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THE GALLANT ACADEMIC

ESSAYS IN HONOUR OF HWO OKOTH-OGENDO

Patricia Kameri-Mbote & Collins Odote (eds)

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PREFACE

I first met Professor Okoth Ogendo sometime in September 1980, upon reporting to the faculty of law of the University of Nairobi, as a first year student. At that time, the faculty of law, later renamed the School of Law of the University of Nairobi, was located on the third floor of the Gandhi Wing of the university. This Wing housed both the junior common room or cafeteria, and the senior common room. It also bordered the Department of Economics.

On this initial sighting, Okoth (whom I never called his first name throughout his life, only referring to him as 'Guru' or 'Prof') was wearing one of his much-loved *Kaunda* suits, which, if my memory serves me right, was a colourful yellow. He was walking down the corridor on the third floor, heading, I believe, to the senior common room. What stayed with me on that day, as well as many of us over the years, was how confident Okoth was, reflected even in his demeanour. One was left in no doubt that he belonged in these corridors that I so much wanted to belong to.

Okoth had just been elected acting dean of the faculty of law, not long before the initial encounter I had with him, in very unprecedented circumstances that are narrated by Willy Mutunga in chapter 4 of this book. When classes started a week or so later, Okoth came to teach a course then called *Legal Methods and Systems*. It was an introductory course to law, legal systems, legal theory and legal reasoning. Ordinarily, it was not the kind of course that would be taught by a senior academic, leave alone the dean. To a class full of 20 year olds, Okoth was both a terror and an absolute delight, challenging the unprepared and enjoying mental gymnastics with the prepared.

Then, the law lectures were held in a theatre named 'Science 2'. It had once been a geology lecture room when the university was known as the Royal Technical College. Okoth, who stood no more than 5feet 6inches tall, dominated the room with the sheer size of his intellectual presence: questioning, prodding, berating and encouraging, all at once. He loved teaching and it was obvious. He loved students and he demonstrated it. He loved the university, not as an ivory tower but as a community of scholars, young and old generating knowledge and preparing future leaders.

After a lifetime in the legal academy, I cannot recall a teacher who left such a deep intellectual inspiration on every serious student. For my part, I would never have considered a career in the academy of law had I not met Okoth, assisted in part by Willy Mutunga and George Okoth Obbo who was a Ugandan graduate student within the faculty of law at the time. He transmitted to me a deep and abiding love of the law and I was really privileged to be taught by him. At one time, after he and I had been staring at one another in class for weeks, he came to class and while looking directly at me, declared in front of the entire class: "I was told that you are the resident class Marxist". I was stunned but managed to say, "Not

the only one sir!" During this period, the majority of students held broadly left leaning views but were not in any sense Marxist. Our banter continued for the rest of his life.

Later, I had yet another great opportunity, as did my classmates, to be taught by Okoth. This time it was Land Law, in the second year of my undergraduate studies.[1] While many legal academics never become masters of the black letter law, many choosing to theorise around legal ideas in their chosen field, in the area of land law, Okoth was a guru, without any equal. His command of the black letter in land law was very impressive. He rivalled JB Kangwana who took tutorials in the area and who was a practising advocate. Okoth nonetheless greatly enjoyed the Latin phrases that informed most of the basic concepts of English land law as has been discussed by PLO Lumumba else where in this book.

In my third year of law school, Okoth came back, alongside Oki Ombaka who had recently returned from studies at Harvard University, to teach, Jurisprudence; which became the darling subject of my academic life and which I taught to several generations of law students later. Okoth the legal philosopher was a complete delight to listen to. He could juggle several ideas at the same time without losing his train of thought. In my first years of teaching, I remember sitting in his LLM jurisprudence seminar with Michael Ochieng and PLO Lumumba and continuing to learn from the Guru how to conduct a seminar.

Okoth must have formed a favourable view of my abilities, because during one of the vacations, he commissioned me to do some research relating to the manuscript he was then writing, which I believe ended up as the book, Tenants of the Crown. [2] Moreover, it was Okoth who first drew my attention to how legal history mirrors social and political history generally. He was, in this regard, a very keen student of agrarian and labour law, and used them to explain the evolution of the state in Kenya. This helped me later in my academic career to appreciate the unity of constitutional law, constitutional history and constitutional politics.

Since the founding of the faculty of law in 1970, it had been in the throes of a serious academic civil war. There was a very vocal left leaning group, which was led by Willy Mutunga who taught labour and commercial law, Shadrack Gutto, who taught constitutional law; and Oki Ombaka, who taught Jurisprudence. This group was pitted against the older academics who had founded the law school, including GGS Munoru, Onesmus Mutungi, George Rukwaro and Emilius Nderitu, JB Ojwang and a couple of expatriate lecturers. Okoth managed to walk the political middle ground during these tumultuous times, but his philosophical positions were much clearer. He was a pragmatic jurist. He understood the need to teach the social and political foundations of law without turning the law school into a school of political ideology.

He was very concerned that academic rigour should never be sacrificed at the altar of political polemics. I remember him repeating numerous times that "there is never an issue of law until there is an issue of fact". Although he never raised it, I thought that the American realists had planted a seed in his mind, in this respect.

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1 My class used to joke that we were taught Land law by a teacher who had no land (Okoth), family law by a teacher who had no family (Kamau Kuria then a bachelor) and Company Law by a teacher who had no company of any business (Leonard Njagi).

2 HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Nairobi: Acts Press, 1991).

In the final year of my undergraduate legal studies, while researching for my dissertation, which in those days was compulsory, I came across Okoth's seminal paper: The Politics of Constitutional Change in Kenya since independence, 1963-1969.[3] This piece of brilliant work decisively shifted my interest to the composite subject of constitutional law, history and politics; a subject that became the basis of my PhD thesis many years later.[4] Okoth's incisive account of the forces that shaped constitutional change in Kenya remains a very insightful piece of work.

Much later after I had joined the faculty and was teaching a course on constitutional law, I came across yet another of Okoth's gems, his essay "*Constitutions without constitutionalism: Reflections on an African Paradox*" [5]. This was an additional eye opener that cemented Okoth's place in my estimation, as the most versatile legal scholar. Yash Ghai, elsewhere in this book has evaluated the contribution of this study to our understanding of the difference between constitutional text and constitutional practice.

I became an academic partly by being in the right place at the right time. During his tenure as dean, Okoth negotiated two Fulbright scholarships with the US government, intended to support staff development within the faculty of law. These are the two scholarships that took my colleague, Justice Smokin Wanjala of the Supreme Court of Kenya, and I, to Columbia University School of Law, in the city of New York. I remember Okoth coming to check on us after we had been there for a couple of months. We much enjoyed having a first wholesome meal at his hotel.

When I returned from Columbia, Okoth had completed his term as dean, and was much sought after in the higher echelons of the university administration. We met on many Friday nights at the senior common room, where we enjoyed many, sometimes noisy, passionate arguments on law, politics and literature. It felt like being in his tutorials all over again. He was still the more informed and more schooled lawyer. During these debates, Okoth chided me about not undertaking PhD studies. My answer was, 'I teach skills. I don't need a doctorate'. In any event, I hardly met law professors with doctorate degrees during my time at Columbia; and I was assured they were the most eminent law teachers in the Common Law world!

Eventually, I gave in and started an outline of my doctoral legal research. Okoth was very encouraging although he refused to read my various drafts, insisting he wanted to see the final product. When I finally submitted my first draft, Okoth was one of my examiners and he was brutal with his comments. He was adamant that I should write as well as I spoke: a big back-handed compliment; and should remove long passages that added no value to the arguments I was making. I would never have graduated with a PhD in law without Okoth's tough love.

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3 HWO Okoth-Ogendo, 'The politics of constitutional change in Kenya since independence, 1963-1969' (1972) 71 (282) African Affairs 9.

4 Githu Muigai, 'Constitutional amendments and the constitutional Amendment process in Kenya (1964-1997) a study in the politics of the constitution ' (PhD Thesis, University of Nairobi School of Law, 2001).

5 HWO Okoth-Ogendo, 'Constitutions without constitutionalism: an African political paradox" in Douglas Greenberg, S.N. Kartz, B. Oliviero and S.C. Wheatley (Eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: OUP, 1993) Chap. 4.

Fate conspired to bring Okoth and I together on one last assignment, at the Constitution of Kenya Review Commission. The Commission under Yash Ghai, arguably one of Kenya's most celebrated constitutional scholars was beset by numerous political and technical problems. While Yash remained the vision carrier, Okoth was the political pillar of the Commission. In a deeply divided political process, both within and without the Commission, Okoth was a voice of reason.[6] He and I were natural allies. We saw the law, much or less, through the same lens-the need for law to reflect the political and social experience of society. He, however, had a better feel of the politics; and I was quite impressed by his quiet influence on the politicians. He spoke to them as he did to his students: with a very authoritative voice.

Although he had started ailing during the final stages of drafting the constitution, Okoth never let it slow him down. He continued to direct the relevant research and drafting with great zeal and enthusiasm. In many ways he felt that the constitution was his signature product. And it was. The whole chapter on land would never have been what it was, without his deep reservoir of knowledge on land law, gained from his assignments all over the world. He helped to tamper Mutakha Kangu's more radical views of devolution as federalism, and Nancy Baraza's and Wanjiku Kabira's more radical gender equity proposals.[7]

Okoth will be remembered as a great intellectual, a great teacher and a great jurist. The University of Nairobi School of Law would not have been the same without him. Generations of law students would have been the poorer, but for him. And I, for sure, would have been far less prepared for all the interesting things I have done with the law. This book is a very fitting tribute to the life and times of a truly great man and it is a great privilege for me to have been asked to write a preface.

Hon. Prof. Githu Muigai EGH, SC
Attorney General of The Republic of Kenya

6 PLO Lumumba, *Constitution Making – The Postponed Promise* (Jomo Kenyatta Foundation: Nairobi, 2007).

7 The two had insisted on a 50:50 gender equity rule. The full story is told in my forthcoming book, *The Politics of Constitutional Change in Kenya.*

CONTRIBUTORS

Professor Ben **Cousins** holds a DST/NRF Chair in Poverty, Land and Agrarian Studies at the University of the Western Cape (UWC). He holds a DPhil in Applied Social Studies from the University if Zimbabwe, and was in political exile between 1972 and 1991. He helped to establish and operate a training centre for small-scale famers in Swaziland from 1976 to 1983, and worked in agricultural extension and training in Zimbabwe between 1983 and 1986. He established the Programme for Land and Agrarian Studies (PLAAS) at UWC in 1995, now known as the Institute for Poverty, Land and Agrarian Studies, and was its director until 2009. In 2013 he received an inaugural Elinor Ostrom Award for contributions to scholarship on common property. His books include: *At the crossroads: Land and agrarian reform in South Africa into the 21st century* (UWC, 2000*)*; *Land, Power and Custom: Controversies generated by the Communal Land Rights Act* (co-edited with Aninka Claassens, UCT Press and Ohio University Press, 2008); *In the Shadow of Policy. Everyday Practices in South Africa's Land and Agrarian Reform (*co-edited with Paul Hebinck*,* Wits University Press); *Land Divided, Land Restored. Land Reform in South Africa for the 21st Century* (co-edited with Cherryl Walker, Jacana, 2015); and *Untitled: Securing Land Tenure in Urban and Rural South Africa* (co-edited with Donna Hornby, Rosalie Kingwill and Lauren Royston, University of KwaZulu-Natal Press, 2017).

Professor Gamaliel Mgongo **Fimbo** is a Professor of Law, now working on contract having formally retired in 2003. He holds an LL.B. (Hons.) from the University of East Africa, an LL.M. from the University of London and PhD from the University of Dar es Salaam. When Prof Fimbo graduated with LL.B at the Faculty of Law, University College, Dar es Salaam, HWOO was completing his second year of the LL.B. degree at the same College. Prof Fimbo taught Land Law at the University of Dar es Salaam while HWOO was teaching Land Law (designated 'Property Law' by HWOO) at the Faculty of Law, University of Nairobi. He and HWOO collaborated extensively in teaching Land Law and in research. Prof Fimbo is a founder member of the Tanzania Institute of Arbitrators (TIArb). He was a member of the Independent Bid Challenge Appeal Panel, the Millennium Challenge Account, Tanzania (MCA-T), former chairman of the Board of Directors of the Tanzania Insurance Regulatory Authority (TIRA) and a former chairman of the Appeals Committee of the Tanzania Football Federation (TFF). Prof Fimbo has chaired several arbitral tribunals and has been honoured to be appointed *Amicus Curiae* in three appeals in the Court of Appeal of Tanzania. Prof Fimbo has published several books as well as numerous articles in scholarly international and local journals. His research areas are Land Law, Constitutional Law, Environmental Law and East Africa Community Law.

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plementation, legal and institutional reform, rule of law, regulation of the state and the administration of justice. She has professional and research experience in several areas ranging from law and language to security sector governance and to gender and the law. She lectures widely and has taught extensively both in Nairobi and at Harvard and has received several awards in recognition of excellence in teaching. Prior to completing the LL.M. Program at HLS in 2008, she worked as a legal associate and pupil at Kaplan and Stratton Advocates in Nairobi, Kenya. She has worked as a research fellow at the Kenya National Commission on Human Rights, the Kenya Law Reform Commission and the Constitution of Kenya Review Commission. She holds a Bachelor of Laws degree from the University of Nairobi and a postgraduate diploma in legal practice from the Kenya School of Law. She is an Advocate of the High Court of Kenya.

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by Kojo Sebastian Amanor & Sam Moyo published in 2008 by Zed Books and in 2014 published a chapter with Klopp, J. «Kenya and the 'global land grab': a view from below.» in Kaag, M. and Zoomers, A. (eds). The Global Land Grab: Beyond the Hype, Halifax/ Winnipeg: Fernwood Publishing, and London/New York: Zed Books.

Professor PLO **Lumumba** is the Director and Chief Executive Officer of the Kenya School of Law. He is an Advocate of the High Courts of Kenya and Tanzania. He holds Bachelor of Laws and Master of Laws degrees from the University of Nairobi LL.D from the University of Ghent, Belgium and Doctor of Letters *(Honoris Causa)* from the University of Cape Coast in Ghana. He has written several books including: *Criminal Procedure in Kenya*, *An outline of Judicial Review in Kenya*, Kenya's long search for a Constitution: *The Postponed Promise and Judicial Review and Administrative Law*. He has published numerous articles in refereed journals and several book chapters. He has co-authored '*The Constitution of Kenya 2010 An introductory commentary'* with Dr. Luis Franceschi. He has also co-authored several books on Ethics. His non-legal books include; *Swearing by Kenya* and *A Call for Political Hygiene in Kenya Politics.* He has also co-authored Books on Integrity as School Series. He has recently ventured into fiction with his book *Stolen Moments*. He is a former Secretary of the Constitution of Kenya Review Commission and former Director of the defunct Kenya Anti-Corruption Commission, (KACC). He has been named and recognized by the International Commission of Jurists (Kenya Section) and the Law Society of Kenya for his exemplary contribution to the legal profession. He was recognized by the Kenya-USA Association for the Martin Luther King Jnr., Leadership Award in 1996 and was the recipient of the 2008 Martin Luther King Africa Salute to Greatness Award by the Martin Luther King Jr. Africa Foundation. He is the Distinguished Mwalimu Julius Nyerere Lecturer for 2014 and the 11th Kwame Nkrumah Lecturer at the University of Cape Coast in Ghana in 2016.

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eds. *Kenya Policies For Prosperity*, Oxford University Press (2010) (with Joseph Kieyah) pp. 309-328; "Property Rights for Poverty Reduction", in Joachim Von Braun et al, *The Poorest and Hungry: Assessments, Analyses, and Actions: An IFPRI 2020 Book*, IFPRI, (2009) (with Ruth Meinzen-Dick and Helen Markelova) pp. 227-235; and "The Land Question in Kenya: Legal and Ethical Dimensions", in *Governance: Institutions and the Human Condition*, Strathmore University and Law Africa (2009) pp. 219-246.

