. Its scope includes the urban and rural very poor, labour tenants, farm workers as well as new entrants to agriculture.

⁸¹ The primary reason for the government's land reform measures was to redress the injustices of apartheid and to alleviate the impoverishment and suffering that it caused. The primary focus of land reform is the 'historically disadvantaged' B those who have been denied access to land and have been disinherited of their land rights.

⁸² Various attempts to codify indigenous law and more specific attempts to impose statute law on land reserved for African occupation occurred through the Transkei Penal Code of 1886, the Natal Zulu Code of 1891, the Glen Grey Act 25 of 1894 (C), the Black Administration Act 38 of 1927,³ the Development Trust and Land Act 18 of 1936⁴ and their subsidiary regulations such as Proclamation R1885 and its predecessor regulatory measures

⁸³ Smith H; The recognition of customary law and redressing historical discrimination: The Communal Land Rights Act 11 of 2004

⁸⁴ *Ibid*

⁸⁵ *Ibid*

⁸⁶ *Ibid*

⁸⁷ *Ibid*

⁸⁸ *Ibid*

⁸⁹ *Ibid*

⁹⁰ *Ibid*

18(3) (d) (ii) read with Section 18(5).⁹¹ New order land rights are to be secondary rights of occupation and use, which are subordinate to “community” ownership of the land.⁹²

3. *Decentralisation of public administration*: New institutions were created to administer the new rights.⁹³ At a local level, traditional councils, where they exist, carry the burden of administration of rights and community rules.⁹⁴ If there is no traditional council, then a local land administration committee must be elected in terms of community rules.⁹⁵

2. Judicial Interpretation of Community Rights

In the *Richtersveld Case*⁹⁶, the community brought their claim under Chapter IIIA of the Land Rights Act and more precisely under Section 2(1). The applicants had to prove that they were a community, who themselves or their ancestors, were deprived of their rights in the subject land after 19 June 1913 as a result of past racially discriminatory laws, according to Section 2(1) of the Restitution Act. The claimants incorporated the doctrine of aboriginal title in their claim by stating that they were a community holding a right:

1. to the subject land based on ownership; or
2. based on aboriginal title giving them the right of beneficial occupation and use; or
3. in land obtained by beneficial occupation of the subject land for a period longer than ten years prior to the dispossession.

The Lands Commission Court dismissed the claim in its entirety and stated that the applicants were not entitled to restitution of the subject land. In 2003 the Richtersveld community appealed against the dismissal of their claim in terms of Section 2(1) of the Restitution Act.⁹⁷ The appeal was successful.

While the decision of the Supreme Court of Appeal (SCA) was a triumph for the community in the sense that they won land rights, the rights granted were not rights of ownership. The SCA struggled with the recognition of rights of ownership under aboriginal title and settled with the uncomfortable fit of a customary law interest. The Constitutional Court adopted a lot of facts and findings of the SCA but concluded that the community’s right to land was based on indigenous law ownership instead of a customary law interest. This concept of indigenous law ownership created by the Constitutional Court is substantively identical to the doctrine of aboriginal title developed in comparative case law of other states. Community land rights can therefore be seen to be upheld in this instance.

3. CLARA Declared Unconstitutional

In October 2008, the North Gauteng High Court declared fifteen key provisions of CLARA invalid and unconstitutional, including those providing for transfer and registration of communal land, determination of rights by the minister and establishment and composition of land

91 *Ibid*

92 *Ibid*

93 *Ibid*

94 *Ibid*

95 *Ibid*

96 *Richtersveld Community v Alexkor*, 2001 (3) SA 1293 (LCC),

97 *Ibid*

administration committees (*Tongoane and Others vs Minister for Agriculture and Land Affairs and Others*). The judgment did not find the parliamentary process to have been procedurally flawed, and did not strike down CLARA as a whole. In May 2010, however, the Constitutional Court struck down CLARA in its entirety (*Tongoane and Others vs Minister for Agriculture and Land Affairs and Others*), having accepted the applicants' arguments about procedural issues, and therefore did not consider the applicants' substantive arguments or those contained in the findings of the High Court. The upshot of the decision was to do away with CLARA, criticised for not taking into account the issue of 'living customary law' practices and sidelining ordinary citizens and public rural voices in the process.⁹⁸ The minister responsible for land affairs decided not to contest the judgment and undertook to revisit the law and formulate a new one. It will be interesting to see the law enacted to replace CLARA.

b) Botswana

Botswana became a British protectorate in 1885.⁹⁹ Before that, it was populated by majority Tswana tribes governed by rigorous and well-defined political and legal systems.¹⁰⁰ In the 1890's, the colonial administration ordered that the chiefs of the five principal Tswana tribes identify the boundaries of their tribal territories.¹⁰¹ When the chiefs had done so, the described boundaries were formally mapped and deemed "tribal lands."¹⁰² The colonial administration declared the remaining land to be "crown land," under the jurisdiction of the colonial administration.¹⁰³ Those areas claimed by the tribes were left to govern themselves according to British principles of indirect rule; the chiefs retained semi-autonomous authority under which they continued to allocate land within their boundaries, settle disputes, manage natural resources and establish tribal rules according to custom.¹⁰⁴

⁹⁸ See Cousins, B. "Contextualizing the Controversies: Dilemmas of Communal Tenure Reform in Post-Apartheid South Africa" in Claassens, A. and Cousins, B ed. *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*. Cape Town: UCT Press. (2008); Smith, H. "An Overview of the Communal Land Rights Act 11 of 2004" in Claassens, A. and Cousins, B ed. *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*. Cape Town: UCT Press (2008); Murray, C. and Stacey, R. "Tagging the Bill, Gagging the Provinces: the Communal Land Rights Act in Parliament" in Claassens, A. and Cousins, B ed. *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*. Cape Town: UCT Press (2008).

⁹⁹ Knight, R.S., "Statutory recognition of customary land rights in Africa, An investigation into best practises for law making and implementation" Rome : Food and Agriculture Organization of the United Nations (2010) Available at : <http://www.fao.org/docrep/013/i1945e/i1945e01.pdf> (Accessed on 1st September, 2012)

¹⁰⁰ *Ibid*

¹⁰¹ *Ibid*

¹⁰² Three categories of land existed in Botswana at the time of her independence in 1966. These were the Crown Lands, tribal lands and land held under freehold interest. After the creation of the Bechuanaland Protectorate in 1885 the whole territory of Bechuanaland fell under the jurisdiction of Britain through Her Majesty. In 1899 certain areas of the country were earmarked for the indigenous population and defined as Tribal Territories. These were later to become the "Native" or "Tribal Reserves". Two Orders in Council in 1904 and 1910 created the Crown Lands. Freehold interests in land came into existence through the creation of the Tati Concessions, the vesting of a certain stretch of land in the British South Africa Company and the granting of individual interests out of the Crown Lands. Most of the freehold interests were farms held by companies. After independence the Crown Lands fell under the State Land. Apart from this minor change in name all three categories of land were retained after Bechuanaland became independent in 1966.

¹⁰³ Any tribes living within "crown lands" lost formal claim to their lands – in particular the non-Tswana minority groups whose leaders were not consulted, most notably the Basarwa (or San) people. The colonial government then allocated crown land to settlers, who held their lands under freehold title.

¹⁰⁴ Knight, *supra* note 99

At independence in 1966, the new government inherited a nation that was divided into three separate systems of land tenure: tribal land (48.8 percent); state land, formally Crown Land (47.4 percent); and land held under freehold title (3.7 percent).¹⁰⁵ Since independence, Botswana's stated policy has been to increase the size of tribal lands.¹⁰⁶ Article 8 of Botswana's constitution provides that the government can acquire property under the following circumstances:

- a) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement;
- b) in order to secure the development or utilization of property for a beneficial community purpose; and
- c) in order to develop or utilize mineral resources.

1. Tribal Land Act (1968)

This was the first land law in Africa to convert customarily-held land claims into formal secure title equal in weight to grants of land made by the state without explicitly changing the rules and systems by which customary tenure was administered.¹⁰⁷ The main features of the law are:

- a) customary, elected and state-appointed leaders administer and manage land under both customary and statutory tenure;
- b) mechanisms to transform customary land claims into legal grants of customary land rights, valid and enforceable as formally-granted titles;
- c) Holders of customary land rights have tenure security over their individually-held land, as well as the ability to transfer, sell, bequeath or assign their land rights; and
- d) all allocation of land is free of charge, as under custom.

2. Land Administration

The Tribal Land Act created land boards as corporate bodies¹⁰⁸ in whom the rights and title to land in each tribal area vests in trust for the citizens of Botswana and to promote the economic and social development of all the people of Botswana.¹⁰⁹ Land boards are meant to function in the place of customary authorities. Specifically, Article 13 (1) provides that:

All the powers previously vested in a chief and a subordinate land authority under customary law in relation to land, including: the granting of rights to use any land; the cancellation of the grant of any rights to use any land; the imposition of restrictions on the use of tribal land; authorizing any change of user of tribal land; or authorizing any transfer of tribal land, shall vest in and be performed by a land board acting in accordance with powers conferred on it by or under this Act.

The main functions of the land boards are to:

1. hear appeals of decisions of subordinate land boards (Art. 13 sec 2);
2. determine land use zones within the tribal area (pending the approval of the minister) (Art. 17sec 1–3);

¹⁰⁵ *Ibid*

¹⁰⁶ By 1998, 71 percent of Botswana's land was characterized as tribal land, 24.8 percent was state land, and land held under freehold title accounted for 4.2 percent of national territory (Adams *et al.*, 2003 at 1).

¹⁰⁷ Knight, *supra* note 99

¹⁰⁸ Article 9

¹⁰⁹ Art. 10(1))

3. determine land management plans in consultation with the District Council, Village Development Committee and tribal authorities (Art. 17 sec 4);
4. maintain land records; and
5. rule on applications for the creation and allocation of bore holes in their areas.

The board also implements policies to ensure the sustainable management of tribal land under its jurisdiction.¹¹⁰ Its work is synchronized and aided by the subordinate lands board.¹¹¹

3. Land Rights

The Tribal Land Act created three different types of land rights within tribal areas: customary, common law, and freehold.¹¹² Customary land rights are exclusive use (but not ownership) rights over all family land acquired by custom within the tribal areas and may not be cancelled without just cause.¹¹³ Individuals, groups or land boards may hold customary land rights.¹¹⁴ If they desire, holders of customary rights may seek an exclusive, inheritable customary land grant certificate.¹¹⁵ Land allocated according to custom before the law was passed does not need to be formally registered for claims and rights to be legitimate and enforceable.¹¹⁶ This provision formalized all existing customary land claims once the law was enacted and eliminated the need for rural community members to immediately undergo lengthy and complex registration procedures.¹¹⁷ As under custom, all grants of customary land rights are free.¹¹⁸

The grantees and uses of customary land rights are strictly regulated. For instance, unless the minister grants an exemption, grants of land under customary law may only be made to citizens of Botswana.¹¹⁹ Similarly, grants of customary land rights are not allowed for trading,

¹¹⁰ It does this through:

- i. Formulating and implementing policies to ensure the sustainable management of tribal land under its jurisdiction
- ii. Allocating land to citizens of Botswana under common law;
- iii. Processing applications for common law land grants made by noncitizens (for which the final decision lies with the Minister of Land and Housing); and
- iv. Creating and enforcing regional policies²³ (Adams *et al.*, 2003 at 5).

¹¹¹ The subordinate land boards are entrusted with granting the more common requests made, including hearing and ruling on applications to use land for: building or renovating residences, ploughing large tracts of land, grazing cattle or other stock, and other similar uses and needs (art. 4 S1). Subordinate land boards also: make recommendations to the land board in respect to applications for boreholes in their areas; hear and adjudicate disputes concerning customary land grants or rights within their area of jurisdiction; and make recommendations to the tribal land boards regarding applications for common law grants of land" (art. 4 S2–4). Again, such functions are essentially a formalized list of functions previously performed by customary authorities.

¹¹² Knight, *supra* note 99

¹¹³ *Ibid*

¹¹⁴ *Ibid*

¹¹⁵ *Ibid*

¹¹⁶ Knight *supra* note 99

¹¹⁷ *Ibid*

¹¹⁸ *Ibid*

¹¹⁹ Art. 20

manufacturing or other business or commercial purposes.¹²⁰ For these purposes, an applicant must seek a grant of common law land rights.¹²¹

The grounds upon which a customary grant of land may be cancelled include: non-eligibility of the grantee; failure to observe restrictions upon land use; contravention of laws relating to planning or good husbandry; use of the land for a purpose not authorized by customary law or in contravention of customary law; or to ensure the "fair and just distribution of land among citizens of Botswana".¹²²

Grants of common law land rights within tribal areas are issued for residential, commercial or industrial land uses (Art. 23). Common law land rights were originally issued largely to foreigners and only outside of tribal areas.¹²³ However, in the early 1980s, this right was extended to citizens of Botswana within the tribal areas.¹²⁴ Common law leases have also been used to create community-based natural resource management schemes.¹²⁵

c) Liberia

1. Overview

Customary land law governs access to and use of land by most rural indigenous Liberians.¹²⁶ Customary ownership is rooted and sustained on *territoriality*.¹²⁷ Customary land tenure rules of today have four sources: traditional practice, national policy, changing land use and increased pressure upon security of tenure.¹²⁸ The 1986 constitution is the foundational authority for the continued legal applicability of customary law. Article 65 of the constitution permits the application of both customary and statutory laws.¹²⁹ Other constitutional provisions that aid in

¹²⁰ Art. 20 (2)

¹²¹ The mechanics and logistics of how customary land is allocated and formalized are set out in the regulations. The opinion and inclusion of local customary authorities – the ward headman – is mandatory at two discrete moments: before a hearing on the availability of the land applied for, and a literal "pointing out" of the boundaries of the land in front of relevant community members.

¹²² Art. 15 S1(a–d). The grounds for termination were made more rigorous in the 1993 amendments; the provision that if, "without sufficient excuse, the land has not been cultivated, used or developed to the satisfaction of the land board....in accordance with the purpose for which the grant was made" was added to the suitable reasons for cancellation and repossession of a grant of customary land.

¹²³ Knight, R.S., "Statutory recognition of customary land rights in Africa, An investigation into best practises for law making and implementation" Rome : Food and Agriculture Organization of the United Nations (2010) Available at : <http://www.fao.org/docrep/013/i1945e/i1945e01.pdf> (Accessed on 1st September, 2012).

¹²⁴ *ibid*

¹²⁵ *ibid*

¹²⁶ Environmental and Natural Resources (AFTEN) Africa Region (2008) *Liberia Insecurity of Land Tenure, Land Law and Land Registration in Liberia* Report No. 46134-LR, World Bank.

¹²⁷ Environmental and Natural Resources (AFTEN) Africa Region (2008) *Liberia Insecurity of Land Tenure, Land Law and Land Registration in Liberia* Report No. 46134-LR, World Bank.

¹²⁸ *ibid*

¹²⁹ Article 65 reads...The Judicial Power of the Republic shall be vested in a Supreme Court and such subordinate courts as the legislature may from time to time establish. The courts shall apply both statutory and customary laws in accordance with the standards enacted by the Legislature. Judgments of the Supreme Court shall be final and binding and shall not be subject to appeal or review by any other branch of Government. Nothing in

the application of customary land law are such as the general principles of national policy¹³⁰ read together with the chapter on fundamental rights,¹³¹ with emphasis on Article 22 which provides for the ownership of property in association. The constitution also establishes the authorities in charge of local administration. Article 56 provides guidelines on the election of local authorities such as paramount, clan and town chiefs by the registered voters in their respective localities. Those elected serve for six years.

The Liberian government has radical title to the land.¹³² The purpose of the paramount chiefs and tribal authority, therefore, is being vested with land interest pertinent to the needs of the tribe, as trustees of the tribe.¹³³ However, the trustees cannot pass any fee simple title in these lands to any person.¹³⁴ But should the tribe become sufficiently advanced, they may petition the government for a division of land into family holdings. The land ceases to be public land and becomes privately individually owned.¹³⁵ Protection of community land is through a provision on the right to strangers and their occupation of land.¹³⁶ The use of land by strangers is contingent on certain qualifications.¹³⁷ Through the Delimitation of Tribal Reserves, the relocation of one group of people into the domain of another by local authorities is proscribed.¹³⁸

Section 8.52(d) of the Registered Land Law (1974) reflects the common understanding that land under both tribal reserves and communal rights remains public land.¹³⁹ In such a case, Section 8.123 indicates, the land is to be registered as public land and the tribal reserve or communal holding is to be shown as an “encumbrance”.¹⁴⁰ This is consistent with how other real rights, such as leases or mortgages, are shown on the register.

2. Natural Resources

this article shall prohibit administrative consideration of the justiciable matter prior to review by a court of competent jurisdiction.

¹³⁰ Article 5 aims to preserve, protect and promote positive Liberian culture, ensuring that traditional values which are compatible with public policy and national progress are adopted and developed as an integral part of the growing needs of the Liberian society.