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Dr. Elvin **Nyukuri** is a researcher in climate change adaptation, land policy and gender spaces within environmental governance. She is also a Lecturer at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP)-University of Nairobi. Elvin earned her doctorate from the Open University, UK in 2013. Her thesis focused on climate change policies and understanding of vulnerability of indigenous tropical forest communities in East Africa to climate change. She obtained her Masters degree in Diplomacy and International Studies from the University of Nairobi and Bachelors of Education in information science from Kenyatta University. Besides teaching she is involved in various research activities looking at the climate change attribution and communication, climate compatibility and development and role of gender in the urban sector, people centered land governance, deepening democracy and climate change governance, complementarity between social protection funds and climate adaptation funds initiatives, the humanitarian policy and practice in a changing climate , planning for climate change within water, energy and food nexus at the county level. Dr. Nyukuri also serves as a programme committee member of the Leading Integrated Research Agenda for Africa, 2030 by ICSU.

Professor Charles Odidi **Okidi** is a Professor of Environmental Law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP) and Research Professor at the Institute for Development Studies (IDS) both at University of Nairobi. He has authored and edited several publications, on Law of the Sea, International Water Law and International and comparative environmental Law. Prof Okidi is the founder of a number of University programmes in environmental law and policy, notably school of Environmental Studies (MUSES) at Moi University; CASELAP at University of Nairobi and was one of the Co-founders of IUCN Academy of Environmental Law. He is a recipient of several honours and recognition including Elizabeth Haub Prize in Environmental Law (1984) for his written works and capacity building in environmental Law.

Dr Collins **Odote** is a senior lecturer at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi. His PhD study was on the interface between land and environmental law. Since then he has continued to research and teach subjects that transcend these two areas. He currently teaches property law at the School of Law, University of Nairobi. His research interests span property theory, natural resource management, environmental law and governance. He has written widely on issue to do with land, environment and natural resource governance. His relevant publications include, *The Dawn of Uhuru? Implications of Community Land Rights in Kenya*,(Nomadic People's Journal, 2013; and *Retracing our Ecological Footsteps: Customary Foundations for Sustainable Development and Implications for Higher Education in Kenya(* University of Nairobi Law Journal, 2015). He is also co-editor of two books on community land rights in Kenya: *Ours by Right: Law, Politics and Realities of Community Property Rights in Kenya*(Strathmore University Press, 2013); and *Breaking the Mould: Lessons for Implementing Community Land Rights in Kenya*' (Strathmore University Press, 2016).

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Professor Okoth **Okombo** is a Professor of Linguistics and Communication Studies at the University of Nairobi. He has published widely on issues concerning language and contributed passionately to policy debates and decisions, some of which influenced the current Constitutional provisions on language in Kenya. Professor Okoth Okombo is an occasional commentator on language issues in legal discourse.

Ruth Adhiambo **Okoth-Ogendo** is the wife to the late Professor H. W. O. Okoth-Ogendo.

Dr. Liz Alden **Wily** is a New Zealand-born political economist who has specialized in land tenure reform over three decades in 23 states. She lives in Kenya and works mainly in Sub Saharan Africa as technical adviser, researcher, mobilizer of community-based initiatives, and designer of post-conflict tenure reforms. Presently she invests most time in facilitating initiatives she has helped to launch, including landmarkmap.org, a global mapping and data facility, and the Global Call to Action on Community Land Security, both of which promote recognition of the communal land rights of 2.5 billion people, and the Africa Community Land Transparency Index being launched by 40 NGOs in West and Central Africa. Liz also works informally in Kenya in various capacities related to community lands. She is a research associate of the Van Vollenhoven Institute at the Leiden Law School and of Katiba Institute in Nairobi. Liz first met Okoth in the 1990s and shared many enjoyable occasions with him in following years advocating for community land security, including in Uganda, Norway and South Africa. Her most recent publication is 'Customary tenure: remaking property for the 21st century' in Comparative Property Law, M. Graziadei and L. Smiths (eds), Edward Elgar Publishing.

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While the death of any staff member is always a sad moment, the death of Professor Hastings Wilfred Opinya Okoth Ogendo marked an important and sad chapter in the life of the School of Law, University of Nairobi. Professor Ogendo was not any staff member. He was an icon, a senior member of staff, a towering academic and a person whose life was intertwined with the history of the School. During his burial, the School committed to celebrating his life and contribution to the University of Nairobi and the world through several ways. One of this was a publication in his honour.

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This book is, consequently a collective effort of many individuals and institutions. We hope it starts a tradition of celebrating iconic scholars and their contribution in Kenya.

ABBREVIATIONS

3Cs	Constituency Constitution Committees
ACHPR	African Charter on Human and People's Rights/
IWGIA	International Work Group for Indigenous Affairs
AfDB	African Development Bank
ANC	African National Congress
AU	African Union
CA	Court of Appeal
CAR	Central African Republic
CC	Constitutional Court
CDM	Clean Development Mechanism
CDR	Centre for Development Research
CIA	Central Intelligence Agency
CKRC	Constitution of Kenya Review Commission
CLEAR	Centre for Land Economy and Empowerment of Women
CLRA	Community Land Rights Act
COTU	Central Organisation Trade Unions
COVAW	Coalition on Violence Against Women
CREAW	Centre for Rights Education Awareness
CSO	Civil Society Organizations
CSP	Corporate Strategic Plan
DfID	Department for International Development
DPGL	Development Partners Group in the Land Sector
DRC	Democratic Republic of Congo
DTM	December Twelfth Movement
EAC	East Africa Community
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
EPZ	Exclusive Processing Zones
FIDA Kenya	Federation of Women Lawyers - Kenya Chapter
GTZ	German Agency for Technical Co-operation
HC	High Court
HSRC	Humanities and Social Sciences Research
IDS	Institute of Development Studies
ILEG	Institute for Law and Environmental Governance
ITP	Institutional Transformation Programme
IUCEA	Inter-University Council of East Africa
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KCSE	Kenya Certificate of Secondary Education

KDA	Kigamboni Development Agency
KENSAD	Kenya Students Association in Dar
KHRC	Kenya Human Rights Commission
KLA	Kenya Land Alliance
KPU	Kenya Peoples Union
KTN	Kenya Television Network
LLB	Bachelor of Laws
LLM	Master of Laws
LPI	Land Policy Initiative
LSNSA	Land Sector Non-State Actors network
Narc	National Rainbow Coalition
NCWK	National Council of Women of Kenya
NEMA	National Environment Management Authority
NET	National Environment Tribunal
NET	National Environment Tribunal
NGO	Non-Governmental Organisation
NLC	National Land Commission
PCC	Public Complaints Committee
PCC	Public Complaints Committee
PhD	Philosopher's Degree
RDP	Reconstruction and Development Programme
RECONCILE	Resource Conflict Institute
REDD	Reducing emissions from Deforestation and Forest Degradation
SA	South Africa
SERC	Standards and Enforcement Review Committee
SIDA	Swedish International Development Agency
SSA	Sub-Saharan Africa
TAC	Technical Advisory Council
TANU	Tanganyika African National Union
TGCL	Tanzanian-German Centre for Post-Graduate Studies in Law
TPA	Terrestrial Protected Areas
TYL	Tanu Youth League
UASU	University Academic Staff Union
UDSM	University of Dar es Salaam
UK	United Kingdom
UN	United Nations
UNECA	United Nations Economic Commission for Africa
UN-Habitat	United Nations Human Settlements Programme
US	United States
USAID	United States Agency for International Development
USARF	University Students African Revolutionary Front
USU	University Staff Union
WSSD	World Summit on Sustainable Development
ZACC	South African Constitutional Court

CHAPTER 1

INTRODUCTION

Patricia Kameri-Mbote and Collins Odote

Hastings Wilfred Opinya Okoth-Ogendo was, until his death on 24 April 2009, a Professor of Public Law at the School of Law, University of Nairobi. He passed away in Addis Ababa, where he had gone to help develop a land policy framework for African countries under the aegis of the African Union, the African Development Bank and the United Nations Economic Commission for Africa. He is remembered as a distinguished scholar, an outstanding teacher and a professional who was committed to applying his knowledge to influencing public policy in order to promote the quality of governance at the local, regional and global levels. One can properly say that with exemplary commitment, he pursued that objective up-to his grave.

Okoth relied on the power of the intellect to influence change as a distinguished professor, teaching and publishing in such areas as law and development; property and land use law and policy; environmental governance; natural resources' law; jurisprudence and legal theory; law, science and technology; and comparative constitutions and constitutionalism. In every case, Okoth sought to promote good governance. His reputation as a scholar of exceptional quality attracted invitations for him to serve as professor for different durations particularly in universities in Africa, continental Europe, United States and United Kingdom, where he forged fond colleagueship and teacher-student relations with the numerous people whose lives he touched. Similarly, diverse local, regional and global organisations sought his expertise to develop policies and legal instruments for promoting good governance in those jurisdictions. He particularly excelled in the development of legal theory and practice on land as property, and land use.

Professor Okoth-Ogendo was, without doubt, the leading voice and expert on property rights and land law in Africa. This position earned him the sobriquet of *The Guru.* He wrote widely and deeply on land law, producing a seminal book, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*[1] and many articles and book chapters on land tenure, use and the relationship between the two. He also participated in the reform of the land laws of several African countries, including Malawi, Uganda and Kenya. While Okoth's death was a sad loss for his family, friends and the continent, the enduring

1 HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Nairobi: Acts Press, 1991).

challenge is how to celebrate his contributions. As a scholar, Okoth's most beneficent legacy is his literary works, a contribution that has shaped the society and continues to influence academic instruction, research, policy and legislative developments and reform across the African continent and beyond.

In Kenya, Okoth was instrumental in the process of preparing the country's first National Land Policy, which was adopted after his death. He was also instrumental in preparing the country for a new Constitution, first through his writings on constitutional law and development, the most celebrated being 'Constitutions without Constitutionalism: Reflections on an African Paradox',[2] and second, in the preparation of the first comprehensive draft of the much celebrated Constitution of Kenya, 2010. He played a critical role as a member of the Constitution of Kenya Review Commission (CKRC), which collected views from Kenyans on the required reforms to the country's Constitution and on whose basis the Draft Constitution, which was discussed at Bomas of Kenya, was prepared. This draft formed the basis for the eventual text adopted at the constitutional referendum on 4 August 2010.

This *gedenkschrift* titled *The Gallant Academic: Essays in Honour of HWO Okoth-Ogendo,* is an honour befitting the academic that was Okoth and remains evident in his indelible intellectual footprint. It explores themes at the centre of Okoth's academic writings - *land* and *constitutional governance.* While both themes are addressed in the book, the central message is that of land governance under a constitutional framework, highlighting the fact that land permeates the social, economic and political realms of society. The book focuses on proxy issues that are key to these two themes and to which Okoth dedicated time explicitly and implicitly, namely: environmental governance; gender and land; community land rights; and climate change.

Beyond Okoth's intellectual forays, this *gedenkschrift* offers a unique and interesting introspection into legal scholarship in Kenya and the evolution of the University of Nairobi's legal academy. Okoth's days at the Dar es Salaam College of the University of East Africa, where all lawyers in East Africa were trained at the time, and the ideological divides among faculty members in the early days of the then Faculty of Law, are very illuminating. Indeed, upon graduation in 1969, Okoth joined the Law Faculty of the nascent University of Nairobi. The story of the School of Law at the University of Nairobi is impossible to tell without canvassing Okoth's life as an academic - as is demonstrated by former Chief Justice of Kenya, Dr Willy Mutunga, Hon Justice Professor JB Ojwang and Professor Patricia Kameri-Mbote in Chapters 4, 5 and 15, respectively.

Okoth's contributions to the ideological, pedagogical and institutional developments at University of Nairobi's School of Law are indeed remarkable. During his 40-year tenure at the School, he was indisputably the voice of wisdom and reason during trying moments - such as the contested dean's elections; conflicts between faculty members, especially in the run-up to the dean's elections; and the frequent conflicts between the staff at the School and the central university administration. The respect and authority Okoth commanded speaks

2 See D Greenberg, et al, *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press: New York, 1993).

to an aspect of faculty leadership that he espoused but is often ignored – the importance of intellectual achievement and acceptance thereof by the faculty that one leads. Okoth was dean as an accomplished intellectual and, throughout his life at the School, he commanded respect not on account of the political power of his office, but because of his intellectual contribution to the institution and his many academic accomplishments. For two decades after serving as dean, he continued to teach at the School and was an enigma to staff and students. His presence at the School was an opportunity for staff and students to engage him on diverse issues. Presence and availability is another aspect of academic seniority that is not emphasised. Universities need to provide suitable and comfortable accommodation for senior scholars such as Okoth so that they can mentor and model academic life for upcoming faculty.

Interestingly, Okoth did not stick to his old subject of property law and guard his turf as many senior faculty members were wont to do. He let younger faculty take on the course assured that they had the requisite resources to do a good job because he had written extensively on the subject. He, unlike other senior faculty, ventured into new subjects such as law, science and technology; law, democracy and governance; comparative constitutional law and natural resource management. This illustrates both his intellectual acuity and adaptability. Okoth co-taught new courses with younger faculty and used this as an opportunity to mentor rather than to lord it over his juniors.

The book is divided into five parts. Part I focuses on Okoth the person and has five contributions. His wife Ruth Adhiambo Okoth-Ogendo shares her view of his life as a husband, father and family man. It is clear from the first chapter that while Okoth's family life was very robust, it was intrinsically intertwined with his life as an academic and a global scholar. Prof PLO Lumumba in Chapter 3 discusses Okoth the 'guru' as the personification of excellence. He draws from his interaction with Okoth as his teacher at undergraduate and graduate levels as well as his boss and co-academic at the University of Nairobi; and as a colleague in various assignments. He opines that in all facets of Okoth's life, he effused excellence and wisdom. Chapter 4, by the former Chief Justice of the Republic of Kenya and President of the Supreme Court, Dr Willy Mutunga, provides valuable insights into Okoth's life as a student at the then Faculty of Law at the University of Dar es Salaam. It also offers a rare peek into his early life as an academic at the then nascent Faculty of Law at the University of Nairobi. He discusses Okoth's role as a bridge builder between the conservative and radical views of the diverse teaching and student fraternity. Mutunga casts Okoth as a pragmatist who took the middle ground, was trusted by colleagues and always sought to get things moving. An example of a situation where Okoth came out as a trusted faculty member was when his colleagues elected him dean despite the fact that he had not satisfied the requirements. The university administration, which was initially opposed to his election, eventually appointed him as acting dean, senior lecturer and chair of the department. This enabled Okoth to meet the requirements and eventually serve as substantive dean.

Chapter 5 is authored by a Supreme Court Judge, Justice (Professor) Jackton Boma Ojwang, who previously taught with Okoth at the School of Law, University of Nairobi. He

writes about Okoth the academic and paints the picture of a person who greatly shaped the nature of the legal academy and academics in Kenya. As pointed out earlier, Okoth's footprint is discernible in the historical development of the oldest law school in Kenya and his scholarship has formed an integral part of the normative and pedagogical approaches adopted by the School of Law at the University of Nairobi over the years. Justice Ojwang opines that Okoth's life exemplifies the importance of commitment to scholarship and discounts the perception that professors are destined to be poor. Indeed, in Justice Ojwang's words, Okoth was not a poor man and he 'sustained himself by the pen'[3]. Chapter 6, by Prof Okoth Okombo, is an interesting analysis of Okoth's use of language both in the written and spoken forms, emphasising the weight of his delivery and its effect on his audience. He focuses on Okoth's voice, which he equates to both his oral and written delivery. In both instances, he argues, the most remarkable quality of Okoth's voice was the weight and boldness of his oral and written works.