¹³¹ See articles 11, 13, 22 and 23 of the constitution. Article 24 is insightful on the inviolability of private property.

¹³² *Ibid*, Article 66

¹³³ Environmental and Natural Resources (AFTEN) Africa Region (2008) *Liberia Insecurity of Land Tenure, Land Law and Land Registration in Liberia* Report No. 46134-LR, World Bank.

¹³⁴ *Ibid*

¹³⁵ *Ibid*

¹³⁶ The Hinterland rules and regulations 1949, Article 65

¹³⁷ *Ibid*, Article 67, *ibid* reads: If any individual enters the territory of a tribe of which he is no a member for the purpose of farming, he shall observe the following procedures:

- i. Obtain permission of the Tribal Authority prior to commencing his activities;
- ii. Agrees to pay some token in the nature of rent, such as fine or six bunches of rice not of every farm;
- iii. Pay taxes to the appropriate tribal chief on all huts on the said lands erected or occupied by him.
- iv. The Tribal Authority may cancel the authority granted and confiscated the corps, subject always to appeal to the District Commissioner provided he neglects to comply with all or any of forgoing provisions.

¹³⁸ *Ibid*, Article 83

¹³⁹ *ibid*

¹⁴⁰ *ibid*

i) Forests

With regard to land-based natural resources, the National Forestry Reform Law (2006) was initiated to clear the uncertainties that surrounded forests and their ownership.¹⁴¹ The law vests all forest resources in the Government of Liberia with the exception of forest resources located in communal forests¹⁴² and those that have been developed on private or deed land through artificial regeneration.¹⁴³ Management rests with the Forest Development Authority (FDA) which is mandated to ensure participation of communities in forest management.¹⁴⁴ Protection of community land rights is guaranteed via varied means. For example, any forest management contracts require that the holder establishes a social agreement with the local forest-dependent communities, approved by the authority that defines the communities' benefits and access rights.¹⁴⁵ Moreover, upon failure to satisfy any financial obligations to the government or to local communities, the licences for forest resources are terminated.¹⁴⁶

Under the protected forest area regulations and prohibitions, prospecting, mining, farming or the extraction of timber in communal forests for commercial purposes is prohibited.¹⁴⁷ Conversely, where communities are adversely affected by the establishment or maintenance of protected forest areas, the authority, in conjunction with other stakeholders, shall undertake to provide alternative livelihoods.¹⁴⁸ Thirty percent of land rental fees go to entitled communities under the forest resource licences.¹⁴⁹ Community participation in forest management is upheld, hence there is some respect for community land rights in the reform law.

The Community Rights Law (2009) clearly reiterates the distinction between forest trees and forest lands. All forest resources in Liberia, regardless of land proprietorship, shall be regulated by the FDA for the benefit of the people, except forest resources located in community forests and forest resources developed on private or deeded land through artificial regeneration. The law explicitly recognizes tribal deeds but limits community forest land to a maximum of 49,999 hectares.

¹⁴¹ Alden Wily, Liz., *So who owns the forest? An investigation into the forest ownership and land rights in Liberia*, SDI Liberia (2007) Available online at http://www.rightsandresources.org/publication_details.php?publicationID=102 (Accessed on 1 September 2012)

¹⁴² A *Communal Forest*: An area set aside by statute of regulation for the sustainable use of forest products by local communities or tribes on a non-commercial basis.(definition as per section 1.3 above)

¹⁴³ Section 2.1, *ibid*

¹⁴⁴ Section 5.1 reads...The Authority shall, by regulation or otherwise, undertake measures to institutionalize the participation of communities in forest management. Such measures may include, but are not limited to:

- (i) Recognition and protection of community land tenure rights;
- ii) Formulation of a code of conduct to govern relationships between holders and communities.
- (iii) Requirement to complete a social agreement between holders and communities that defines the parties' respective rights, roles, obligations and benefits with respect to one another;
- (iv) Provision for security of access by communities to non-timber forest products and other forest resources;
- (v) Provision of technical assistance to community foresters

¹⁴⁵ See section 5.3 of the National Forest Reform Law.

¹⁴⁶ See *ibid.* section 6.1

¹⁴⁷ *Ibid*

¹⁴⁸ See *Ibid*, section 9.10

¹⁴⁹ *Ibid*, section 14.2

ii) Minerals

The government reserves the right of ownership of minerals under the Minerals and Mining Law (2000)¹⁵⁰ of which Section 11.3 provides that:

Government's rights as owner of minerals in the Republic of Liberia are absolute and supersede the rights of any landowners or occupants of land in respect of the exploration or mining of minerals, provided that such land owner or occupants of land shall be entitled to just, prompt and adequate compensation for any diminution in the value of land caused by disturbance, disfigurement or other factors occasioned by the government's exercise of its rights.

The legal owner or lawful occupant of a property on which minerals are discovered shall be entitled to a right of first refusal as against any third parties.¹⁵¹ This has in a way aided the regulation of concessions.

3. Customary Land Law in the Courts

In Liberia, the applicability of customary law in the courts is clear. In *Manney v. Money*¹⁵², the Supreme Court wrote that "it is to be observed that unless contrary to plain rules of equity and justice, the native custom will be supported in our courts when the proper proceedings are instituted." The court reiterated this in *Watson v. Ware*¹⁵³, though in slightly different terms, when it wrote: "It has always been the policy of the government that insofar as native customary law and customs are not in violation of the constitution or of express provisions in statutory law, they will be applied and upheld by the courts here." That said, very few cases concerning customary law are heard in Liberia's courts.

Disputes concerning customary land tenure are resolved by traditional authorities in accordance with the Hinterland Rules and Regulations, and those involving clashes between customary and civil law claims by the state administrators there¹⁵⁴. In addition, Section 38(iv) of the Hinterland Rules and Regulations provides that disputes between a "civilized person" and a "native" are to be heard in a joint court of the District Commissioner and the Paramount Chief.

¹⁵⁰ Part I, Section. 23, of the *Liberian Code of Laws* Revised (2000)

¹⁵¹ See sections 11.4 and 11.5 *ibid*

¹⁵² 2 LLR 618 (1927)

¹⁵³ 10 LLR 158 (1946)

¹⁵⁴ McCarthy has summarized this system nicely: Disputes over civil matters are first subject to Court of the Clan Chief (the "subject matter" is less than \$25), then to the Court of the Paramount Chief (the "subject matter" is greater than \$25 but less than \$100), then to the Court of the District Commissioner, on to the Court of the Provincial Commissioner, then to the Provincial Circuit Court of Assize. Article 81 states that the duties of the Superintendent of Native Tribal Affairs include that to "hear all cases on appeal arising from the District and Provincial Commissioners", and that "all appeals from him shall lie with the President final hearing and determination". Indeed, most land rights disputes have thus been adjudicated by the Executive. On the other hand, Title 20: Executive Law, §25.3, which establishes a Liaison Officer for Liberian Tribal Societies, does not give such direct rights of appellate review to Bureau of Tribal Affairs within the Ministry of Internal Affairs, nor does it state the President as having final powers of hearing and determination. To the extent that such adjudicative powers remain, they would need to be implied from §25.2@), which states that the Minister has a duty to manage tribal affairs and "all matters arising out of tribal relationships", and §25.2(1), which states one of the duties of the Minister as "administering the system of tribal courts".

d) Ghana

1. Overview

The Ghanaian situation presents a slightly different approach.¹⁵⁵ Land in Ghana may be classified broadly as public or customary. Public land can be grouped into two: state land and vested land.¹⁵⁶ State land refers to land that the government has compulsorily acquired for a specified public purpose or in the general public interest.¹⁵⁷ Vested lands, on the other hand, are brought about by statutory intervention where the land owner retains the customary land ownership but the management of the land is taken over by the state in trust for the owner.¹⁵⁸ Customary lands include stool¹⁵⁹, skin, clan, individual¹⁶⁰ and family¹⁶¹ lands which: constitute about 80% (including vested lands) of land holding in the country, have a common trait of communal ownership; and are guided by customary tenets¹⁶². These tenets are that:

¹⁵⁵ Academic discourses on land tenure in Ghana have used two main approaches. The first approach suggest that Ghana's land tenure system is historic and rooted in concepts of indigenous culture, spirituality, and communal social solidarity (Busia, 1951). The second approach sees customary land tenure as very dynamic and evolving. As population density increases and land becomes scarce, tenure systems adapt by ensuring increasingly defined property rights, which move from community rights to land, to lineage rights, and down to household and individual rights to land. Continent wide, the penetration of capitalist land use has particularly provided impetus for the fast adaptation to change of the original communal land tenure system described as being typically African. This position argues that an approach based on strengthening customary rights in land is compatible with a market based approach to land management (Deininger, 2003).