Part II turns to the impact of Okoth's work in discourses on land tenure. Chapter 7, the opener to this section, is authored by Prof Gamaliel Mgongo Fimbo, who was a year ahead of Okoth at the University of Dar es Salaam. Originally presented at the inaugural lecture in honour of Okoth on 13 June 2014 at the School of Law, University of Nairobi, the chapter or paper carefully weaves through Okoth's treatment of land law and points to his ingenuous handling of a subject that many students find difficult to fathom due to its technical nature and breadth. Prof Fimbo articulates and explains the land law flow chart that Okoth used to teach, arguing that it provides a solid foundation for teaching land law for all time as evidenced by discussions on land law curriculum and teaching approaches at both Nairobi and Dar es Salaam universities. He also argues, just like Okoth, that land law traverses all the other disciplines of law. This theme is further pushed by Prof Ben Cousins in Chapter 8, who problematises the fundamental and age old question of what constitutes property in the African social order. Using the example of post-apartheid South Africa, Cousins confronts the failure of modern formal property systems to secure the land rights of the urban and rural poor, proposing instead alternative paradigms to the dominant narrative of individual titling. Significantly, this is a theme that resonates with Okoth's works on community land rights[4] and agrarian reform.[5]

Dr Liz Alden Wily assesses the progress in African states' recognition of customary rights in land law in Chapter 9. This is a subject that was dear to Okoth, who argued that the perception of African commons as *terra nullius* amounted to an expropriation of the land rights of Africans who held land communally. While she finds that not many states have customary land rights recognised in their laws, it is important to note that community land rights are not only included in Kenya's Constitution but a Community Land Act

3 Drawn from HWO Okoth-Ogendo and JB Ojwang's shared Dholuo mother tongue, "*Chiemo gi kalam"*

4 See, HWO Okoth-Ogendo, 'The nature of land rights under indigenous law in Africa' in A Claassens & B Cousins (eds), *Land, Power & Custom* (UCT Press: Cape Town, 2008) 99; HWO Okoth-Ogendo, 'The tragic African commons: A century of expropriation, suppression and subversion' Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005, 2.

5 See generally, HWO Okoth-Ogendo, 'Some issues of theory in the study of tenure relations in African agriculture' (1989) 59 (1) African Journal of the International African Institute 6.

was enacted in August 2016. This is the culmination of battles by many people, including Okoth, to have this category of land rights recognised. Examples of these battles are canvassed in Chapter 12. Dr Collins Odote takes up the theme of community land rights in Chapter 10, addressing the institutional arrangements for governing community land rights in Kenya. He argues that the plurality of normative regimes that govern community land rights necessarily leads to a plurality of institutions. This is what Dr Odote characterises as the conundrum that he sets out to unravel in his chapter.

Part III addresses broader governance issues that Okoth wrote on, his most cited work being 'Constitutions without Constitutionalism'.[6] In Chapter 11, Prof Yash Pal Ghai examines the concept of constitutionalism, delving into the various meanings and uses of the term. He uses three essays (by Okoth, Prof Issa Shivji and himself); literature on constitutionalism from around the world; and the writings of select African scholars to unpack this complex term. He seeks to distinguish constitutionalism from constitutions, arguing that the latter is just but a document. It is only through constitutionalism that life is breathed into the document. In Chapter 12, Odenda Lumumba tells the story of Okoth's engagement with civil society organisations working on land issues. He demonstrates the diverse ways in which Okoth contributed to the civil society organisations' quest for national land policies through scholarly works. Indeed, as Odenda Lumumba argues, Okoth was involved in advising on, drafting and pushing the land agenda in Kenya and Africa - with key civil society organisations as his allies. Based on this, the writer makes a case for collaboration between civil society and the academy in pushing for reforms in diverse governance spheres.

Prof Karuti Kanyinga's Chapter 13 demystifies the concept of land tenure in Africa. Kanyinga demonstrates the impact of Okoth's work beyond law, and particularly in the field of politics - discernible in his tackling of the land question over different historical epochs. He specifically focuses on Okoth's contribution to the re-orientation of studies on land from a Eurocentric viewpoint to a more nuanced outlook that took on board the political economy of land by focusing on his own doctoral work. Interestingly, Okoth's conceptual rendition of the land question, which intrigued Kanyinga as a doctoral student, forms part of the former's footprint in the national and regional policies on land.

Prof Wanjiku Kabira and Dr Nkatha Kabira provide an interesting perspective of Okoth as a Commissioner in the Constitution Review Commission of Kenya in Chapter 14. They describe Okoth as the dream keeper whom diverse people trusted to validate their viewpoints and translate them into constitutional text as they contributed to the fashioning of a new social contract for Kenya. They credit Okoth with bridging the gap between law and peoples' lived realities in the drafting of the Constitution, and bringing his vast global experience to influence and bear on local circumstances. They use a women's lens to demonstrate Okoth's versatilities and abilities.

The Kabiras' chapter is a good bridge to Part IV, which looks at Okoth's influence on the discourses on gender and land. Prof Patricia Kameri-Mbote, in Chapter 15, documents

6 H.W.O Okoth-Ogendo, 'Constitutions without constitutionalism: an African political paradox' in Douglas Greenberg, S.N. Kartz, B. Oliviero and S.C. Wheatley (Eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Chapter 4) (OUP: New York, 1993).

Okoth's implicit footprint along the path to the recognition and protection of women's rights to land in Kenya and in Africa. She argues that though Okoth never wrote on gender and land, his work provided anchorage for such work because of its flavour of justice and equality. Dr Agnes Meroka follows on this theme in Chapter 16 by looking at the intersectional discrimination of women in land matters. Focusing on the Maasai in Kajiado, she argues that there are gendered impacts of land loss on the Maasai as a community but the mechanisms and strategies adopted to address that loss do not take the gender perspective.

Part V addresses another running theme in Okoth's work – land use. Dr Elvin Nyukuri looks at the experiences of a forest dwelling community (the Ogiek) within the context of a changing climate and measures taken to mitigate and adapt to that change in Chapter 17. Okoth was involved in the preparation of the part of the Intergovernmental Panel on Climate Change Report dealing with land use and climate change in 2007. Dr Nyukuri's chapter, like Dr Meroka's, merges two themes in Okoth's work – justice for a marginalised category and land use. Chapter 18 looks at an interesting case of pollution caused by sustained emissions from Kenya Metal Refineries at Owino-Uhuru slum in Mombasa, public protests surrounding it, and the legal regime governing the environment in Kenya. In this chapter, Prof Charles Okidi and Dr Collins Odote illustrate how pollution continues despite robust provisions in the Constitution and the framework environmental law, the Environment Management and Coordination Act.[7] This, in their view, validates Okoth's arguments on environmental governance[8] and constitutionalism.

Part VI comprises annexes, which include Okoth's curriculum vitae as evidence of his contribution, a poem authored by Okoth (The Dancing Maniac) and select messages sent to Okoth's family upon his demise. These provide a more holistic picture of Okoth as a family person, friend, and local, national, regional and global scholar. It is clear from these accounts that Okoth left a great intellectual legacy that will continue to spur new works of scholarship and initiatives to ensure that there is justice and equality not only in land matters but also in other spheres. The book demonstrates the critical and catalytic role that scholars/academics play in society. This requires that scholars remain true and committed to their calling and do not join what Mahmood Mamdani refers to as *Scholars in the Marketplace.*[9]

7 For instance, see Article 70 (1) of the Constitution of Kenya and sections 3, 72, 87 and 93 of the Environment Management and Coordination Act, Cap 387.

8 See HWO Okoth-Ogendo, 'The Juridical Framework of Environmental Governance' (1999) in HWO Okoth-Ogendo and Godber W. Tumushake (eds), *Governing the Environment: Political Change and Natural Resources Management in Eastern and Southern Africa*. (Nairobi: ACTS Press, 1999) 41, 55-56.

9 See Mahmood Mamdani, *Scholars in the Marketplace: The Dilemmas of Neo-Liberal Reform at Makerere University, 1989-2005* (Dakar: Council for the Development of Social Science Research in Africa, 2007).

PART I: OKOTH THE PERSON

CHAPTER 2

OKOTH-OGENDO THE MAN

Ruth Adhiambo Okoth-Ogendo

I. OKOTH THE HUSBAND AND FATHER

When I first met Okoth, there was no doubt in my mind that I had met the love of my life. He was charismatic, humble, charming and clearly an intellectual. His rather poetic expressions of love immediately caught my attention. In fact, he wrote one of his poems one afternoon as we sat on the boulders sprouting out of water at Hippo Point on the shores of Lake Victoria as the waves in the lake made a refreshing sound. Okoth was very playful, romantic and fun to be with. There was never a dull moment with him. Within three years of a steamy courtship, we were married. God blessed our marriage with five wonderful children, namely: Niki, Tshazibane, Rodney Walter, Hastings Wilfred Okoth (Junior) and Annmarie.

As a husband and father, Okoth loved his family. It did not matter what was at stake at his place of work. He would always try to have quality time with each of us individually once a week if he was in town. For example, he routinely took his daughter Anne for pizza dates on Tuesdays. His namesake, Hastings Wilfred, always knew that Thursdays was his date with dad in the office. Wilfred would ritually walk from the Main Campus to Parklands Campus to be with his dad. Rodney was the designated chauffer on Saturdays for morning errands. This was Okoth's way of ensuring that he spent quality time with every child as he mentored each of them. On Sundays, he would occasionally take the whole family out for fun day and a luncheon date at the Hotel Intercontinental. Surprise candlelit dinners were not uncommon for Okoth to organise just for the two of us.

When *Sheng* started to take root in the country, Okoth would come home and tell me humorously, *"Mummy, I have some chums, dress up we go out for dinner*." The first time I heard him utter those words I asked him what *"chums"* were. He laughed sarcastically and referred me to the children who told me to dress up quickly because dad was saying he had *dough,* confusing me even further. This would cause prolonged laughter in the house, something I did not find funny. It is only later on that I discovered that *chums* and *dough* meant money for the evening candlelit dinner. Okoth was very humorous and always played and joked with the family and stayed close whenever he could. How we miss those good days!

He also loved watching cartoons and reading cartoon magazines. He would often watch the *Jungle Book* cartoon movies and read Any Capp cartoon books with the children even when they had grown. His favourite character in the *Jungle Book* story was *Baloo*. The children would sit around him and they would make fun by mimicking the cartoon charac-

ters in the story with a lot of amusement. One notable character trait of Okoth was creating light moments. He routinely did this as soon as he arrived home, calling everybody using pet names mainly derived from cartoon characters. This would make us all burst into laughter even before he got into the house. Immediately, the children would escort him to his regular seat in the house and cluster around him for more fun moments. But do not be fooled, Okoth was also very firm, a scenario that would play out often when reviewing the children's school work, particularly if one of the children's performances did not meet his high threshold. He did not accept defences such as *"But dad, I tried".* He would always retort and say; *"I don't remember taking you to school and paying fees for trying. I took you to school to perform."*

"*But dad, this is good. The teacher appreciated it*", a child would say, to which Okoth would reply, "*Then your good is not good enough. Get serious. You can do better than this."*

To date, his children have not accepted the harsh reality of losing a pillar of their lives and their best friend. His son, Tshazi, in an article entitled: "A letter to my Dad -- who will deliver it?" actually best captures what Okoth was to his children: Part of the letter reads:

> *Dad, your love in my conscience was absolute and unmatched. You were compassionate, stern with a brilliant sense of humour. Your jovial encouraging nature nurtured my strengths, developed my talents and inspired a purpose in my life. You were a leader, a teacher, a friend, my fortitude of solace. You were my inspiration when I was lost, my pillar of integrity when I was unsure. You took the lead to inspire values in me and encouraged my decisions to become a product of those values. Your profound excellence in your profession, your character and your life mission for the benefit of others unquestionably inspired a drive in us to succeed. To say that you were the most loving, industrious and resilient man I have ever known is an understatement. I am proud to be your son, NGONG, as you fondly referred to me.*

It was always admirable to watch the way Okoth perfected the art of balancing his professional, social and family life. At home, he was a perfect husband and a father one would dream of. In his social life he was an entertainer who would make those around him die with laughter, while in his professional life he was the *guru* many students looked up to for enriching their studies. I guess he achieved this through his easy character and humility. Okoth was a very peaceful person both at home and in public, always shying away from controversies despite the nature of the challenge. At home, our disagreements as a couple were always confined to the bedroom. A visitor walking in on the spur of the moment would never tell that we were having an argument, neither would the children. This is because Okoth was always quick to take responsibility for his mistakes and become as meek as a cat when he was in the wrong. This made it easy for us to sort out our issues. Once he went to a social joint owned by his friend and colleague, Prof Otieno Osanya, in the company of his late brother, Kepha Ogendo. A fight broke out and the next thing Kepha knew, Okoth had disappeared from the place. He sneaked out under the tables, took a taxi and came home leaving even his driver behind. We always laughed at this incident.

II. HIS EARLY LIFE

Okoth's roots can be traced to a small village in Gem Rae, Nyakach in Kisumu County where he was born. His Father, Samuel Ogendo was polygamous, with Okoth's mother as the second wife. Okoth was born in 1944 as the first child of his mother, Jennifer Akumu. In the early years, my mother in-law loved telling us the life history of Okoth as a child, especially when one of the grandchildren exhibited a character that reminded her of Okoth in his younger days. Apparently, Okoth began to demonstrate his intellectual potential and humorous tendencies right from his youthful days. It was hilarious to the children to hear their grandma tell them that their dad hated school at the beginning of his schooling, and often played hide and seek with her to avoid going to school. The most hilarious incident was when Okoth left for school in the morning but on the way, climbed up a tree and stayed there the whole morning, only climbing down during lunch break as other children were going back home. He would wait for his classmates and join them at the tail end as if he was in school with them and then ask them what they were taught. But come end of the term, despite his cheeky behaviour, he would be top of his class. My mother-in-law would always tell this story with a lot of love and admiration for her son.

As he grew, Okoth began to exhibit tendencies of a responsible and respectful child, one who was extremely obedient to his parents and supportive of his siblings. He started to embrace education, honesty and yearned for knowledge as he matured. His older brother Jonathan would later tell us that Okoth often carried his books with him to read in the fields as he grazed his father's cattle. Stories have it that one day, he was so engrossed in his books that he forgot his primary responsibility of taking care of the cattle. By the time he looked up, the cattle were nowhere to be found, having strayed into and destroyed a neighbor's maize farm. The punishment he received from his father after this taught him a life-long lesson, an experience he would frequently share with his children. It taught him to be responsible, focused and hard working. It also taught him the art of balancing responsibilities, something he perfected as an adult.

He quickly earned a place in his father's good books for being responsible and hard working. He would later become a source of inspiration to many people in his home area, including his school mates and family. This was best demonstrated in the wake of his father's death in the early 1990s when he became the pillar of strength to the larger family. He encouraged his siblings and became their source of comfort and an automatic replacement of his old man by chairing all family meetings. His opinion was always valued by the family, always acting as the moderator within his larger family in case of disputes.

Okoth often used the story of his humble childhood, particularly of obedience and hard work, to mentor his younger siblings and even his children. He used to humour his children by telling them that he wore his first pair of shoes only when he went to high school in Maseno and that it took a while for his feet to register that shoes are a necessary component of one's attire.

III. HIS LIFE WITH THE OUTSIDE WORLD

The ever assertive and self-confident Okoth cut an intimidating demeanour yet he managed to come across as a humble and down to earth man with a great sense of humour who cut effortlessly through the socio-economic strata like a razor; always at ease with both the high and low of the society in equal measure. He would socialise with the society's high and be at home with the seemingly low by often being seen cracking jokes with them. He loved and supported his domestic workers in very many ways, including accompanying them to their rural homes in times of bereavement and at other important functions. Okoth never discriminated against anyone in his social life, perhaps because of his humble upbringing.

To his regular social friends, he loved the finer things in life from good food to wine, a kind of *swanky* life, yet to his family he was a very simple, loving husband and father. Only those who interacted closely with him fully appreciated his humility and demeanour. His son-in-law, John Gazusa, had this to say about his father in-law:

> *Professor Hastings Okoth-Ogendo, from what I was able to observe, took me in like he took in all of those that he interacted with. It was a brief encounter with open arms and without hesitation. That said, however, it was absolutely clear that this acknowledgement came with unspoken rules that when engaged, challenged you to dig deep within yourself to understand what it was that you stood for, no matter the subject of discussion. It was easy to see that clearly at an intellectual level, this was a giant of a man steeped in the intricacies of law, history and life experience. But what struck me most was the humility of the man, the simplicity of the man at the delivery level, and the inclusivity of the man at the human level. A trinity that is hard to find, but when found is a pleasure to be a part of. I knew dad for a short time, but it felt like an eternity. Such was the humanity, as I have come to learn, of Professor Hastings Okoth-Ogendo. I was humbled to earn the position of the first son in his family.*

Daddy, as we all referred to him in the family, had a very subtle but infectious sense of humour, a trait that made him such fun to socialise with. Occasionally on Saturday afternoons, he would join his group of friends from the lakeside. After a few glasses of wine, Onyango Bon, a member of the group and Okoth's great friend who was talented in entertainment gimmicks, would take a stick (in the absence of a guitar) and sing Lingala and old music. Professor would take to the floor and dance with others until the wee hours of the morning. They would be so deep in their fanfare until we, their spouses, started wondering whether they were the same serious people we saw in the office and at home. It did not matter that they did not have formal music to entertain them. But come morning, Okoth would quickly transform into a totally different personality, so serious and ready to do serious work that any comments about the events of the previous evening would irritate him. Perhaps the lighter side is one trait of Okoth that only his family knew.

One day a student walked into his office and found me comfortably reading. The first question she asked me, perhaps not knowing who I was, was *"You mean you can actually sit in this man's office and feel that comfortable?"* I asked her *"Why not?"* Her response was, *"He is so serious and scary."* I explained to her that the serious face she was noticing was just a facade of a very humble, likeable and down to earth person.

Okoth appreciated and cherished his friends and colleagues. He demonstrated this by immortalising some of his great friends by naming his children after them. He named his eldest son after his great Zulu friend and Oxford University college mate, Tshazibane, while the second son, Rodney Walter, was named after his teacher and friend at the University of Dar es Salaam.

To the wider world and in professional circles, he was a leader, a mentor with almost intimidating academic credentials. Okoth was well recognised for his brilliance, focus and charisma. I had the privilege of accompanying him to some of the conferences and workshops that he was involved in both within and outside the country. I noted during those meetings that other participants often took his views very seriously and many of them would consult him after the meetings and exchange contacts with him. It was such a joy and privilege to see him draw such immense attention from the audience because of his brilliance. How I wish I could rewind the clock to hear him and share such moments with him again!

In his last meeting in Addis Ababa, just a day before he passed on, he received such a moving and emotional standing ovation from the audience at the end of his presentation**.** Little did we know that this was to be the last time he would be standing at a podium. It was like sendoff accolades for his good work over the years. Twenty-four hours later, the world was shocked by his sudden death. The image of Okoth embraced by the rest of the world was best displayed by the many moving and heartfelt messages the family received during and after his death. Some of these messages are contained in Part VI of this book.

Professor was committed to his country, Kenya, as well. This was evident in the many leadership and professional roles he undertook that helped shape the destiny of Kenya. For example, he was instrumental in the making of the 2010 Constitution and the National Land Policy. To Okoth, research and writing were like a walk in the park. He published extensively in high impact journals on a variety of themes, including African constitutional history, governance issues, constitutional theory and law of property in land. He also wrote books on land law, notable among which is *The Tenants of the Crown*. He was evidently committed to producing well- researched works for professional and academic use. His brilliance and expertise had him sought after by many African countries like Malawi, Zambia, Uganda and Tanzania as well as others in Latin America and beyond. By the time of his death, he was fully involved in the Uganda land policy review process. It is, therefore, not surprising that he acquired a leadership name, 'The Guru' of land law and to a great extent constitutional law.

Professor, as he was fondly referred to, enjoyed his teaching profession and helped to mould many young minds with such intensity that only he could articulate, himself being an alumna of Maseno and Alliance High Schools, Makerere, Oxford and Yale universities. He taught generations of law students at the University of Nairobi and at New York University, among others. I would be right to say that majority of the Kenyan legal professionals passed through his class and would remember him as one of the great teachers of land law and constitutional law. He was arguably a leading land lawyer of international repute who influenced the lives of many in the legal fraternity. Most of his students have risen to great heights in their professional and intellectual capacities through his men-

torship and the intellectual foundation he gave them. He was always proud of his bright and successful students and openly praised their achievements. Some of these include Prof Patricia Kameri-Mbote, past Dean of the School of Law, University of Nairobi; Prof PLO Lumumba, Director of the Kenya School of Law, Prof Phoebe Okowa-Bennum, Prof Githu Muigai, the Attorney General of Kenya, Dr Smokin Wanjala, Judge of the Supreme Court of Kenya, Dr Bondi Ogola, Prof Otieno Odek, Judge of the Court of Appeal of Kenya and director of the Judiciary Training Institute, Dr Collins Odote of the Centre for Advanced Studies in Environmental Law and Policy, University of Nairobi and many more he taught, mentored and was proud of. In fact, there is a joke in the circles of those he taught in the legal profession that goes as follows: "*You were not taught well if you didn't pass through Prof Okoth-Ogendo's class."* His daughter Niki also captured this in an article she wrote about her father entitled "*The legendary land doctor."* She wrote in part:

> *So, dad, what land issues did God call you for so urgently to solve that you couldn't wait to tell us? As a legendary land doctor, please tell us, what happens when a giant elephant is swallowed by the very land it so dearly protected? Who harvests the memory locked within, for we know that the elephant never forgets and the land always remembers.*

Interestingly, Okoth's grandchildren, Malaki, Elijah and Ruth, whom he never had the privilege to see, get very fascinated by the tale of a grandpa who was a legendary land doctor. They become very attentive whenever a story is told of a grandpa who treated miles of land that stretches from the bottom of the earth to the sky. In their innocence and to the amusement of family members, they would ask whether their grandpa gave injections to this sick land. This is a question we have left to grandpa to answer in his next class! In the process, the younger Ruth would give such an infectious smile quite oblivious of why everyone else around her is amused.

Okoth was arguably an erudite individual who read whatever was available. Reading was part and parcel of him. He was widely read and often lamented that he would not know what else to do if he could not engage himself in intellectual thought and research. Whenever he was not spending time with the children at home or amusing himself, he would be in his study room writing his research papers. He wrote and kept a collection of books for research work and teaching.

IV. HIS DEATH AND ITS IMPACT ON THE FAMILY AND FRIENDS

Okoth was upbeat in the week leading to 17th April 2009 when he was to travel to Addis Ababa. He spent a lot of time contacting the people in the then Ministry of Agriculture and non-governmental organisations connected with land issues as well as polishing his land policy paper. He was, however, disappointed that the then Minister for Agriculture was rather uncooperative. Okoth lamented that the minister refused to give him a hearing for a briefing on such an important report. This did not dampen his spirit. He was already evidently excited about this trip and asked me if I could take time off work for a week to join him. I had not been to Addis Ababa and he thought it was a great opportunity for me to not only

visit the city, but also to listen to his final presentation as the chair of the African Task Force to the joint conference of African ministers of agriculture, land and livestock on land policy guidelines in Africa. He argued that he was not likely to be back to Addis Ababa soon since he had been offered a teaching contract at the University of Cape Town in South Africa.

He had planned for this contract to allow him to take his last two children, Wilfred Jnr and Annemarie with him to South Africa. He was trying to get Annmarie, who had just passed her Kenya Certificate of Secondary Education (KCSE) examinations to join Monash University in South Africa. Wilfred had just been offered an internship job with Tectura International, an architectural firm, and had been posted to their office in Pretoria. Mom was not going to be left behind. After all, I had already attained the minimum requirement of 50 years of age for retirement. I opted to take an early retirement so as to be part of the plan.

Okoth spent the whole of the Saturday he was travelling to Addis Ababa helping Annemarie put her college documents together. It was a very busy but happy week for us. Rodney had just come home from Kent University in the United Kingdom and Okoth decided to welcome him home by taking us all to what we refer to today as "*the last meal with dad"* at the Hotel Intercontinental just before he travelled. During that luncheon, he told the children to order anything they wanted from the menu. There was a light moment just before we ordered when we saw the children consulting each other with animated faces before they ordered wine. Dad turned to me pretending to be also consulting and whispered, *"See, your children are drinking wine."* I whispered back to him and asked, *"Why did you give them a blank cheque to order anything from the menu? You see they are now copying you?"* Then he said, "*That is how to know what they do when we are not with them. I will address this when we come back from Addis. Don't spoil the day. Let it pass."* It was all laughter after that. Little did we know that it was the last time we would have a meal with dad at the Hotel Intercontinental.

Okoth left for Addis Ababa on Saturday 18th April 2009 at 2 pm aboard Ethiopian Airlines. He left me behind to clear with my employer and join him the following week on Tuesday 21st April 2009. On the way to the airport, he reminded me to carry for him the new suit that Rodney had just brought from the United Kingdom. He wanted to wear it on the last day of the conference at the closing function on 24th April 2009. Sadly, this was not to be. He did not make it to that last day to see how elegantly the suit fit him. He died at 6.45 pm, the very day and time he had wanted to wear his new suit. Interestingly, this is the suit he had on when I brought him back home from the same trip a week later as cargo in a coffin in the very flight he had happily travelled on two weeks earlier as a passenger. We still wonder to date whether this suit and the lavish luncheon at the Intercontinental was a premonition of sorts.

I arrived at the airport in Addis Ababa at around 4.30 pm on Tuesday 21 April 2009. To my surprise, Okoth was not at the airport as was his habit when I travelled alone. Two ladies from the Kenyan Embassy in Ethiopia received me. The Okoth I knew would have left everything else to come and meet me at the airport. The ladies were quick to explain to me that he was unwell and had requested the embassy for assistance in picking me up. I wondered how unwell he would have been to miss my arrival at the airport.

At the hotel I went straight to his room to check on him. He explained to me that he had suffered serious food poisoning from eating a sandwich the previous day at the conference and was feeling weak but was recuperating well. We spent the whole evening planning our South Africa trip and relaxing. While he looked better than I had anticipated, deep down in my heart, something did not seem right and I was anxious. I suspected that he was just putting on a brave face for my sake, or he would have been at the airport. I had known Okoth for 33 years and knew he would go to great lengths to hide his pain from me or the children to stop us from worrying. I therefore took his explanation with a pinch of salt and suggested that we plan to get back home immediately after he had presented his paper. He did not comment and continued to feign wellness. The following day, Wednesday 22 April 2009, was quiet as we attended the conference together.

Thursday, 23 April 2009 was his day to present his long planned paper. We took our position at the dining area very early and were quickly joined by Mr Ibrahim Mwathane, a land expert, who was also one of the Kenyan delegates at the conference and a friend of Okoth's. Ibrahim offered to pick goodies from the breakfast serving table for his friend and created a light moment by asserting that he was the one who had been taking care of his friend before I arrived. We left for the conference immediately after breakfast and all was looking well. Okoth presented his paper that afternoon at about 2 pm. What followed was a chorus of applause from the audience. It was his special moment as the African Council of Ministers adopted his report without amendment. I shared in his moment of glory as he clenched his raised fist and said, *"It is done."* Soon after that he kept walking in and out of the conference hall looking partly happy and partly disturbed. He requested me to note any comments from the participants verbatim on the side of the referenced paragraphs for him to work on later.

At the end of the meeting I went out and found him talking to some participants who were having refreshments. Soon after, I saw him being helped down the stairs to the conference van by a group of men. I wondered where he was going without letting me know and why he was leaving me behind. He was quick to explain that he was just tired and needed to go and rest at the hotel and did not want to bother me. He even tried to encourage me to stay behind and have some refreshments and join him later. This request was not consistent with the man I had lived with for over 30 years. The Okoth I knew would not leave me alone with strangers. I quickly figured that once again he was shielding me from some deep pain or worry he did not want me to know.

I noticed on the morning of 24 April 2009 at 5 am that he had developed a very high fever and was becoming restless. I immediately contacted the airline and Dr Joan Kagwanja, the co-coordinator of the conference. It was my plan that we leave Addis Ababa immediately to arrive in Kenya by noon for Okoth to see his doctor in Nairobi. His condition was fast deteriorating and he needed to see a doctor urgently. We rushed him to the OAU Hyatt Hospital in Addis Ababa instead, where his temperature was quickly stabilised. He became well and even made jokes with colleagues from the conference who had come to see him. He was very jolly once again as they reviewed the events of the previous afternoon -- after the presentation of his paper. His colleagues left and he told me that he wanted to take forty

winks, a terminology he was fond of using when he wanted to take a nap.

We were scheduled to leave at 2 pm aboard a Kenya Airways flight but his doctor in Nairobi changed this and suggested that since Okoth was a member of AAR, he should travel by an evacuation flight with medical facilities because he was leaving Addis Ababa from the hospital. By 5.30 pm, there was no sign of this evacuation flight. This got me worried and I went outside to check whether any ambulance was waiting to take us to the airport. There was none. It looked like we were going to leave at night, so I decided to go back and sit by his side and wait for information. I was shocked when I walked back to find Okoth's bed surrounded by a group of hospital medics. I pushed my way through and asked him what was wrong. He responded with a few desperate words *"Mummy, Mummy, I cannot breathe,"* before I was pushed out of the room where he was being attended to. Those were his last words to me. Fifteen minutes later, I saw the medics walk out of his room. In my mind, my husband was now fine. We needed to leave Addis Ababa as soon as possible after the scare. May be the evacuation flight was waiting for us at the airport, I reasoned. Death was not on my mind. I had already called the children to prepare to pick us up at the Jomo Kenyatta International Airport. I was to call them back to confirm the exact time of our arrival. Nobody told me that my patient had passed on. I walked back into the room and saw Okoth's bed had been removed. He was being dressed for the morgue!

Okoth is dead! In shock, I said to myself, *"This cannot be true, Ruth, you are hallucinating. Nothing is real here. Daddy is alive."* I was alone in my new world. I did not even realise that there were people around me. At 7.45 pm, dazed and confused, I stepped out of the OAU Hyatt Hospital in Addis Ababa pulling two suitcases completely unaware of where I was, where I was headed to or what was happening before I fully comprehended the magnitude of what had befallen my family. The cruel hand of death, like a hawk, had just snatched the father of my children and the love of my life from our midst.

The Kenyan ambassador to Ethiopia and his family took me into their residence for one week and gave me a place to mourn my husband with other Kenyans in Addis Ababa. May God bless him wherever he is for taking such a heavy responsibility of feeding mourners and a widow he did not know. The Kenyan community and the embassy staff organised daily prayers at the ambassador's residence and for somebody to be at my side at all times. My sincere gratitude to the Kenyans in Addis, and particularly the ladies led by one Elsa, Mrs Okuthe, Dr Joan Kagwanja and many others. May God bless you all and take care of you like you took care of me during those painful moments that I am yet to recover from.