¹⁵⁶ Ministry of lands and forestry (2003) *Emerging Land issues in Ghana*.

¹⁵⁷ Such lands are vested in the President and held in trust by the State for the people of Ghana. All previous interests are extinguished and persons who previously held recognizable interests in such lands are entitled by law to compensation either monetary or replacement with land of equivalent value. The 1992 Constitution makes provision for the payment of prompt, fair and adequate compensation where the government exercises its powers of eminent domain. Laws governing the compulsory acquisition of land by the government include Article 20 of the 1992 Constitution, Administration of Lands Act 1962, Act 123, the State Lands Act 1962, Act 125, the Land Statutory Wayleaves Act 1963, Act 186 and regulations made under these statutes. The Lands Commission administers state lands on behalf of the President.

¹⁵⁸ The management responsibilities cover legal, e.g. prosecution, financial, e.g. rent assessment, collection, disbursement and estate management e.g. physical planning and its enforcement and administration of the property. Legislations governing vested lands are the Administration of Lands Act, 1962 (Act 123). Similar to state lands, vested lands are administered by the Lands Commission, as a government agency, on behalf of the customary owner.

¹⁵⁹ A stool means the seat of a chief of an indigenous state (sometimes of a head of family) which represents the source of authority of the chief (or head of family). It is a symbol of unity and its responsibilities devolve upon its living representatives, the chief and his councillors. Land owned by such a state is referred to as stool land. (National Land Policy, Ministry of Lands, Accra 1999). Note: A skin in Northern Ghana is the equivalent of a stool in Southern Ghana.

¹⁶⁰ Individual lands constitute grants emanating from common law freeholds.

¹⁶¹ Scattered all over Ghana are a number of traditional groups, which do not recognize a stool, or a skin as a symbol of communal land ownership. In these areas the allodial ownership vests in the clan or family. This system of tenure is predominant in the Volta Region and some traditional areas on the Central, Eastern, and Greater -Accra, Northern, Upper East and Upper West Regions of Ghana.

The head of the clan /family is in no less a fiduciary position as stipulated in the 1992 Constitution. Family lands, implicitly inferred by the 1992 Constitution as private property, are devoid of extensive government regulatory mechanisms compared to stool or skin lands. Family lands together with individual lands are about 35% of the total lands in customary ownership.

¹⁶² Alden Wily, Liz., *So who owns the forest? An investigation into the forest ownership and land rights in Liberia*, SDI Liberia (2007) Available online at http://www.rightsandresources.org/publication_details.php?publicationID=102 (Accessed on 1September 2012)

1. Ownership is inter-generational.
2. Land is held in trust by the head of the community for the entire members of the community, clan or family in the belief that land is owned by the dead, living and those yet to be born.
3. Allodial title to the land resides in the community, clan or family and is non transferable.

The five recognised types of interests in land: allodial interest; customary freehold; common law freehold; leasehold (including subleases); and customary tenancies.

Allodial interest is the highest proprietary interest known to customary law, beyond which there is no superior title. It is sometimes referred to as the paramount or absolute title and has been likened to the freehold interest, as the concept is understood in English common law. Other lesser titles to, interest in or right over land are derived from the allodial interest. Depending on the applicable customary law, allodial interest in land is held originally by stools, skins, “tendama”¹⁶³, sub-stools, clans or families. It is a title that, in some traditional areas, is vested in the head of the land-owning group who manages it on behalf of the community with the consent and concurrence of the principal members of the community.¹⁶⁴ This interest can be transferred from one owner (community or individual) to the other through purchase or gift.

Customary freehold, also called the usufruct, is an interest in land to which members or indigenes of the land-owning community that holds the allodial interest in land are entitled as of right, according to the customary law of that community.¹⁶⁵ It is an interest held by members of such a community who acquire it by first cultivation or by allotment from the land-owning group of which they are members.¹⁶⁶ So long as it is held and exercised by an indigene, the interest assumes indefinite duration and prevails against the whole world including the allodial title holder.¹⁶⁷ Any group, sub-group or individual member of a community owning the allodial title may acquire the customary freehold title or interest by exercising his/her inherent right to develop such vacant virgin communal land.¹⁶⁸

The customary freehold includes the right to occupy and derive economic use from any portion of the communally owned land that has not been occupied previously by any member of the

¹⁶³ Tendamba are the descendants of the pioneer settlers of their respective villages and towns and are representatives of the “earth god” and caretakers of the land. The functions and duties of the *tendamba* used to include:

- allocation of vacant land to “strangers”;
- settlement of land disputes;
- pouring of libations and sanctifying the land when sacrilege has been committed;
- introduction of new chiefs to the “earth-god” and acting as an advisor to chiefs;
- annual sacrifices to ensure peace and prosperity;
- enforcement of covenants in respect of communal lands;
- imposing sanctions against trespassers and for anti-social behaviour.

¹⁶⁴ Historically allodial title has been created or assumed through discovery or conquest and subsequent settlement thereon and use thereof by the stool/skin and family.

¹⁶⁵ Alden Wily, Liz., *So who owns the forest? An investigation into the forest ownership and land rights in Liberia*, SDI Liberia (2007) Available online at http://www.rightsandresources.org/publication_details.php?publicationID=102 (Accessed on 1September 2012).

¹⁶⁶ *Ibid*

¹⁶⁷ *Ibid*

¹⁶⁸ *Ibid*

community.¹⁶⁹ Thus the usufruct can cultivate, build or enjoy the use of the land in any manner, provided there is no invasion of the stool's and state's right to the minerals therein.¹⁷⁰ Such rights are limited to the area occupied.¹⁷¹ The customary freehold is freely transferable and the freeholder may dispose of his/her interest *inter vivos* or by testamentary disposition to members of the community as desired.¹⁷² It is an interest held in perpetuity by the beneficial user; the only caveats are that the land must not be abandoned and the members' lineage must not become extinct.¹⁷³

Common law freehold is an interest in land arising out of sale or gift by the holder of an allodial title.¹⁷⁴ The interest is held for an indefinite period and is derived from the rules of common law.¹⁷⁵ It is created only by express grant.¹⁷⁶

Leaseholds are rights granted to a person to occupy and use land for a specified term subject to certain agreed covenants and the payment of an agreed rent. The holder of the allodial title, customary freehold or common law freehold may grant a lease in respect of land over which he/she has not already granted.¹⁷⁷ Sub-leases may be further granted by leaseholders.

Lesser interests, such as customary tenancies, may also be created under customary law by holders of an allodial title, customary freehold or common law freehold.¹⁷⁸ These are usually share-cropping contractual arrangements by which a tenant farmer gives a specified portion of the produce of the farm to the landlord at each harvest time.¹⁷⁹ The two best known of such tenancies are the 'abunu' (the produce is shared 50:50) and 'abusa' (one-third to the land owner and two-thirds to the farmer).¹⁸⁰ There are other forms of customary tenancies in which the consideration for the grant is not the sharing of farm produce but monetary payments, such as periodic rents.¹⁸¹ In addition to these interests, certain rights recognized by law also exist in land.¹⁸² Examples are easements, profits a *prendre*, restrictive covenants, reversions and common law licenses. Customary land ownership recognises rights of the members of the land-owning community to the community's common resources namely: water, "durbar"/funeral

¹⁶⁹ *Ibid*

¹⁷⁰ *Ibid*

¹⁷¹ Mere hunting by an indigene, however, does not appropriate customary freehold title. It is rather a derived right. Other derived rights include rights to water, rights to non-timber forest products and minerals. These derived rights, also referred to as group rights, are distinct from customary freehold.

¹⁷² Transfers to persons outside the group, i.e. strangers may be done only by the holder of the customary freehold with the consent of the appropriate head and principal elders of the land owning community. This is due to the fact that such alienation to a stranger implies admitting an outsider to the ancestral heritage of the state, and extending birthright of citizenship.

¹⁷³ Alden Wily, *supra* note 165.

¹⁷⁴ *Ibid*

¹⁷⁵ *Ibid*

¹⁷⁶ *Ibid*

¹⁷⁷ *Ibid*

¹⁷⁸ *Ibid*

¹⁷⁹ *Ibid*

¹⁸⁰ *Ibid*

¹⁸¹ *Ibid*

¹⁸² *Ibid*

grounds, grazing grounds and non-timber forest products. Use and control is based on customary rules which, in the past, provided sound basis for sustainable management.¹⁸³

2. The Constitution¹⁸⁴

Article 267 (1) of the constitution states that “all stool lands in Ghana shall vest in the appropriate stool on behalf of, and in trust for, the subjects of the stool in accordance with customary law and usage” (Republican Constitution, 1992).¹⁸⁵ While stools/skins can deal in their lands as they wish, a grant of stool/skin land is invalid unless it receives the concurrence of the minister responsible for land.¹⁸⁶ The constitution stipulates that such land “shall vest in the appropriate stool on behalf of and in trust for the subjects of the stool in accordance with customary law and usage”.¹⁸⁷ Article 267 (2) sets up the Office of the Administrator of Stool Lands and charges the office with the collection and disbursements of all stool land revenues, defined to include all rents, dues, royalties, revenues or other payments, whether in the nature of income or capital from stool lands.¹⁸⁸ The implication is that even though indigenous owners have the capacity to manage their lands and enter into contracts, they do not have the capacity to collect the monies they negotiate for.¹⁸⁹ This drives all the payments made to the indigenous owners into an extra-legal framework because they become illegal when paid to the land owners.¹⁹⁰

Article 267(3) also provides that there shall be no disposition or development of any stool land unless the Regional Lands Commission of the region in which the land is situated has certified that the disposition or development is consistent with the development plan drawn up or approved by the planning authority for the area concerned.¹⁹¹ This implies that where the Lands

¹⁸³ However, growing population of both people and animals, diminishing supply of land, inter and intra regional migration and urbanisation have contributed to dwindling reserves of such resources and are posing tremendous challenges to the management of the common resource. The continued supply of the common resources on a sustained basis is under constant threat due to the absence of any statutory framework for their management.

¹⁸⁴ In the 1969 Constitution Article 164 (2) provided for the establishment of a Stool Lands Account into which was paid stool land revenue out of which was paid appropriate proportions to the stool, traditional authority and the local District Courts. The 1979 Constitution Article 190 (2) provided for the establishment of the Office of the Administrator of Stool Lands to be responsible for the establishment of a stool land account, and the collection and disbursement of stool land revenue. However for one reason or another, the Office was not established.

¹⁸⁵ Kasanga, K. and Kotey, N. A., *Land Management in Ghana: Building on Tradition and Modernity* (2001)

¹⁸⁶ *Ibid*

¹⁸⁷ Stool lands are predominant in areas of the country which have a strong centralized political system as exists in most parts of the Akan areas in the southern and some areas in the northern parts of the country. In these areas traditional authority is inexplicably linked to landownership and the stool holds the allodial title in land. The constitution regards such occupants as ‘fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin or family concerned and are accountable in this regard’ (Article 36(8) of 1992 Constitution).

¹⁸⁸ *Ibid*

¹⁸⁹ *Ibid*

¹⁹⁰ The Constitution (Article 267(6)) even prescribes the formula for the disbursement of the moneys so collected. Based on the formula, only 22.5 percent of the price money is to be paid to the landowners whilst as much as 59.5 percent is retained by the state. The remaining 18 percent is paid to the traditional council (which is only an association of heads of traditional groups) where the land is situated.

¹⁹¹ Source same as 361 above

Commission is unable to give the requisite certification, any disposition by the indigenous owners is invalid, pushing all such grants into illegality with its consequent development.¹⁹²

Again Article 267(5) prohibits the grant of freeholds in any stool lands however so described. It is not too clear what the full implications of this clause is, especially the extent to which it affects land rights of subjects of the land owning communities and other customary freeholders.¹⁹³ But if the meaning of the clause is taken at face value, then all customary freeholders of stool lands and ‘strangers’ (absolute purchasers or renters) are being turned into tenants of the chiefs as landlords.¹⁹⁴ The state has a right to eminent domain and so may reserve customary lands.

3. Institutional Framework

The institutional arrangements for land tenure in Ghana can be broadly classified as public and private. Public institutions comprise government land agencies which collaborate to manage all state-acquired and vested lands and enforce regulations regarding the administration of customary lands.¹⁹⁵ Private institutions comprise: customary land owners (chiefs and family heads); individuals who may possess land with sizes ranging from 0.1 or less to several hectares; and Non-Governmental Organizations (NGOs).¹⁹⁶ In the case of the management of customary lands, the authorized ‘representatives’ of the people are either the chiefs or family/clan heads.¹⁹⁷ There are some parts of the country where ‘traditional priests’ (“tendama” and to a lesser extent the “wulomei”) are the ‘authorized representatives’.¹⁹⁸ They have the right to manage the land on behalf of their people, with the consent and concurrence of the principal members of the land-owning community (council of elders).¹⁹⁹ The council often arrives at a decision through consensus. In some instances, the chief/head may give specific instructions to be implemented by the council.²⁰⁰ The councils have procedures through which allocation of land is made, in order to forestall any disputes or multiple sales as well as for the management of common resources.²⁰¹

¹⁹² *Ibid*

¹⁹³ *Ibid*

¹⁹⁴ The framework in general provides for intervention in the following areas, among others.

1. Control over creation of proprietary rights in land without taking land. This included management of stool lands by the state, validation of stool land transactions and subsequently prohibition of freehold grants of stool lands.
2. Control over creation of proprietary rights by taking land, through compulsory acquisition, occupation and use of land on the orders of the President, vesting of the management rights of the land in government in trust.
3. Control over revenue accruing from land ownership without taking land. The state collects and disburses revenue accruing from stool lands including agricultural rents on behalf of the landowners, as the government thinks fit without any input from the owners.

¹⁹⁵ Ministry of Lands and Forestry, 2003, *Emerging land tenure issues in Ghana*.

¹⁹⁶ *Ibid*

¹⁹⁷ *Ibid*

¹⁹⁸ *Ibid*

¹⁹⁹ *Ibid*

²⁰⁰ *Ibid*

²⁰¹ A few customary landowners have well established a land secretariat that mediates the process of land allocation, documentation and record keeping. Capacity is however, low and the secretariats are without any real estate professionals engaged in the process. A major drawback of this system is that the council of elders comprise mainly of male members with little representation of women and the youth. This has at times ignited protests from the youth calling for accountability from the council for the proceeds from the land. A

4. Tanzania

Customary land management in Tanzania under colonial rule saw communities essentially being left to continue internal land allocation practices according to custom.²⁰² In addition to personal property allotments, there were communal lands open to all community members to hunt, graze their animals and gather natural resources. Under customary systems, land was theoretically allocated free of charge. But in practice, a "facilitation" fee is commonly charged.²⁰³ The two major land acts in Tanzania are: the Village Land Act and the Land Act of 1999 under which land is divided into three categories namely: reserved land,²⁰⁴ village land²⁰⁵ and general land.²⁰⁶

The acts establish pre-existing customary tenure rights as the basic means of holding property rights in all areas zoned as village land and any areas within general lands that were occupied according to a customarily-deemed right of occupancy before the law was enacted.²⁰⁷ Under the constitution, all land in Tanzania is held by the state and land rights are therefore not rights of private ownership but of occupancy.²⁰⁸ Under the land laws, there are two ways of gaining title to land: customary rights of occupancy and granted rights of occupancy.²⁰⁹ The constitution vests all the land in the president. Articles 145 and 146 of the constitution establish local government authorities in each region, district, urban area and village to "transfer authority to the people". The basic units of governance at the village level are village assemblies²¹⁰ and elected village councils²¹¹.

reorganization of these institutions into systems that are participatory and accountable to community membership should be encouraged.

²⁰² Among non pastoralist and non-hunter-gatherer groups within Tanzania, land tenure is often grounded in the principle of "first right"; members of the indigenous ethnic group who first settled in a particular area have claim to the land there and hold the power to welcome or reject newcomers and to decide which lands to allocate to them. Newcomers, upon arriving in an area, first approach local chiefs and headmen and request to be allocated an area to build a house, plant crops, and graze their animals. The rights of the first settlers were "locally considered to be as secure as private title deeds" (Odgaard, 2006 at 12).

²⁰³ Tanzanians also access land through "borrowed" or "rented" land rights, in which various kinds of payments and services are exchanged for use of the land, and renters are forbidden to make long-term investments (like tree planting) that might solidify their claim to the property (Daley, 2005 at 564) These customs are still practiced in modified form today throughout much of Tanzania; studies have found that in many rural villages, 90 percent of village land is defined and governed by customary laws (ILD, 2005, Vol. 3, at 51).

²⁰⁴ Reserved land is defined in the acts as all land set aside for special purposes, including forest reserves, game parks, game reserves. Nineteen percent of Tanzania's surface area is devoted to wildlife in protected areas. No human settlement was allowed in these areas prior to 1999. Another 9 percent of the mainland's surface area is comprised of protected areas where wildlife and humans co-exist.