Back home, I could see relatives, friends and particularly my children on the television crying painfully. I was distraught. It was painful to watch. Whenever there was a mention of "his widow" on television I did not know that it was in reference to me. Dr Ed Rege was coordinating events between Kenya and Addis Ababa, giving updates. To you Dr Rege and your team, may God bless you. The Minister for Foreign Affairs, Hon Moses Wetang'ula and his Permanent Secretary Thuita Mwangi, colleagues of Okoth, the legal fraternity, friends and relatives, my family will forever be grateful to you for standing by us in those difficult moments. The days were long and the nights were even longer. What followed was such deep pain, confusion and a sense of great loss that no sane person can wish

it even on their worst enemy. We cannot find words to describe the loss: loss of love, loss of guidance and loss of strength. Annmarie, our last born daughter, captured this in her letter to Okoth posthumously:

I miss you, daddy. Sometimes I still feel like you have just travelled and would be back soon. You used to travel a lot but this is the longest you have been away from me. Dad, sometimes I buy chocolate and cut it in half like we used to -- only that this time I have nobody to share the other half with. I still take myself on pizza dates on Tuesdays like we used to hoping for a miracle that I would walk in and find you waiting for me at a corner of the restaurant like before. But no, you are not there and you are not coming. Your teases are still fresh in my mind. I still remember how you used to tell me that I sound like a mosquito in the ears when I want something. How I wish to hear those words again from you! I also remember as a little child (by the way, now I am a grown woman) when you and mom were travelling and would be away for a week, how you used to tell me that you would be away for 4+3 on my hands just to make it feel less painful for me. Now you are gone forever. No number on my fingers can add up to make me feel any better.

The last thing I remember on your last trip is you telling me, "I promise to come back soon. Just put your college application documents together safely and I will go through them once more when I come back. Just let mom relax." You said you would be back, dad. Never in a million years did I imagine you would be back in a metal box as cargo in a plane you used so often as a passenger.

You are physically gone but your presence is all over me. Nobody seems to understand the connection we had. People around think I am mad when I say I feel your presence around me. My only consolation is that mom and I have since become very close. She consoles me a lot with the word of God. I love and miss you, daddy.

Okoth, my love, when I watched your lifeless body (which only 15 minutes prior to that was vibrantly full of life) being wheeled to the morgue, for a moment I thought it was a bad joke. I know you liked joking but this one was a bad one. But no, days have turned into years and you are not coming back, not now, not ever. That scene of you transiting to the next world as I watched helplessly and the experience that followed haunts me day and night to this day. Nothing around me makes sense any more. There are no more happy jokes, no more human size flowers for my birthday, no more travels, no more home candlelit dinners for just you and me. You did not even prepare me for retirement life or life without you. Daddy, no words, no amount of paperwork and time can adequately describe the pain of losing you. Yes, death is the only way to transit to the next world. As a Christian, now I teach that a lot but to say it is disorienting and painful are understatements. The only memory of you I now have left is the occasional walk through the memory lane and our beautiful children who have grown to be their own persons with independent lives. I will always miss, you my love.

Mom too was unable to cope or bear the loss of a son that many would have wished to call their own. Mama Jennifer received the bad news with such tremendous shock, pain and tears that drove her into a severe depression. She was unable to eat, talk or sleep and

developed health complications as a result. She passed on hardly a year of your death. I wish I could say we shall meet in heaven but in heaven there are no husbands and wives. We are separated to eternity by death, my love.

V. RECOGNISING HIS CONTRIBUTION

During the burial of Okoth, speaker after speaker gave an idea of how to immortalise the guru. Evidently, four major proposals came out clearly in the eulogies:

- To establish a Centre for Property and Land Use Law at the University of Nairobi in remembrance of the 30 years Okoth dedicated to teaching and research in this field.
- For the jurists who worked with him both in Kenya and internationally to establish an Institute of Comparative Constitutions and Constitutionalism in recognition of Okoth's contribution to the field of research for good governance through constitutional order.
- To prepare and publish a book, a collection of essays with an appropriate title befitting such collection of thoughts in his honour.
- To help publish his unfinished works and have these combined with his other works for reference by students and other researchers.

As the saying goes, a long journey begins with taking the first step. It is very encouraging. As a family, we express our sincere gratitude to all who have made it possible to take that first step with No. 3 above. We particularly want to thank Prof Patricia Kameri-Mbote, past dean of the School of Law, University of Nairobi, and her team from the School, the PLO Foundation, the Ford Foundation, and Prof Charles Okidi for their immense contribution that has culminated in the writing of this book in honour of their departed friend, mentor and colleague. We also thank Prof. Kameri-Mbote and Dr Collins Odote for coordinating the writing of this book and editing it.

May the Almighty God continue to give courage and strength to those Okoth loved and interacted with. Long live his legacies through the successes of those he taught and mentored, and through the institutionalisation of his legacy. Long live the *guru,* long live Professor Okoth-Ogendo, the man!

CHAPTER 3

HWO OKOTH-OGENDO: A PERSONIFICATION OF EXCELLENCE

PLO Lumumba

I. INTRODUCTION

Professor Hastings Wilfred Opinya (HWO) Okoth-Ogendo stands out like a pink poodle among African legal scholars. Friend and foe alike acknowledge his celerity of mind. I remember Prof Okoth-Ogendo as my teacher, colleague, client and friend.

I first encountered 'the guru', as we fondly called him, in 1981. I had been admitted to the Faculty of Law at the University of Nairobi. He was then Dean. On the day of orientation he was as clear as he was sharp. He informed the impressionable first year students that they had been admitted to a course leading to the award of a degree of Bachelor of Laws and that at the university, nobody was in the business of teaching but that students would interact with their lecturers who would guide them on where to find the law. Waxing eloquent, he said further, "Any student admitted to this Faculty is part of *crème de la crème* and is expected to perform well, but those who insist on failing will not be rescued."

'The Guru' did not teach my class until the second year of study when he taught us land law. Unlike most of my colleagues whose interactions with him ended at the undergraduate level, I met him as his sole graduate student in the Jurisprudence class. That was when he became my friend. We later served together in the Constitution of Kenya Review Commission where he was a Commissioner and I, the Secretary. It is against this background that I am emboldened to write about a man whose thoughts transcended the bounds of Kenya.

In his long intellectual journey, he was comfortable when grappling with the law of property in land, as he was dealing with matters constitution. Indeed, his *magnum opus* is his article, 'Constitutions without Constitutionalism: Reflections on an African political paradox',[1] written in 1972, when his chosen area of research and expertise was the law of property and land.

II. EARLY ECHOES

I first heard of *The Guru* in 1979, then, a Form 5 student. I met his late brother Otieno whom we referred to as Spartacus, after the famous Thracian gladiator. He was a Form 6 student.

1 H.W.O Okoth-Ogendo, 'Constitutions without constitutionalism: an African political paradox' in Douglas Greenberg, S.N. Kartz, B. Oliviero and S.C. Wheatley (Eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (OUP: New York, 1993) Chapter 4.

Spartacus was respected by his classmates as one of the best students in English, and he was fond of mentioning his brother, whom he described as the best land lawyer Kenya had ever produced.

A. Joining the University

When I was admitted to join the Faculty of Law at the University of Nairobi, The Guru was Dean and as part of the orientation, he addressed us at Taifa Hall. I remember very distinctly that he wore a tight-fitting white trouser and a black blazer, and in his hand was a silverish pen which he elongated as he made his points. He spoke for nearly 30 minutes. Tongue in cheek, he told us that although we assumed we were God's gift to the University of Nairobi having been selected as the best students, the rigorous law degree course would separate the best from the charlatans.

III. THE GURU AS A TEACHER

The Guru taught my class for the first time in our second year of study. His assigned subject was land law. The introductory class was memorable. He stepped into the class, the auditorium in Gandhi Wing, and commenced his "Lecture" in the following manner, *"One hundred years ago, a great event took place in England, a great land lawyer, Hagreaves, was born. One hundred years later another great event took place: another great land lawyer, Hastings Wilfred Opinya Okoth-Ogendo, was born and he stands before you."* All the while as he spoke we had been busy writing only to realise that he was introducing himself. The episode amused everybody.

The land law classes were loved particularly for the exotic Latin maxims, which, The Guru confounded us with. The list of such maxims was long but every student remembered "*Quicquid plantatur solo, solo cedit* (whatever is affixed to the soil belongs to the soil) and *Cuius est solum, eius est usque ad coelum et ad inferos* (He who owns the land owns to the sky and to the centre of the earth).

IV. JURISPRUDENCE IN THE MASTERS DEGREE PROGRAMME

Unlike most of my colleagues, whose interactions with The Guru ended at the undergraduate level, I was his sole student in the Jurisprudence class at the graduate level between 1988 and 1989. I debated many issues of law with him. We touched on the writings of Karl Marx, Vladmir Lenin, Hans Olivecrona, Jeremy Bentham, John Austin, HLA Hart, Thomas Hobbes, Thomas Aquinas, John Hegel, Oliver Wendel Holmes, Hans Kelsen of the Positivism fame, John Locke, John Rawls, Ronald Dworkin, Cheikh Anta Diop of the Diopism philosophy, and many others. It is during this period that The Guru became my friend.

Until his death, he always remembered with amusement and shock that I attended his class on 5 December 1987 at 9 am, while my wedding was scheduled for 11 am, and then proceeded to church as a bridegroom.

V. THE CLIENT

In 1990, I opened a private law office, which was located at Arrow House along Koinange Street in Nairobi. One morning, completely unexpectedly, The Guru walked into my office and told me that he had a legal problem, which he wanted tackled. The case was straightforward, he said, yet complex. He had acquired property in Karen believing that he had access to his land, but when he went to the ground, what he thought was his access to the land had been taken by his neighbour. Upon his instructions, I embarked on research, filed the case and he eventually won.

VI. THE BOOK, *TENANTS OF THE CROWN*

During our many conversations as I went through my master's degree programme, I was in the habit of reminding The Guru that as the foremost professor of land law, he needed to immortalise his thoughts in writing. It is then that he told me that he was in the process of writing a book, which was later published as *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya.*

Apart from his scholarly work, he contributed to local and international public policy in matters of land and agrarian law, constitution and governance. I personally worked with him on consultancies on constitutional law in Somalia and Sudan.

VII. THE DAYS AT THE CONSTITUTION OF KENYA REVIEW COMMISSION

When the clamour for a new constitution started in earnest in the late 1980s, and the government thought of constituting a commission to provide leadership, the name of Prof. Okoth-Ogendo was mentioned as possible chairman of that commission. Although this was never to be, when the constitution making process commenced in 2000, he was appointed as one of the commissioners.

When I joined the Commission in the year 2001 after the resignation of the then Secretary/Chief Executive Officer, the late Arthur Okoth Owiro, Prof Okoth-Ogendo was the Chairman of the Research, Drafting and Technical Support Committee. He later became one of the three (3) Vice Chairpersons, and during the National Constitution Conference, he was the Chief Rapporteur.

When the history[2] of constitution making in Kenya is recorded, The Guru shall be chronicled as one of the key intellectual forces in conceptualising the architecture and philosophy of the Constitution of Kenya, 2010.

VIII. POST-CONSTITUTION MAKING

After his engagement with the constitution-making, Prof Okoth-Ogendo, quintessential scholar that he was, went back to the University of Nairobi where he continued to serve with dedication as a professor of Law. In addition, he continued to undertake consultancies in different parts of the world. It is noteworthy that when he died on the Friday, 24 April

2 For the details of the workings of the Constitution of Kenya Review Commission, see Prof PLO Lumumba, *Constitution Making – The Postponed Promise* (Jomo Kenyatta Foundation: Nairobi, 2007).

2009, he had been invited by the Economic Commission for Africa to deliver a paper on land policy, but fell ill soon after making his presentation.

IX. CONCLUSION

The Guru was a lover of William Shakespeare's poetry. One quote in particular, attributed to Brutus in the play, *Julius Caesar,* titillated The Guru:

> *There is a tide in the affairs of men.*
> *Which, taken at the flood, leads on to fortune;*
> *Omitted, all the voyage of their life.*
> *Is bound in shallows and in miseries.*
> *On such a full sea are we now afloat,*
> *And we must take the current when it serves,*
> *Or lose our ventures.*

The Guru will always occupy a hallowed place in discussions on land law and the making of the 2010 Kenya Constitution because in his life on earth, he rode the crest of the floods and died a personification of intellectual excellence.

CHAPTER 4

MY MEMORIES OF HASTINGS WILFRED OPINYA OKOTH-OGENDO FROM 1968 TO 1982*

Willy Mutunga

I. INTRODUCTION

In his book, *Detained: A Writer's Prison Diary,*[1] Prof Ngugi wa Thiong'o suggests a great framework for a fairly objective analysis of people's intellectual, ideological, and political positions during the course of their lives. In Chapter 5 of his book, he uses this framework to analyse the life trajectories of detainees. He gives a thoroughly illuminating analysis of Jomo Kenyatta's[2] intellectual, ideological, and political positions from the 1920s all the way to the years when Jomo Kenyatta served as the first Prime Minister and first President of Kenya. What is clear is that individuals can wade through various terrains of radicalism, conservatism, and opportunism before finding a permanent balance.

I want to write about my intellectual, ideological, and political encounters and engagements with Okoth between July 1968 and July 1982. I believe as others write about Okoth's life trajectories, current and future generations will be able to comprehensively judge his contributions. I am not going to write about Okoth's intellectual prowess. His *curriculum vitae* attests to that and is an annex to this book. Indeed, two of my great law professors[3] have stated publicly that Okoth was one of the most brilliant students they had ever taught. I cannot comprehensively write about Okoth without touching, where appropriate, on my intellectual, ideological, and political interactions with another brilliant college mate, Professor Issa Shivji (Issa), who was Okoth's classmate at the University of Dar es Salaam.[4] In the course of this discussion, I will invariably mention other students who studied in Dar.

During the period that I knew Okoth (July 1968 to July 1982), it was first as a college mate at the University of Dar-es-Salaam, and then, as a colleague at the Faculty of Law at the University of Nairobi. I lost my job at the University of Nairobi when I was detained on 29 July 1982. Upon my release, 16 months later, I practised law, joined the human rights

* I benefited from comments and reflections from Professors Micere Mugo, Joyce Nyairo and Makau Mutua.

1 Ngugi wa Thiong'o, *Detained: A Writer's Prison Diary* (Nairobi: East African Educational Publishers, 1981).

2 ibid 84-92.

3 Professors Walter Rudolph James and Yash Pal Ghai who both taught Land Law and Constitutional and Administrative Law, respectively, at the University of Dar es Salaam. Professor Ghai was also the Dean of the Faculty.

4 This tale of two students in the Faculty of Law, University of Dar es Salaam who took different ideological and political paths is definitely a topic for a doctoral thesis. I hope someday some student will take up this challenge.

and multi-partyism movements, before going back to school at Osgoode Hall Law School in Toronto to study for my doctorate degree in 1989, and consequently, our paths rarely crossed. When they did, it was at the social level only.

On the other hand, Issa and I have had such interactions since I left the University of Dar- es-Salaam in July 1974 after completing my Master's degree in Law. I cannot say I have had the kind of relationship I have had with Issa with the other students of the University of Dar es Salaam I mention below, namely, President Yoweri Museveni,[5] S Amos Wako,[6] and Judge Emmanuel O'Kubasu.[7]

II: UNIVERSITY OF DAR ES SALAAM

A. The Tale of Four Students[8]

Upon getting to the Faculty of Law, University of Dar es Salaam in July 1968, I got to know who the brilliant students were. Invariably, that is normally the first information you get from fellow students. What I heard about Okoth was not only about his performance in law, but his prowess in other disciplines. They were all talking about a poem, 'The Dancing Maniac' that Okoth had written. The other brilliant student who was famous outside the legal discipline was Issa, who had by then authored two brilliant ideological and political think pieces entitled 'The Silent Class Struggle' and 'The Silent Class Struggle Continues'.[9]

Both Issa and Okoth reflected the different approaches in the teaching, researching, and studying of law in Dar es Salaam -- with the former reflecting a historical, socio-economic, political, and cultural approach to the discipline. Both used non-legal phenomena in the study of law, but Okoth did not integrate the non-legal phenomena into his analysis of law, preferring to be appreciated as a poet and a lawyer. Issa did the opposite. He used the non-legal phenomena to ruthlessly critique the discipline of law. Both supremely mastered the law as perceived by staunch positivists. I believe that is how Professor Sol Piciotto, who coordinated the innovative and progressive foundational course in law, 'Economic and Social Problems of East Africa', would have described his two brilliant students.