²⁰⁵ Village land is the land falling under the jurisdiction and management of a registered village. Land that has been demarcated as village land under any law or administrative procedure –whether formally approved or not.

²⁰⁶ General land denotes all land that is neither reserved land nor village land; all urban areas fall under this category.

²⁰⁷ Knight *supra* note 99 .

²⁰⁸ *Ibid*

²⁰⁹ *Ibid*

²¹⁰ This includes every man and woman above the age of 18 living in the village, as set out in the Local Government (District Authorities) Act of 1982

²¹¹ They govern on behalf of and are answerable and accountable to the village assembly. Village councils were first created in 1975, under the Village and *Ujamaa* Village (Registration, Designation and Administration) Act of 1975. They were then transformed into local government bodies in the 1990's. The village council is "the supreme authority on all matters of general policy making in relation to the affairs of the village" (District Authorities Act, art. 141). The council meets monthly, and must convene and report to the village assembly on a quarterly basis. At least one quarter of the council members must be women. Under the terms set forth in the

The 1999 Land Act recognizes and legalizes customary law as it applies to the assignment, transfer and definition of property rights, though its primary concern is not customary land ownership (read village land).²¹² The Village Land Act (VLA) is the main legislation on community land.²¹³ The Act's definition of exactly what constitutes "customary law" allows space for each community to freely determine its own rules and practices, provided they do not contradict Tanzania's other laws or contravene the rights of others.²¹⁴ Article 20 explains that the customary law to be applied to land held under customary tenure "shall have regard to the customs, traditions and the practices of the community concerned, to the extent that they are in accordance with the principles of the national land policy and of any other written law."²¹⁵ It goes on to qualify that any customary law that "denies women, children or persons with disabilities lawful access to ownership, occupation or use of any such land," will be void and inapplicable, and should not be given effect by a village council or assembly.²¹⁶ The primary innovations²¹⁷ concerning statutory recognition of customary land rights established by the VLA and accompanying legislation include the following:

1. Customarily-held land rights are equal in weight and validity to formally-granted land rights.²¹⁸
2. Processes for titling, granting and registration of family and communal land within villages are established and village councils are given the power and authority to administer and manage village lands according to customary rules.

Local Government (District Authorities) Act, village councils may propose village by-laws (whose enactment must be approved by the consensus of the entire village assembly as well as by the district council of the area) and take steps to ensure that these laws are implemented and adhered to (Alden Wily, 2003). Village councils are autonomous of both the central government and the next higher tier of local government authority, the district council.

²¹² See preamble and section 4(3) of the Land Act.

²¹³ The Village Land Act and the Land Act of 1999 recognize - and legalize - customary law as it applies to the assignment, transfer and definition of property rights (VLA, art. 14).

²¹⁴ Knight, *supra* note 99

²¹⁵ *Ibid*

²¹⁶ Meanwhile, the Village Land Act's definition of "custom" is slightly complicated by its acknowledgment that in trying to socialize Tanzania (through tactics like abolishing chiefdoms) Nyerere's *ujamaa* scheme introduced dramatic changes in custom. To this end, the "customary law" which is to be applied under the Village Land Act is the custom that was in operation *before* the *ujamaa* scheme was put into effect. (VLA, art. 20 s. 4(b)). For those communities unaffected by the *ujamaa* scheme, they may continue to apply the customary law they have always applied. In other areas, for example communities living on general land, people should apply the "customary law recognized as such by the persons occupying the land" (VLA, art. 20 S4 (a, c)). The customary law recognized by pastoralists is to be the customary law that continues to govern pastoralists' land (VLA, art. 20 s. 4(d)). As such, the particulars of what will constitute customary law are left to each ethnic group, tribe or community to establish.

²¹⁷ Knight, *supra* note 99.

²¹⁸ The Village Land Act makes explicitly clear that "a customary right of occupancy is in every respect of equal occupancy status and effect to a granted right of occupancy" (VLA, art. 18§1). Moreover, if the government aims to compulsorily acquire land belonging to a villager or a village as a whole, it must pay the same levels of compensation for the land it would have to pay if the land were under a granted right of occupancy or the person had a title deed; Article 18(i) promises that "A customary right of occupancy ... [shall be] subject to the prompt payment of full and fair compensation to acquisition by the state for public purposes." However, it is yet to be seen if this promise/provision will be fully honoured. A close reading of the law does not make it clear if this extends to village lands that are re-zoned as general land on the grounds of being "unused."

3. Women have equal rights to hold, access and derive benefits from land and the burden of protecting and enforcing women's, widows' and orphans' land rights is on the village council.
4. Communal areas and pastoralists' land claims are formally recognized and protected.
5. New village-level land registries are created to formally register customary land rights.
6. Tanzania's informal land market is formally recognized.
7. The decisions of village-level customary dispute resolution bodies are appealable directly up to the highest court of Tanzania (under the Land Disputes Settlement Act of 2002).

The VLA is rooted in and builds upon Tanzania's pre-existing system of village administration institutions (village councils) which are responsible for administration and management of village land.²¹⁹ Villages are required to demarcate which land within the village is communal land (to be used by the whole community according to custom and need), individual/family land and reserved land (to be held for future generations and needs). Furthermore, the VLA mandates that the definition of the bounds of the village must provide for the land rights of pastoralists, the need for commonage and the land needs of future generations of Tanzania.²²⁰

After any disputes over village boundaries have been resolved and all village lands have been formally demarcated and mapped, the village council starts the administrative process of applying for a certificate of village land.²²¹ The certificate grants the village council²²² administrative management powers over the land and affirms the occupation and use of the lands in accordance with the applicable customary law.²²³ At the end of this process, the village (through the village council) becomes a corporate legal body able to transact and negotiate with outsiders. The council must manage village land in "accordance with the principles applicable to a trustee managing property on behalf of a beneficiary."²²⁴ The village council must also prepare management plans for the use of communal lands.²²⁵ In the event that communal lands have been customarily shared by neighbouring villages, village councils may enter into "joint village land use agreements" that allow them to share the management of these lands²²⁶

²¹⁹ Knight, *supra* note 99

²²⁰ Art. 23(2) of the Village Land Act

²²¹ *Ibid*

²²² Once a village has been registered and has received a certificate of village land, villages may generate their own by-laws to regulate a variety of economic activities as well land and natural resource management (art. 65 S2). As such, the Village Land Act creates a space for communities to proactively decide how to govern themselves and to freely incorporate – and therefore formalize - local customary rules and rights into their land use and management plans.

²²³ Art. 7 Village Land Act

²²⁴ Interestingly the law does not say that the council *is* the trustee, or the villagers *are* the beneficiaries, but rather that the village council must manage the property "*as if* the council were a trustee of, and the villagers and other persons resident in the village were beneficiaries...." (VLA, art. 8 S1, 2, emphasis added). The simile here is necessary because the state is the ultimate owner of the land.

²²⁵ Art. 13 Village Land Act

²²⁶ Art. 11 Village Land Act. The village council must categorize land that has been traditionally used by the whole community as "communal village land" to which all villages have rights of occupation and use (VLA, art. 57§1(h)) and specify these areas in the land use and zoning plan. Under Article 13§7, areas that must be zoned as communal land automatically include:

Any land which has been set aside by a village council or village assembly for community or public occupation and use or any land which is and has been, since the formation of the village, habitually used whether as a matter of practice or under customary law or regarded by village residents as available for use as community or public land before the enactment of this act, shall be deemed by this act to be communal village land approved as such by the village assembly and shall be registered by the village council.

To protect pastoralists' land claims, Article 7(1) of VLA clearly provides that village land may encompass: fallow land; land allocated "to persons using that land with the agreement of the villagers, or in accordance with customary law"; and "land customarily used for passage or ...for depasturing cattle".²²⁷

5.4.3 Analysis of Comparative Experiences

USA, Canada and Australia have recognised aboriginal title of communities to land and related resources. This claim is based on indigeneity which some communities in Kenya such as the Ogiek have tried to assert. However, this has been hotly contested such that, in the face of many marginalizations, community has been seen as the best basis for claims to land and related resources.

Most countries have provided for community land distinctly from other land. It is noteworthy that in countries such as Botswana, Ghana, Tanzania and Liberia, the normative and institutional bases of customary law are strong and therefore capable of standing alongside the formal institutions. This is because the practices around community land are well established, entrenched and have not been subjugated as happened in Kenya. Most of the countries have also realised the need to link land rights to natural resources such as forests and bio-diversity. Many of the countries have addressed community rights in their constitutions hence illustrating the importance that is attached to it. In summary, the laws deal with:

1. Land that is the subject matter of community land claims.
2. Holders of the rights and their designation. This indicates who is included and who is excluded. Outsiders may either nationals from outside the community or foreigners with leasehold rights.
3. Customary rights and derivative rights such as customary tenancies, freehold and leasehold rights.
4. Land administration and management.
5. Institutions for administering and managing land.
6. The rights of marginalized communities.
7. Mechanisms for dispute resolution.

Kenya has made the important step of providing constitutional anchorage for community rights. This will catalyse the framing of normative and institutional structures for handling community rights to land. The experiences from other countries are useful in framing a community land rights law in Kenya based on what has worked and what has not. At a broader level, they are also useful in defining the key tenets of the law. However, as will be clear from the sections below, a one-size-fits-all approach will not work in Kenya because of the different manifestations of community, the disintegration of community structures because of neglect and the ethnicisation of the land question.

²²⁷ Art. 7 Section 1(e)(i–iii) Village Land Act.

6.0 GIVING MEANING TO “COMMUNITY RIGHTS” TO LAND AND RELATED RESOURCES IN KENYA

6.1 THE MEANING OF COMMUNITY

6.1.1 Existence of Community Rights

This study has established that community rights and claims exist in different parts of Kenya despite their tenuous nature and neglect by law. Subjects of community rights lay claims through occupation, long residence and social acceptance by those with earlier claims. Community rights are claimed as the basis for: citizenship, identity or belonging; ensured access to resources and exclusion of perceived outsiders. Transformation of tenure in the communities is going on even as the Community Land Bill is awaited.

The absence of documentation of community rights has undermined their strength when pitted against the legally secured public and private rights. Claims of community rights, which are largely informal, clash with the formally protected rights. Attempts to formalise community rights through adjudication and consolidation of trust land and issue of registration certificates for group ranches has not improved security of community tenure to land. Some of the initiatives seeking to secure the rights have been plagued by corruption, illegal acquisition by non-members and acquisition of private rights by crafty members excluding other members of the community. The breakdown of community governance mechanisms has allowed for abuse of trust by those charged with looking after the community's interests.

6.1.2 Multiple Meanings

“Community” has different meanings in different contexts. It may be defined on the basis of ethnicity or culture, as is the case in Samburu and East Mau. This is the most prevalent definition despite its limitations. Experiences from Kasigau, Yala and Lamu illustrate these limitations because of the neglect of the dynamism of community and their negation of communities that prefer fabricated communities that do not have enough in common to sustainably manage the land and resources in it. The Kasigau and East Mau cases demonstrate how the narrative of community is used to include and exclude different groups competing for scarce resources.

The third criterion – community of interest - is discernible in cases where communities are brought together by land principally and secondly by land-based resources such as forests, water and wetlands. This criterion is critical for creation of cohesive communities in Kenya in light of the ethicised socio-politics following the tragic 2007-2008 post-election violence. The increased allegiance to ethnic groups than to national polity makes ethnic identity the default frame of reference¹. The Waki report noted that the constitutional liberty to own land anywhere in Kenya exists only in theory.² It based this assertion on the creation of districts based on ethnic parameters hence mimicking “native reserves” in which there were “insiders” (ancestral land

¹ Ndegwa, P N. (1997). *Studies on ecological and epidemiological significance of Glossina swynnertoni Austen in Masai Mara, Kenya*. Ph.D. Thesis, University of Nairobi.

² See Republic of Kenya, Report of the Commission on Investigation of Post Election Violence (CIPEV), October 2008 (available online at <www.kenyadialogue.org> (accessed on 1 November 2008).

owners) and “outsiders” (migrants).³ The report concluded that the overt and covert pursuit of ethnic homogeneity in land allocation and acquisition has led to a type of “residential apartheid” as Kenyans move into more ethnically homogeneous areas even within urban centres.⁴ In framing community rights law, it is therefore important to ensure inclusivity in defining the basis for entitlement in contexts where different communities have been using land and related resources side by side as is the case in Kasigau, Yala, Lamu and East Mau. This will ensure, for instance, that ethnic inclusion is observed in Kasigau. It will also facilitate creativity in bringing people together and assist in the creation of cohesive communities without ethnicity as a divide.

However, what emerges from the case studies is that the understanding of ‘community’ that is prevalent in on-going discourses on the 2010 Constitution’s recognition of community land rights is that of community defined by ethnic and (in some contexts) sub-ethnic identity. This suggests that absent a deliberate intervention, ‘community’ in the sense of ‘community of interest’ will not take hold in people’s consciousness.

6.1.3 Internal Exclusion

The community exclusion narrative masks instances of internal exclusion as the entire community fights “the enemy” from outside, usually non-members or the state.⁵ Indeed these issues were not very pronounced in the case studies and only came up in discussions on: membership of community organs (Samburu); security of entitlements (Kasigau); and loci for grant of individual titles (East Mau). Consequently, there is a more subtle narrative of exclusion from within, beyond ethnicity and culture, by which sub-groups who may well fit into the ethnic narrative may be defined out of entitlement in certain contexts. These sub-groups are variously defined by gender, age and class.⁶

The constitution⁷ and the NLP⁸ provide explicitly for: equitable access to land; security of land rights; and elimination of gender-based discrimination in law, customs and practices related to land and related resources.⁹ The NLP singles out women in pastoralist communities as needing interventions to secure their access to land.¹⁰ The recognition that women tend to lose out through inheritance practices that favour men is taken care of by both the constitution¹¹ and the NLP.¹²

³ *Ibid*, p. 31.

⁴ *Ibid*.

⁵ Kameri-Mbote, P. & Celestine Nyamu Musembi, Mobility; Marginality and Tenure Transformation in Kenya: Explorations of Community Property Rights in Law and Practice, *Special Issue Nomadic Peoples Journal* (Forthcoming December 2012)

⁶ *Ibid*

⁷ Article 60

⁸ NLP pars 7 & 8

⁹ Government of Kenya, *Constitution of Kenya*, Government Printer (2010) and the Government of Kenya, *National Land Policy*, Sessional Paper number 3 of 2009(August, 2009)

¹⁰ NLP para 183 e

¹¹ Article 68 c (vi)

¹² NLP para 223

6.1.4 Community Land Rights Without Community Land?

It is apparent that despite the constitutional recognition of community rights and its elaboration in the NLP, there is no legal framework on community rights. This perpetuates the perception that community land tenure is a less important and therefore less secure form of tenure relative to private and public land tenure which are already provided for under the Land Act and the Land Registration Act.¹³ References to community land in these laws in a sense pre-empts innovative handling of issues under the yet to be enacted Community Land Bill. It is therefore likely that the perception of community tenure as transient, and the parcelling out of community land into individually held pieces, ostensibly as a defence against future land grabbing (Kameri-Mbote 2009), will persist. This raises the possibility that constitutional recognition of community land rights may eventually be inconsequential as the subject matter itself is fast disappearing before the necessary law can be enacted.¹⁴ Group ranches and trust land are the only real options currently available for safeguarding community land rights law formally. But each of them is riddled with problems.

6.1.5 Transient Tenure in the Absence of Community Land Law

There is general lack of clarity on the status of community land in the absence of a community land law. In some areas, communities have embarked on sub-division of their land to protect it from counties and other operatives who have traditionally abused the trust bestowed on them. Group ranches are seen to have failed due to the haphazard manner in which they were delineated and lack of a clear legal regime for their management to minimize conflict. As a result, their members have opted to subdivide the ranches into individual holdings. By the mid-1990s official policy itself leaned towards extending individualization of land tenure to all districts in the Arid and Semi-Arid Lands (ASAL).¹⁵ Indeed the group ranch policy appears to be guided by exceptionalism as it is built around a presumption that only pastoralist areas require accommodation of collective interests in land. Yet pastoralism is just one form of land use dependent on community tenure and is not the only one. There are other land uses for which individual ownership is just as unsuitable. These include hunting, foraging and bee-keeping, which are not necessarily compatible with pastoralism. Conflicts do arise between pastoralism and these other land uses, drawing attention to the need for a comprehensive look at various manifestations of community-oriented land rights and allied land uses.

Much of trust land has now changed status, either to individual ownership under the Registered Land Act, or to government land on account of the exercise of the powers of the county councils and the president as discussed earlier. The effect of this trend is that customary tenure, and hence the recognition of collective rights, ceases to apply in those areas (Kameri-Mbote 2002). The

¹³ Kameri-Mbote, P. & Celestine Nyamu Musembi, Mobility; Marginality and Tenure Transformation in Kenya: Explorations of Community Property Rights in Law and Practice, *Special Issue Nomadic Peoples Journal* (Forthcoming December 2012)

¹⁴ It is worth noting that a proposed moratorium on dealings with community land to pave way for the community land legislation has not been affected and registration of individual titles over community land continues unabated.