B. The Rag Day

I owe my intellectual, ideological, and political development to the University of Dar es Salaam. In Mwalimu Nyerere and other comrades, I had great teachers and mentors during

5 On 9 April 2013, I spent two hours on a podium with President Museveni. I sat next to him during the inauguration of President Uhuru Kenyatta as the fourth president of Kenya. We talked about the Dar days, but completely steered clear of how our respective jobs had been impacted by that history!

6 Senator Amos Wako will definitely deserve an analysis using Professor wa Thiong'o's framework. As Chief Justice, I spent several months seated close to S Amos Wako when he served as Attorney General and a Commissioner in the Judicial Service Commission. Talking to him since then and after reinforces my view that such a write-up is long overdue.

7 He was my colleague for a short while at the Judiciary. His leadership of the Kenya Students Association Dar (KENSAD) was, indeed, progressive. His life trajectories as a Magistrate and a judge would form a basis for interesting analysis.

8 Okoth, Issa, Wako and Museveni.

9 These papers were later published as *Class Struggles in Tanzania* (London: Heinemann, 1976). See also IG Shivji, 'Rodney and Radicalism at the Hill, 1966-1974' in IG Shivji, *Intellectuals at the Hill: Essays and Talks 1960-1993* (Dar es Salaam: University Press, Dar es Salaam, 1993) 32-44. A brilliant book that captures intellectual, ideological, and political debates among professors and students is Karim F Hirji (ed), *Cheche: Reminiscences of a Radical Magazine* (Dar es Salaam: Mkuki na Nyota, 2010).

my studies in the university in 1968 to 1971(Bachelor's degree) and 1973 to 1974 (Master's degree). In the latter stint at Dar es Salaam, I did more reading that made me pick the intellectual, ideological, and political line for my future development, a line that I believe I have not abandoned. It is on the basis of this line that I am able to reflect on some of the ideological and political struggles that engulfed Okoth in the period 1968 to 1982.

From Wikipedia it is stated:

The Oxford English Dictionary states that the origin of the word 'Rag' is from 'an act of ragging; especially an extensive display of noisy disorderly conduct, carried on in defiance of authority or discipline,' and provides a citation from 1864, noting the word was known in Oxford before this date… Alternatively, it is thought to be from the Victorian era when students took time out of their studies to collect rags to clothe the poor.[10]

The Rag Day at the University of Dar es Salaam in 1968 was organised and coordinated by Amos S. Wako, a brilliant third year law student. Okoth supported the celebrations. Being a first year law student myself, I did not understand or participate in this tradition and watched from the sidelines.[11] The Rag Day must have been a tradition that the university borrowed from its British contacts, particularly the University of London that awarded degrees to students of the University of East Africa in its formative years. In the case of the students at the University of Dar es Salaam, they would dress in rags and drive to the city of Dar es Salaam where they begged for money for charity from the city residents.

The University Students African Revolutionary Front (USARF)[12] chaired by Yoweri Kaguta Museveni thought it was about time that what the Front called "a bourgeois tradition" was "visited with revolutionary violence". The buses that were to take students to the city were deflated by Karim Hirji[13] during the night and the Revolutionary Square where the buses were parked barricaded by members of USARF. After breakfast, the students participating in the Rag Day assembled at the square to board the buses. They faced a small band of determined USARF revolutionaries who told them that they were putting an end to the bourgeois practice that humiliated the poor. They dared the students to cross the barricades. USARF won and that was the last celebration of Rag Day in the University of Dar es Salaam. Issa was on the other side of the ideological and intellectual debate on this matter of the Rag Day. He was not only a member of USARF, but also its leading ideologue and legal adviser.

The Rag Day struggles were one of the many reflections of the ideological battles taking place in the university that was becoming a Mecca of revolutionary activity. As students, we were lucky to hear many leaders from the liberation and revolutionary movements based in Tanzania. Opposition political parties oppressed by one-party dictatorships in their

10 Oxford English Dictionary as quoted on Wikipedia, available at <https://en.wikipedia.org/wiki/Rag_student_society> accessed 1 November 2015.

11 I sought out Museveni after the standoff between the Rag Day promoters and resisters and asked the reasons for the actions of USARF (University Students African Revolutionary Front). I was convinced that from his arguments on independence of our countries, our dignity, and Nyerere's vision for the poor that he had good reasons. When I asked him why USARF did not seek to persuade the students of the cogency of these arguments, he looked at me and said, "USARF thinks for students. On their own they will stay mired in their bourgeois proclivities." Or words to that effect!

12 Read more about USARF in Karim F Hirji (ed) (n 9) above.

13 The author confirmed this fact with Hirji in 2016.

various countries came to the University where they had a great audience. In a curious twist of fate, Jaramogi Oginga Odinga the leader of the Kenyan opposition political party, Kenya Peoples Union (KPU), visited the university some months after the Rag Day struggles. This time, Yoweri Museveni had to sit on the back benches of Nkrumah Hall as Amos S. Wako welcomed Jaramogi to the podium and led the huge student presence to chant the KPU political slogan, "Dume Dume/Stud Stud", with the communist salute of the clenched fist to boot. Okoth was part of the committee that organised Jaramogi's visit. I doubt if any student skipped Jaramogi's great speech on imperialism and invisible governments in post-colonial Africa. Many students had read his book, *Not Yet Uhuru,*[14] and they proudly let him know. Jaramogi was visibly overwhelmed by the student support.

C. The Kisumu Massacre on 25 October 1969

Little did we know that immediately after Jaramogi's visit KPU would be banned, Jaramogi and his comrades detained. The story of the Kisumu massacre is now well documented.[15] President Jomo Kenyatta went to Kisumu to open a hospital built with funds from the Soviet Union. In a political rally that saw Kenyatta and Odinga trade political arguments, including threats and abuses, there ensued a breach of the peace planned by the ruling Kenya African National Union (KANU) party.[16] Twenty-two Kenyans[17] were murdered, causing outrage among students at the University of Dar es Salaam.

The President of the Kenya Students Association in Dar (KENSAD), Emmanuel O'Kubasu (now retired Judge of the Court of Appeal) convened an emergency meeting of all Kenyan students. We decided to condemn the massacre. Okoth was one of the drafters of the telegram that bore the name of O'Kubasu[18]when it was dispatched to the Ministry of Education in Nairobi. A counter telegram was also dispatched to the Ministry, coordinated by two law students from Central Province, signaling the divisive ethnic politics in Kenya that Kenyan students at the University of Dar es Salaam reflected.[19]

D. The Crisis in the Faculty of Law, 1969

A new law course, Military Law, was to be introduced in the curriculum of the Faculty of Law by an Australian professor. USARF did not like the idea, citing some foreign interests behind this new project. Without any dialogue with the professor, the faculty, and the students, USARF decided to arrest and try what it called Central Intelligence Agency (CIA) professors in the Faculty of Law and their local agents. USARF soldiers surrounded the building housing the Faculty of Law. Arrests were made. USARF mounted its court ready

14 Oginga Odinga, *Not Yet Uhuru*, (London: Heinemann Educational Books, 1968).

15 See, for example, Raila Odinga (with Sarah Elderkin), *The Flame of Freedom* (Nairobi: Mountain Top Publishers, 2013) 127-130.

16 ibid.

17 This was the official number given to us in Dar es Salaam. Raila writes that the official number was 59, but he confirms that more than 100 people were massacred. Raila Odinga, ibid.

18 In this day and age when telegrams are obsolete, it is necessary to explain why the telegram sent to the Ministry of Education bore only the name of the President of KENSAD! The Post Office charged fees by counting the number of words in the telegram. Consequently, it would have been very expensive if the names of all the students had been included in that missive.

19 The issue of the counter telegram came to the public domain in 1987 when the then Minister for Foreign Affairs, Ndolo Ayah, talked about it. It would be interesting to peruse that telegram because if the sponsors of it had money they could have put as many names of the Kenyan students in Dar on that telegram as they could afford!

for trial, replete with prosecutors and arresting officers, and of course their judge. The trial did not take long as one of my classmates, Said El Maamry, who was also an inspector of police, broke it up. Okoth, who was one of the named local CIA "agents", was not arrested because he had left for Kenya. In USARF's opinion, the local agents were part of the plot to teach Military Law, and were known to be close to the American Law professor(s) beyond their status as students. I never got to read the specific charges against Okoth, but since he was a brilliant student, various professors used to assign him research work. I doubt whether this kind of association qualified him to be named a CIA agent. Ideologically, Okoth was not Issa, but I do not know whether he publicly verbalised his political views. I know that Okoth was critical of the ban on the wearing of tight jeans and mini-skirts by Tanganyika African National Union (TANU) Youth League (TYL) and he encouraged the late Grace Githu to wear her button in opposition to the TYL ban. The said button was very descriptive, courageous, and definitely annoying to the ban supporters. It read: "Up with the Mini-Skirts!" Did that make Okoth a target of USARF? I do not know. Unfortunately, I never discussed this issue with Okoth when he was alive. His views on the issue would have been invaluable.

III. UNIVERSITY OF NAIROBI

A. The Context

The Literature Department at the University of Nairobi was the most radical when I joined the Faculty of Law in November 1974. In its faculty were Professor Ngugi wa Thiong'o, the most celebrated writer in the country and one of the most brilliant in Africa; Professor Micere Githae Mugo, the radical 'matriot', a poet, a writer, and actress; Okot p'Bitek,[20] the great Ugandan playwright; John Ruganda, yet another Ugandan playwright who managed the Free Traveling Theater as an alternative patriotic theatre; and others. Soon this radicalism was to creep into the Faculties of Law,[21] Government (Political Science),[22] Sociology,[23] the Institute of Development Studies (IDS),[24]Department of History at the University of Nairobi[25] and its constituent then, Kenyatta College; and others.[26]

Struggles by students against all manner of grievances against the state and the university administration were a common occurrence at the University of Nairobi since the 1960s when it was known as the Royal Technical College. The Faculty of Law lagged behind

20 Okot p'Bitek was actually employed as a senior research fellow and lecturer at the Institute of African Studies. On account of being a prolific poet, he became an adopted member of the literary fraternity and surrogate member of the Literature Department. Professor Micere Mugo remembers him playing an active part in the debates that culminated in renaming the English Literature Department as the Department of Literature. Along with Professors Ngugi wa Thiong'o, Micere Mugo and others, he played a critical part in the creation and development of the paradigm of Orature that was exported to the rest of the world.

21 Shadrack Gutto, Oki Ombaka, Robert Martin, myself, and later Kivutha Kibwana.

22 Peter Nyong'o, Apollo Njonjo and Michael Chege.

23 George Katama Mkangi Chamanje.

24 Kabiru Kinyanjui, Michael Cohen.

25 Elisha Stephen Atieno Odhiambo, Vincent Simiyu, Mukaru Ng'ang'a, Maina Kinyatti.

26 Kamoji Waachira and Edward Oyugi of the Departments of Geography and Education, respectively, at Kenyatta University College; Sultan Somjee from the Institute of African Studies. Alamin Mazrui of the Linguistics Department at Kenyatta University College.

in these struggles but from late 1960s there emerged study groups that became the germ of radicalism among the faculty. Joint struggles of faculty and students against oppression, curtailing of academic freedom, for democracy in the country, for democratic elections, and for academic leadership[27] in the university were regular in the 1970s.

This radicalism gained momentum when on 28 February 1979; the University Academic Staff Union (UASU) was resurrected with a specific mandate to fight for the rights of Professor wa Thiong'o to resume his duties at the university. Professor wa Thiong'o had been detained without trial on 31 December 1977 and released from detention on 12 December 1978. UASU decided to be a union for all staff in the university and became the University Staff Union (USU). USU combined agitation for bread and butter issues powerfully with the rights for intellectual space in the academy. USU also became a base for radical social movements such as the December Twelfth Movement (DTM).[28]

The Kenyatta-Moi KANU dictatorships had by the late 1970s punished dissent through detentions, jailing, assassination, exiling dissenters and making them disappear. By the time UASU was resurrected the university was the only centre of dissent. Parliament had been silenced through the detentions, imprisonment, and forcing into the exile of the vibrant opposition in the KANU-controlled Parliament by the Seven Bearded Sisters.[29] KANU was also able to co-opt into its oppressive bosom the Central Organisation Trade Unions (COTU) and the women's movement, Maendeleo ya Wanawake.

Okoth did not play any role in USU, but he was not hostile to its activities.

B. Struggles on Methodologies of Teaching Law

What I have briefly sketched was the context within which both Okoth and I joined the Faculty of Law in the mid-1970s. Clearly, the dominant school of jurisprudence in the faculty was staunch positivism.[30] Legal rules were to be mastered outside the non-legal phenomena and that informed the research, teaching and practice of law. In Dar es Salaam, staunch positivism had been ruthlessly critiqued. Both Okoth and I were part of that critique, although from different schools of jurisprudence.[31] Given the intellectual, ideological, and political agitation in the University of Nairobi, the two opposing teaching approaches of

27 The university administration promoted members of the faculty. The Chairs of the various departments in the university were appointed by the university administration. It was from among these chairs that Deans of Faculties were elected by the academic staff of the departments. The university administration was, therefore, able to clone itself from the academic wing of the university by these appointments. Domination by a university elite accountable only to the political elite made the university an instrument of the oppressive state. It did not come as a surprise when this dictatorship in the institution of higher learning was resisted.

28 Willy Mutunga, 'Building Popular Democracy in Africa: Lessons from Kenya' in Joe Oloka-Onyango, Kivutha Kibwana, Chris Maina Peter (eds), *Law and the Struggle for Democracy in East Africa* (Nairobi: Claripress Limited, 1996) Chapter 12; Willy Mutunga, 'On Social Movements', (unpublished paper presented to a project by Fahamu Trust). It has a section on the December Twelfth Movement.

29 They were actually eight and there was only one sister, the late Chelagat Mutai. The other seven members derogatorily so named by the then Attorney General, Charles Njonjo, were: George Anyona, Koigi wa Wamwere, Dr Chibule Wa Tsuma, Mwashengu wa Mwachofi, Lawrence Sifuna, James Orengo, and Abuya Abuya.

30 Professor Hart's book, *The Concept of Law* published in 1961 is a major work on legal positivism.

31 Professor Fimbo's Chapter discusses Okoth's approach to the teaching of law. My approach is found in Willy Mutunga, 'Notes on Teaching Commercial Law', Chapter 2 in Kibwana, Nderitu, and Rukwaro (eds), *Law Curriculum Development in an African Context: The Kenyan Experience* (Nairobi: Faculty of Law, University of Nairobi, 1991) 14-21. Okoth's paper, 'Teaching the Law of Immovable Property: A Personal Assessment' is Chapter 5, pages 39-54 in Kibwana, et al (eds).

law were headed for a conflict.[32] The seeds of that conflict were clearly sown when Professor Robert Martin joined the Faculty of Law in 1972 to teach constitutional law.

Professor Robert Martin taught constitutional law within a historical, socio-democratic, and political context that shunned staunch positivism. Invoking mainly the Marxist theory of state and law, he was able to render ruthless criticism to Kenyan constitutional law, a task that had been undertaken earlier in the great publication by Yash Ghai and Patrick McAuslan.[33]

Professor Martin was arrested in March 1975 in the wake of the struggles in the university that condemned the murder of JM Kariuki on 2 March 1975. In a deliberate attempt to intimidate radical faculty, Professor Martin was charged with the criminal offence of behaving in a manner likely to cause a breach of the peace. The particulars of the charge were that during the violent demonstrations that took place in the university campus on 2 March 1975, he had abused a policeman by uttering the said words, "You policemen are stupid like your father Kenyatta." Robert Martin was represented in his criminal trial by a team of lawyers led by Archroo Kapila. I had appeared for Professor Martin when he took his plea and had applied for bail. Senior Resident Magistrate Pritam Singh rejected my application and committed Professor Martin to Industrial Area Remand Prison. The political and diplomatic overtones of the trial played out in the courts when the Assistant Director of Prosecutions, Sharad Rao, came to prosecute a case ordinarily handled by a lowly police prosecutor. The Canadian embassy was also involved because it was clear to them that the charges were trumped up.