¹⁵ Okoth-Ogendo H.W.O.O. Okoth-Ogendo & W. Oluoch-Kosura, *Final Report on Land Tenure and Agricultural Development in Kenya*, Ministry of Agriculture, Livestock Development and Marketing, p, 44 (May 1995). See also Kameri-Mbote P., *Property Rights and Biodiversity Management in Kenya*, ACTS Press, Nairobi (2002).

wide discretionary powers given to county councils and the president under the repealed constitution have been abused. As a result, chunks of trust land have been put out of reach of communities for purposes that can hardly be described as ‘public’ or beneficial.

It is clear from the above discussion that the current legal regime cannot be relied on to safeguard community land rights.¹⁶ The 2010 constitution and the NLP seek to fill this gap. The delay in putting the requisite legal framework in place leaves community land under the old and inadequate framework. This catalyses the sub-division of such land into individual holdings which may not be adequate for the land uses suited to the areas in which they are situated.

6.1.6 Sustainability: Land Tenure and Land Use Link

Preserving significant ecosystems has implications for tenure to land for communities, especially those living in forests or sharing land with wildlife. In the research sites, the issue of environmental sustainability is evident. In Lamu, the interface among proposed developments, community rights, the continued existence of the Marine Park and the status of Lamu Town as a World Heritage site is problematic. This is the same in the Mau Forest where the water tower is threatened by conversion of land to agriculture, unsustainable harvesting of trees and human encroachment into the forest. Yet the Ogiek lay claim to the land as ancestral heritage. In Kasigau and Samburu, there are community conservation initiatives with the former exploring a project for payment of ecosystem services and conservancies proliferating in the latter. These initiatives are likely to be affected by the tenure to the land on which they are carried out. The conservancies need to be undergirded by clear tenure arrangements. How community rights are framed in law will have implications for these initiatives.

Land use planning is a thorny issue in Kenya as conversion of land to agriculture and urban development proceeds unabated. This has happened alongside conversion of trust land and group ranches to individual land holdings. It is clear that areas in Samburu and Kasigau are unsuitable for agriculture. This, coupled with the importance of wildlife to Kenya’s economy, raises the need to zone the country for different land uses and to explicitly provide for multiple compatible land uses. Further, land use and land tenure should be synchronized to allow viable interactions between conservation imperatives and compatible land uses; and forestall the wanton conversion of areas suitable for conservation into agricultural and settlement areas.

Given that population growth rates in the areas studied will impact on land use, it is necessary to have a land use policy, map the whole country and indicate what areas of community land need to be secured for posterity. This requires careful thought partly based on the economic returns for the community in order for them to agree to forego conversions of their land to other uses. If this is not done, the situation in Kasigau, where the protected area is seen as taking from community land, will recur. There will also be increased human-wildlife conflicts and loss of wildlife as their habitat is converted to other uses.

¹⁶ Chapter 11 of the 2010 Constitution introduces the devolved system of government with counties replacing county councils. It remains to be seen how the counties will deal with community land.

6.1.7 Need for Innovation

It is not possible to have one community rights model to cover all because communities manifest differently and their use of land and other resources will nuance how they organise as communities. It is clear that the Samburu, Yala, Lamu, Mau and Kasigau communities are different. The common things one needs to know about them are:

- a) What is a community to them?
- b) What do they see as community rights?
- c) What can be carved out as individual entitlements without impacting negatively on the community body politic?
- d) How do they treat individual members' entitlements? Can they be disposed of and to whom?
- e) What is the normative basis of the community entitlement (custom or statutory law)?
- f) What are the institutional and normative governance frameworks?
- g) How are disputes that arise solved?

The broad regime of community rights can be most easily aligned to pastoralism, agriculture, mixed land uses and residence in sectional properties. This would mean starting from community of interest as the primary indicator before considering culture and ethnicity if they are relevant. In Yala, for instance, the wetland is the common denominator. Thus people's relationship with land is a primary consideration whatever culture or ethnicity they affiliate with. This would be going back to a broader social conception of property by looking at value-enhancing relationships regarding assets whether there are kinship ties or not. Since the value of property increases with each additional subscriber, and the utility of property draws from the network of subscribers, it is important to enlarge the circle of community property rights holders beyond ethnicity and culture, where possible, to increase potential for transactions and broaden the network to ward off free-riders.

Fixation with ethnicity and culture leads to obsession with ancestral claims to land. In the Mau case study, this has been facilitated by the Task Force's identification of all Ogiek. This may not be possible in other parts of Kenya. The question then is: how does one deal with newly born members of the community?

Beyond private and community land rights, the power of eminent domain (compulsory acquisition) and development control should undergird the concept of public trusteeship which facilitates the regulation of property rights. This calls for moving beyond narrow community (ethnic, cultural or interest) and individual interests to recognising that private, community and public rights are subordinate to national interest which include the other loci. This is consonant with the view that "the deep structure of property is not absolute, autonomous and oppositional (but) is ...delimited by a strong sense of community-directed obligation- and is routed in a contextual network of mutual constraint and social accommodation mediated by the agencies of the state".¹⁷

The challenge is to identify a polity that the citizenry trusts given their mistrust of the state, due to past illegal and irregular allocation of public land, and absence of accountability in dealing

¹⁷ Gray, K. and Susan Francis Gray, 'The Idea of Property in Law', in John Dewar & Susan Bright eds., *Land Law: Themes and Perspectives* 15 (1998)

with trust land. This challenge lies in putting together the National Land Commission and delineating its mandate and functions vis-a-vis all categories of land.

6.1.8 Lessons from Other Regions and Countries

The experiences from Latin America, USA, Canada, Australia, South Africa, Botswana, Liberia, Ghana and Tanzania provide useful pointers on the way to go with the community land rights law. But it is important to reiterate that the acceptance of Aboriginal rights in USA, Canada and Australia, which approximates closely to the Ogiek case, is not accepted in Kenya. Despite the Mau Task Force’s assertion that the Ogiek have lived longest in the East Mau, this does not amount to acceptance of indigeneity. Indeed it is evident in the fact that Kenya refused to sign UNDRIP. The communities in Latin America, South Africa, Botswana, Liberia, Ghana and Tanzania have to be seen within the countries’ socio-economic, political and cultural contexts. While there are lessons that Kenya can learn from these countries, there are nuances in the Kenyan context that must be taken into account. It is, for instance, instructive to note that the realization of the rights the Endorois successfully claimed against the government continues to elude them.

6.2 RECOMMENDATIONS

A community land law should be informed by the main land uses that easily lend themselves to communitarian management. The link between land use and land tenure is important if the rights granted to communities are to benefit them. A template for such legislation in Kenya should include the elements tabulated below.

SN	Element	Description
1	Nature of community.	<ul style="list-style-type: none"> • How is the community organized? • What are the rules that hold the community body politic together?
2	Holder of rights.	<ul style="list-style-type: none"> • Community. • Groups of persons.
3	Demarcation.	<ul style="list-style-type: none"> • Maps and boundaries of community land including resources.
4	Principles for protection.	<ul style="list-style-type: none"> • How are community rights recognized? • How are community rights protected? • Registration of community rights to land and land-based resources. • Taking into account multiple interests of all land users, including women and younger members. • Land use planning requirements and sustainability imperatives. • Processes for compulsory acquisition of community land. • Rights of way. • Grazing rights. • Conversion of community land to other categories

		(private or public) and vice versa.
5	Governance and regulation of community land transactions.	<ul style="list-style-type: none"> • Who can transact? • What are the permissible transactions?
6	Enforcement of rights.	<ul style="list-style-type: none"> • Including individual entitlements.
7	Land rights delivery mechanisms for community land rights.	<ul style="list-style-type: none"> • Registration.
8	Relationships.	<ul style="list-style-type: none"> • With county government and the National Land Commission.

These issues may not be relevant for all areas of community land. Consequently, different typologies of community land rights can be identified and issues relevant to each typology provided for. It is important to document the community land claims and to provide for security of the claims while facilitating ways of handling individual entitlements within the broad community claim. There should also be rules for conversion of public and private land rights to community rights and vice versa.

Legislation on community land must be guided by the underlying normative framework. Where customary law is the governing law, there will be need to facilitate the evolution of that law without ossifying it. For instance, the relationships between pastoralists and their sharing of pasture and water in Samburu should not be curtailed. Customary practices that encourage unsustainable land uses should be dealt with in consultation with the community rather than using formal law to subjugate the practices and ignore their contexts.

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