Although Professor Martin had a strong defence against the charge (as an English speaker he could not have uttered those words in such broken English; there was a full blown riot in the university and there was no peace; there was jurisprudence that peace could not be broken by any individual in the presence of police officers who would stop it;[34] and that he did not utter those words) his legal team knew that the case was politically instigated to intimidate the faculty at the university. Ultimately, there was a plea bargain, thanks to the intervention of the Canadian Embassy and the support Professor Martin received from the students. His contract with the University of Nairobi was coming to an end and he had already secured a contract with the University of West Ontario at London, Canada.[35] Imprisonment would have severely hurt his career. It was meant to be a clear message of intimidation from the state and the university administration, an issue that I took to the USU as its secretary general.

I was assigned to teach commercial law. I taught sale of goods, hire purchase and bankruptcy while agency, a course also under commercial law, was taught by another lectur-

32 The two opposing approaches were the positivistic and the broad approach.

33 Yash Ghai and Patrick McAuslan, *Public Law and Political Change in Kenya* (Nairobi: OUP, 1970).

34 See, for instance, *R v Kimanga* [1973] E.A. 42, *Wainaina v R* [1973] EA 238.

35 Professor Martin's views on this trial are published in Robert Martin, 'Teaching Law in Kenya: A Personal Footnote' (1977) 14 Africa Law Studies 43. He was also the editor of the *East African Law Journal.* He published my very first article, a radical one at that, entitled, 'The Demystification of the Kenya Law of Hire-Purchase'(1975) 6 (2) in East Africa Law Journal.

er. Okoth, the undisputed Guru of land law, taught it. Both were second year law courses. Other second year law courses were evidence, trusts and succession. I taught my courses within the historical, socio-economic, cultural, and political contexts of Kenya. I allowed democratic participation in my lectures and tutorials, preferring the Socratic method that I found very useful at the University of Dar es Salaam. I allowed open book examinations. My examination papers had five questions, three of which tested the mastery and grasp of legal rules, cases, and positivistic jurisprudence. The last two questions tested the students' ability to critique the legal rules they had mastered so that they could legitimately enter into discourses on reform of the law, the role of law in development, and the role of law in transformation. Obviously, my students had to work harder than those whose lecturers required them to display the mastery of legal rules only. It also meant that my students in commercial law took my methodology to other law courses in the second year by asking questions about the origin of a particular legal rule and its role and purpose in the Kenyan context.

The two teaching approaches resulted in all of us agreeing to a workshop to interrogate what we taught and how we taught it.[36] This workshop took place on 13 – 15 April 1978. We invited Professor Joe Kanywanyi of the Faculty of Law, University of Dar es Salaam, to come in as an observer and commentator. The broad approach that other lecturers[37] and I adopted was accepted because of various reasons: *One*: the staunch positivists did not seek to persuade, reflecting the arrogance of the university administration and the state. They even had the temerity to demand that those colleagues who adopted the broad approach needed supervision because "they did not teach law". Given that strategy, they lost the moderates[38] in the faculty who did not want to be supervised. *Two*: the student representatives in the seminar supported the broad approach. *Three*: Some of our students who had gone abroad for graduate work and were now part of the faculty[39] did not take kindly the assertion that their former teachers, the proponents of the broad legal approach, had not taught them law! *Four:* the staunch positivists underestimated the political context in the university where conservative scholars were seen as part of the oppression in the university. *Five*: the role played by Okoth in the workshop was critical. Okoth wrote a paper justifying the broad approach in the teaching of land law. Both proponents of the two approaches respected him and he became the intellectual, ideological, and political bridge in the conflict. *Six:* Professor Kanywanyi, the arbiter, commentator, and observer endorsed the broad approach and supervised the drafting of the resolutions that captured the consensus.

C. The Election of the Dean

Clearly, by 1979 Okoth emerged as a leader out of the conflict on the approaches of teaching law. It was felt that he was the best person to protect the consensus we had reached. We did not trust the leadership imposed by the university administration. I recall talking to Okoth about the election of a Dean in our faculty. I pledged to mobilise support for his election. His initial reaction was that he did not qualify under the university statutes. He was

36 The papers were published in Kibwana, Ndiritu, and Rukwaro (eds) (n. 31) above.
37 Shadrack Gutto and Oki Ooko-Ombaka were staunch supporters of the radical approach.
38 Emilius Ndiritu, George Rukwaro, Jason Namasake.
39 Kivutha Kibwana, Shem Ong'ondo, Bonaya Godana and Onyancha B'womote.

not a chair of any of the three departments in the Faculty of Law and he was still a lecturer. I countered his argument by one taken out of the broad approach to the teaching of law. We would not go for the substantive post, but for an acting one so that we could argue that the rules only applied to substantive positions. Okoth was convinced and we launched our campaign against Prof Onesmus Mutungi, who was chair of the Commercial Law Department, my boss in that department.

We decried the undemocratic nature of the statutes that rigged the elections of deans in favour of appointees of the university administration. Okoth won by a single vote. The administration sought to refuse to recognise his election, but we were also fortunate that the new Vice-Chancellor, Prof Joseph Mungai, accepted our legal argument. Okoth became acting dean and was thereafter promoted to the position of Senior Lecturer and Chair of the Private Law Department. The rest, as they say, is history. It was an election in which I am proud to say I honed my trade union and political skills.

Okoth's election as acting dean when he did not chair any department, and was not a senior lecturer paved the way for other candidates in other faculties. The election definitely encouraged our colleagues in the Faculty of Arts who subsequently decided that Dr Micere Githae Mugo, acting chair of the Literature Department, would be their next acting dean! In 1980, she beat the candidate favoured by the administration, Prof Philip Mbithi, who was also Chair of the Sociology Department. The election of Dr Mugo generated a lot of interest in the university because she was the first woman don to seek such office. The university administration unsuccessfully attempted to subvert her election, ostensibly because she was one of the radical professors and a woman. Dr Mugo was also active in USU and she had support beyond the Faculty of Arts. Prof Joseph Mungai, the Vice-Chancellor, properly followed the Okoth precedent by confirming Dr Mugo as acting dean, thus triggering her promotion. She ultimately became substantive dean of the Faculty of Arts before she was forced to flee into exile in 1982.

IV. CONCLUSION

A decade ago, some East African scholars met to celebrate the life and scholarship of Issa Shivji. He had turned 60 and was retiring from the University of Dar es Salaam. I found the inquiry, analysis, and the problematisation of Issa's scholarship in a convening that he participated in very innovative, illuminating, and extremely useful. Issa participated fully, agreeing with some analyses, defending his positions, clarifying cardinal issues of the discussion, and offering well thought out self-criticism of his scholarship. How I wish we had done this also in the case of Okoth. I believe it is a great practice to glorify and critique colleagues' lives and scholarship when they are alive. This, however, is not a fundamental hurdle to the overall historical project of revisiting lives and works of scholars, and indeed, everybody else. Prof Ngugi wa Thiong'o has given us a useful framework for such analysis when our colleagues have passed on.

I know I am open to the criticism that I have shied away from drawing a final conclusion on Okoth within the 14 years of my analysis and that by doing so I may have discredited Prof Ngugi wa Thiong'o's astute theoretical framework for reading both character and

contexts. All I can say is he did make shifts and turns, but hasten to add that he did not do so because he was by nature a prevaricating or deceitful person. As a consummate intellectual, Okoth observed and he learnt; he changed sides based on his ideological, intellectual and political positions that clearly placed him between conservative and radical forces in Dar es Salaam and at the University of Nairobi. What we cannot deny him is that he had the courage to take up the challenge to lead at the Faculty of Law when, with a majority of one vote, we called upon him to do so.

The 14 years of Okoth's life that I have covered are just part of his life's trajectory and the analysis of other periods of his life will definitely illuminate his overall intellectual, ideological, and political positions. It is likely that the various think pieces in this book will help clarify what I believe is an important ingredient of any inquiry and interrogation of the life and works of any scholar.

May the Almighty Allah rest Okoth's soul in eternal peace!

CHAPTER 5

OKOTH-OGENDO THE ACADEMIC

By Jackton B. Ojwang

I. INSTITUTIONS AND PIONEERS

In the 1970's, unlike today with its tens of Universities – both public and private – there was only the University of Nairobi, as the sole institution of advanced learning and research in Kenya. Then as now, the structuring, standard-setting, management and sustenance of such a large public agency was a veritable challenge: apart from the fact that the country was just going through early endeavours to enhance leadership capacity, a University institution by its specialized demands, required clear and effective policy and implementation schemes. Inability to attain such a supportive environment, in a new learning set-up, would have weakened all subsequent initiatives in creating an ideal setting for the youth. The University, by its disciplinary categorizations of the instruction mandate, would have to prescribe content on the basis of professional criteria, as well as prescribe disciplined processes for imparting knowledge, and for ascertaining the effectiveness of uptake. Any remarkable shortfall in that regard, posed the risk of undermining all subsequent initiatives in creating a suitable academic setting for the youth – with all the grave implications for quality of education. It would, furthermore, cast its negative impacts on the prospects of achieving a dependable human-resource base, for the entire range of social, economic and political undertakings. In short, the quality of management, within each and every institution entrusted with public tasks – and in this instance, the University as a place of learning – was a matter for priority attention, in the earlier years of the post-independence period.

It fell to the pioneers in the educational sector, but more particularly in the University of Nairobi, to establish functional and credible programmes of teaching and research, with the required supporting structures and human-resource capabilities. The initial conceptual and inspirational paths conceived by these pioneers, would ultimately be the reference-points, not only guiding the learners, but also informing the works and perspectives of later academics. The controlling beacons would, naturally, be those laid by the more dynamic and more resourceful leaders of the educational sectors – rather than those left by the more average academics.

Hastings Wilfred Opinya Okoth-Ogendo, as a pioneering scholar in a new Faculty of Law (now the University of Nairobi School of Law) in 1970 – with its three Departments of Public Law, Private Law and Commercial Law – was one of those expected to set the tone

of a new academic work-place: through their individual research initiatives, and through the forging of an academic community, with a learning-orientation, and with an inclination to seek out, and to develop ideas and programmes of utility.

There being no local precedent in legal research and learning – just as could indeed be expected – most of the first-generation academic staff, in my perception, had regarded themselves as beneficiaries of a standard engagement – their core responsibility being to follow the curriculum, extracting from prescribed text, whether in contract, tort, property law, commercial law, administrative law, trusts, or family law, and so on. Such curriculum was restricted in scope, having been defined by the priorities of practice before the courts; it had been drawn on past experience, and informed by a report formulated ten years earlier, by the Denning Committee on Legal Education for Students from Africa.[1]

However, it would have been incumbent upon pioneers at this stage, to show leadership, especially through subjecting the standard textual material to the developmental setting of the Kenyan social, economic and political institutions and realities. Such leadership, while it would provide scope for reflections upon the plurality of schools of jurisprudence that have evolved over time, would have been expected to focus its attention on progressive values in modern times; on objective situations of life among the citizens, and their interplays with the legal process. Hardly any academic, at the time of establishment of the University of Nairobi's Faculty of Law, had been involved in research entailing such an appreciation of law in the social context.

This is the challenge taken up from the start by Professor Okoth-Ogendo, as emerges from his earlier works, as well as the methods of giving instruction which he sustained during the succeeding three-odd decades. It may be affirmed, as regards this early period (1970's) in Professor Okoth-Ogendo's academic life, that he was a vibrant pioneer in legal scholarship; and Kenya's legal education owes him a place of honour as a contributor to the right vibes in the academic sector and, more particularly, in legal research, and in his mode of imparting instruction.

II. EARLY STEPS, AND LASTING PROFILE

After receiving his first law degree at the Dar-es-Salaam College of the University of East Africa (1969), Okoth-Ogendo had joined the Law Faculty of the newly-constituted University of Nairobi. He soon thereafter proceeded to Wadham College in the University of Oxford, in Great Britain, to study for the postgraduate Bachelor of Civil Law degree (awarded in 1971).

Oxford, the ancient jewel in the crown of British education, with its boundless array of devout, full-time scholars, was spice to Okoth-Ogendo's primordial intellectual inclination. So much did this experience exhilarate him, he would not return to Nairobi immediately upon completion. He instead proceeded to Yale Law School, at the Ivy League University in the United States of America, where he set upon research-work leading to the

1 Cmnd. 1255/1961 (U.K.). The Committee was led by the late Lord Denning of Whitchurch (1899-1999), of the English House of Lords.

doctoral degree in law (*Juris Scientiae Doctor* – Doctor of the Science of Law, or JSD), in his favourite sphere of property law.

This is the context in which Okoth-Ogendo ultimately secured a working attachment to one of the research units of the University of Nairobi (the Institute for Development Studies), so he would ultimately be doubling up in membership between that unit, and the Faculty of Law.

Okoth-Ogendo subsequently limited his academic niche to the Faculty of Law, which I myself joined as a Lecturer in August, 1976: he taking charge of land law, while I had responsibility for the law of evidence. He had, as a research scholar at Yale, spent more time at the Institute for Development Studies during his research visits to Kenya; but thereafter, he was able to devote himself more fully to the Faculty of Law.

It is in my clear recollection that Okoth-Ogendo had a vibrant devotion to legal scholarship; laboured constantly to be in command of relevant legal matter, especially in the sphere of property law; was continuously engaged with legal issues and legal material; actively pursued the complexities of the law in the context of broad national developments; articulately and vigorously put forth his intellectual perceptions; and continually had relevant studies in the works, for publication. He held a commanding intellectual and professional standing among his students, who would come up with monikers to typify him: "the *guru* of land law"; *"quicquid plantatur solo, solo cedit*" (meaning: whatever is affixed to the soil belongs to the soil) – in reference to the ownership-status of fixtures upon land which is the subject of purchase or related transactions; and so on. He was a frequent participant in professional conferences, at which he made erudite presentations on property law and related issues.

Okoth-Ogendo, unlike many academics who devote much time to miscellaneous personal-welfare pursuits, was of the unyielding persuasion that scholarship, devotedly conducted, would be a precious source, both of an enduring professional record, and of decent welfare-sustenance. He demonstrated the fact that being an excellent academic was by no means a ticket to pauperism! Quite the contrary of current perceptions. He chose to give legal practice a wide berth, and to concentrate on scholarship and consultancies, in his areas of academic preoccupation.

Such is the context in which an observer can recount the persona of Professor Okoth-Ogendo. He was an intellectual in every sense, and, by his focused work in the field of law, he accorded this calling an attraction which made it the desire of every bright student seeking a place in academia; and young academics in law felt inspired to undertake further studies, and to place their names on record as published scholars in relevant journals.

I was the first beneficiary of such a frame of mind in the Law Faculty of the University of Nairobi, when I received support and encouragement to take up a Commonwealth

Research Scholarship for studies at Downing College[2] in the University of Cambridge, the other jewel in the crown of devoted scholarship in British history; and here I obtained the Ph.D. degree in comparative constitutional law, at the end of 1981.

Thereafter, other young academics – Dr. Bonaya Adhi Godana, the late Parliamentary Deputy Speaker; Professor Kivutha Kibwana, currently the Governor of Makueni County; Dr. Dan Bondi Ogolla, who worked for the United Nations Framework Convention on Climate Change Secretariat in Bonn, Germany until December 2016 where he moved after working for UNEP in Nairobi, and for the Biodiversity Convention Secretariat in Montreal, Canada – sensed the special importance of the research competence in academia, which would in general, come in the course of works undertaken in the context of a structured and sustained, in-depth preparation of a doctoral thesis.

Indeed, for this earlier generation of academic staff endowed with special research-competence, the preferred lifestyle ordinarily took the path of professional commitment, conditioned by the viewpoint that disciplined scholarship, in the end, paid-off in all respects. To such a singular sense of commitment, at a historic moment in Kenya's legal education set-up, was, however, the intractable, countervailing deadweight of academic staff who were pulling the other way: they merely cherished the privilege of being in an elite teaching engagement; they felt insecure, with the initiatives of their colleagues who were motivated by creativity in research and publication; their own aspiration was to attain higher ranking merely by way of influential connections; and they constituted, most unfortunately, a substantial collective vote, in relation to important Law School governance-arrangements that required majoritarian choice.

Such forces constituted a real long-term career-challenge to any academic who would dream of attaining excellence, but was inclined to remain in the country, rather than seek a place of merit in a foreign University. It took approximately two decades thereafter, to achieve modest growth in the numbers of academics working towards, and attaining

2 Downing College, the College of the late Professor Clive Parry of International-law fame, had been proposed by a Ghanaian Lecturer at our Law Faculty, Dr. Sylvester W.K. Awuye, a doctoral graduate of St. Anthony's College, Oxford University, who with Okoth-Ogendo, had no doubts that this choice would bring me to a fresh and illuminating course of scholarship – such as, ultimately, to help in strengthening the University of Nairobi's Faculty of Law. [Of the Oxbridge academic environment, and of Clive Parry, then Professor of International Law in the University of Cambridge, and Fellow of Downing College, my College as a newly-admitted doctoral-research student, an anecdote is pertinent. As the senior Law don at the College, Parry invited the law research students for a meeting at his office, for guidance on modalities of work. In a fatherly gesture, the learned Professor thus proposed: "My child, you came all the way from East Africa to this seat of learning, and I would suggest that you partake of our best facility; may I propose that you work under the supervision of Basil Markesinis of Trinity College". I took the hint, and worked most beneficially with the eminent and truly inspiring scholar, now-retired Professor Sir Basil Spyridonos Markesinis.
Downing College was an inspiring establishment, at which Sir Frederic William Maitland (1850 - 1906), the Downing Professor of the Laws of Egland (1888 - 1906) built a career of distinction, thus meriting such acclaim: "As an historian of English law Maitland has never been equalled" - Charles H. Haskins, in *Proceedings of the American Academy of Arts and Sciences*. Vol. 51 No. 14 (December 1916), p. 915]

high-level research qualifications.[3]

I bear witness that in those early years of what is now the University of Nairobi School Law, competing orientations among the individual academics inflicted a severe constraint on operational collegiality and on the governance process, impeding the discharge of affairs of the University in many respects. Significant change has since taken place, and the Law School is currently endowed with several tens of highly accomplished scholars, who have brought substantial benefits of committed research, apart from considerably alleviating the "political" burdens of the past.

Okoth-Ogendo's entire life and ethos rested upon scholarship. He had little time, in this regard, for unlimited attempts at varying occupational possibilities; and the intellectual concept was the framework of his general social dialogue, especially towards the youth. This orientation had evolved right from his days as a primary-school child: and significantly, he dedicates one of his main works of scholarship "to the man who brought me my first pen, my late uncle Naphtali Obumba…."[4]

III. PROPERTY: THEORIES AND PARADIGMS

The works of Professor Okoth-Ogendo, as signalled in this Chapter, had as their foundation, the institution of "*property*" – a preoccupation, which in his perception, called for appropriate paradigm-choices, in the context of African reality, as contrasted with conceptions formulated in the context of Western social and economic systems.

In one particular study,[5] he was seeking "an adequate theory for social science research in the African context." Such theory, he argued, "must be predicated on a proper appreciation of the social foundations of the conceptual and methodological tools…inherited from Western or other bodies of social science."

Okoth-Ogendo was arguing, in effect, that, notwithstanding the intellectual validity of the many social-scientific studies generated by Western scholars, the relevance of these works in Africa is to be ascertained only at the empirical level, in the African context. He attempted an application of this argument to a particular sphere of "the African scenario", namely, that of land-use analysis, which he found to have novel requirements.

In a special illustration, Okoth-Ogendo argued that colonial government in Africa had introduced a capitalist theory of land development, which held that the sanctity of

3 In this category are, for instance, the following scholars: Dr. David W. Gachuki, who received his Ph. D at the University of Warwick in the U.K. in 1983; Professor Arthur A. Eshiwani who received his J.S.D. at the University of California, Berkeley in the U.S.A. (1990); Professor Francis D.P. Situma who received his Ph.D. at the Fletcher School of Law and Diplomacy, Tufts University in the USA (1995); Professor James Otieno-Odek (now Justice of Appeal) who received his J.S.D. degree at the University of Toronto in Canada (1995); Professor Patricia Kameri-Mbote who received her J.S.D. degree from Stanford University in the U.S.A. (1999); Professor Albert O. Mumma who received his Ph. D. at the University of Cambridge in the U.K. (1992); Professor Githu Muigai (now the Attorney-General) who received his Ph.D. degree from the University of Nairobi (2002); Professor Migai Akech who received his J.S.D. from New York University (2004); Professor Winnie Kamau who received her J.S.D. at the University of York in Canada (2007); Dr. Jane Dwasi who received her J.S.D. from the University of Wisconsin in the U.S.A. (2001).

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

5 H.W.O. Okoth-Ogendo, "Property Theory and Land-use Analysis: An Essay on the Political Economy of Ideas", University of Nairobi, IDS Discussion Paper No. 209 of August 1974.

the individual initiative, to be secured through private land-holding, excluded entirely any prospect of external control. Professor Okoth-Ogendo's position was that "the distinction between public and private domains of economic activity is no longer tenable, certainly not in Africa…." Such a thesis calls for further development, especially in relation to the sphere of social and economic rights, which invariably features in the new generation of African constitutional safeguards.[6]

The said concern for local context to the evolved jurisprudential paths, brought Okoth-Ogendo to terms with the customary norms and observances among the differing communities of Kenya; and he ended up making a case for the development of a "common law of Kenya". He did it as follows:[7]

> *…there is…no justification at this stage for tying Kenya's legal system indefinitely to 19th century English law or indeed to any foreign law of whatever epoch.*

Such was a controversial standpoint, insofar as it portrayed the "common law" as consisting in a precise specification of ingredients founded upon the English experience – and not germane to the Kenyan situation. Although such a perception of the "common law" is today held by some in the Kenyan legal fraternity, it does not reflect the essence of the modern common law, which should be perceived as: *a progressive tradition of law founded upon citizen-rights, and upon judicial yardsticks, inspired by the sense of equity and fairness as adjudged on the merits of each case, and incorporating creditable precedents instituted from time to time.*

Such has been the nature of the common law in its modern cast,[8] for a long time; and it is this, which accounts for its continual relevance in Africa, in North America, in India, in the Caribbean, in Australasia, and even in the United Kingdom. It has been so as far back in time as early twentieth-century. It is not out of turn, in this regard, to call to the attention of lawyers the elocution of Lord Atkin of Aberdovey (1867-1944), one of the greatest common law judges, in 1941:[9]

> *The [requirement of old common law forms of action] which have now disappeared, should not in these days be allowed to affect actual rights. When these ghosts [the ingredients of the ancient common law] of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them undeterred.*

It is precisely such a foundation of justice, upon which the modern common law is erected, that accords the courts of Kenya and of other countries the legitimacy of their legal and constitutional interpretation, in tune with the rights and expectations of the citizens.

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6 E.g. The Constitution of Kenya, 2010, Article 43.

7 H.W.O. Okoth-Ogendo, 'Customary Law in the Kenyan Legal System: An Old Debate Revisited' in J.B. Ojwang and J.N.K. Mugambi (eds.), *The S.M. Otieno Case: Death and Burial in Modern Kenya* (Nairobi: Nairobi University Press, 1989) 135, 146.

8 Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge, Mass: Harvard University Press, 1988); Thomas S. Schrock and Robert C. Welsh, 'Reconsidering the Constitutional Common Law' (1978) 91 Harvard Law Review 1117.

9 *United Australia Ltd. v. Barclays Bank Ltd* [1941] A.C. 1, 29 (House of Lords, UK).

IV. ENLARGING THE FRAMEWORK OF PROPERTY LAW

Had Okoth-Ogendo been a scholar in a typical Western University, he probably would have distinguished himself as a *property lawyer*; and in the quest for comprehensive coverage, he presumably would have devoted himself to both real property (primarily land) and "incorporeal property", that is, "intangible right in land, such as easement."[10]

However, as a legal scholar in a developing country, where land in its physical form constituted such a vital ingredient in the social, economic and political arrangements, his primary subject of interest was just *land,* and such related, broader dimensions of life. Indeed, Okoth-Ogendo's scholarship in land law had a definite broadening orientation, turning on agricultural policies and agrarian institutions, besides land's interactions with the wider physical environment.

Professor Okoth-Ogendo entered upon his studies on land from a historical standpoint, which he explored in his main work, *Tenants of the Crown*.[11] This work is essentially an explanation of the evolutionary context of Kenya's law relating to agricultural land-use. The work is not so much about evolved doctrines of land-holding, as about *the socio-economic framework within which the law relating to agricultural land has taken shape.* This work, in effect, is by no means a statement on operative legal norm; rather it is an examination of the dynamics that, in the past, configured the governing norms in relation to land-holding. The governing land law has, in any event, been changing continually; it would not have been practical to render a descriptive picture in definitive terms.[12]

There is, thus, an *orientation to context, policy and principle,* to Professor Okoth-Ogendo's works, as the defining element of his contribution in the sphere of property law. No less has this broadening angle come out through his works on the land-encapsulating phenomenon, the *environment.*

In his article "Managing Watersheds in Kenya",[13] Okoth-Ogendo perceived land as part of the continuous environmental package that, integrally, was essential to human survival. He urged "the need to take urgent steps to reduce the rate at which natural resources are being depleted if the survival of mankind on planet earth is to be secured".[14] He took a focused view of the vitality of water resources, before adverting to the special interplay of that scenario with the issue of *land,* thus observing:

> *The first [question] is how best to preserve or restore the global ecological balance to a level that enables nature's own methods and processes of generating and conserving water to again operate without impairment. The second is whether and how existing fresh*

10 B.A. Garner, *Black's Law Dictionary*, 8th ed. (St. Paul, MN: West, 2004)743.

11 Okoth-Ogendo (n 60).

12 The numbers of statutes once regulating the land sector – the Indian Transfer of Property Act, 1882; the Government Lands Act (Cap. 280, Laws of Kenya); the Registration of Titles Act (Cap. 281, Laws of Kenya); the Land Titles Act (Cap. 282, Laws of Kenya); the Registered Land Act (Cap.300, Laws of Kenya); the Land Acquisition Act (Cap. 295, Laws of Kenya); and the Wayleaves Act (Cap.292, Laws of Kenya) – have all been repealed recently by the Land Registration Act, 2012 (Act No. 3 of 2012), and by the Land Act, 2012 (Act No. 6 of 2012).

13 Amos Kiriro and Calestous Juma (eds.), *Gaining Ground: Institutional Innovations in Land-use Management in Kenya* (Nairobi: Acts Press, 1989) 131-141

14 ibid 131.

> *water reserves can be developed and managed in a manner that supports those natural methods and processes. The third is whether mankind's own patterns of consumptive utilization can be controlled in such a way as to prevent further relapse into waste, pollution and depletion.*[15]

His argument is that "[all] proper resource management must be anchored on good land-use and proper husbandry".[16]

Professor Okoth-Ogendo, indeed, took the controlling factor of the environment further still, into the sphere of *climate change*.[17] The broadening focus upon land, in the said work, now includes the complex factors of climate change, as perceived in the United Nations Framework Convention on Climate Change, of 1994. But he remains mindful of the "land factor" and other local elements that bear an impact on the global climatic situation; in his perception:[18]

> *…a great deal must depend on individual country perceptions, politics and principles on how best to respond to climate-change issues. For although commitment to mitigate the effects of climate change is global, actual strategies and programmes directed at this, cannot ignore national development imperatives.*

V. PROPERTY LAW AND PUBLIC LAW: FORGING AN INTERFACE

Property law, to a significant extent, may be perceived as having been just a phase in Professor Okoth-Ogendo's wider interest in issues of governance and public law. A close observation of his path in scholarship, suggests that he had entertained an inner sense that all the wide-ranging processes of human life – be they social, economic or political – had an anchorage in a sustaining, fixed platform: *property,* and especially, *landed property.* Upon *land,* sat all the communities; and upon it, they founded and conducted all their culture and tradition. Upon land, were raised, and practised, all the economic plans and activities, that created integrality, and special governance settings, at localized levels, and on a wider scale. Upon land, rested the organizing capacity and the resource-muscle for political direction. Therefore, *land tenure; access to land; agrarian policies* – lay at the root of all the modern reforms in governance, as well as all possible initiatives of progressive constitution-making.

It is hardly surprising that many of Professor Okoth-Ogendo's most innovative works fell squarely within the conventional typology of *public law* – quite in line with his place as a scholar in the Department of Public Law, to the very end. Such a position, however, is more formal than substantive. From the time of establishment of the Faculty of Law's three Departments, they bore no meaning in terms of the specialised contributions of the academics. Those in Commercial Law would be specialising in Public Law or Private Law, for instance – not following any departmental order. The Law School will need to deliberate upon this issue: bearing in mind that specialised teaching and research, supported with dedicated disciplinary assets, has the potential to sustain a professionally strong and dependable academic unit.

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15 ibid.

16 ibid 136.

17 H.W.O. Okoth-Ogendo and J.B. Ojwang (eds.), *A Climate for Development: Climate Change Policy Options for Africa* (Nairobi & Stockholm: ACTS Press & Stockholm Environment Institute, 1995).

18 ibid 2.

A remarkable work, at an early stage in his career, was *"The Politics of Constitutional Change in Kenya Since Independence, 1963-1969"*.[19] In this study, he made illuminating observations on the pattern of governance in the wake of Kenya's Independence Constitution of 1963 – highlighting the regressive political trend which was clawing back on the rights and freedoms embodied in that charter, quite steadily, up to the apotheosis in the 1969 Constitution, which landed this country with a governance framework in which *executive supremacy* was the reality.

Professor Okoth-Ogendo's perceptive scholarship in public law was subsequently to come forth in his lucid contribution on *"Constitutions without Constitutionalism"*.[20] He returned a negative verdict on Africa's contemporary governance practices, in relation to the conventional Western notions of democracy and constitutionalism, in these terms:[21]

…what we found [in relation to the African countries] is a situation in which *only the idea of the constitution has survived.* The most fundamental of the functions of a constitution, at least in liberal democratic theory, to regulate the use of executive power, is clearly not one that African constitutions that have survived military intervention now perform.

From that premise, Professor Okoth-Ogendo peered into the subsequent "African course," making certain reflections. He concluded that the Constitution, as governing set of norms, has a significance that lies several removes from current governance practices in most of Africa. He perceived a clear divide between the Constitution as formally adopted, and the reality of governance as practised in a typical African state. The significance is in the reality, as he observes, that the Constitution intrinsically entails certain cross-cultural functions, bearing upon the people and the governance-process; and the Constitution is required in any case, where any localized governance situations deserve protection. He considers that the Constitution should be the embodiment of norms providing a suitable balance between conventional perceptions of constitutionalism, and prevailing notions of autochthony.

VI. RELATED ENGAGEMENTS: WIDENING TREND

The foregoing assessment is consistent with the portrait that emerges from Professor Okoth-Ogendo's *curriculum vitae:* in particular, as this shows the opening-out of his property-law focus – into *environment*; into *public law* and *governance*; and into *contributions and services to public, State, and international agencies and initiatives*.

Such an expanding sphere of interest is reflected in his devoted service to considerable numbers of organizations: for instance, as Chair of the Board of Directors, African Population Advisory Council (from 1998); Director of the International Planned Parenthood Federation's Centre for African Family Studies (1990-1994); member of the International Advisory Board of the Netherlands Institute of Human Rights (from 1985); member of the World Bank's Africa Technical Department's Africa Population Advisory Committee

19 H.W.O. Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya Since Independence, 1963-1969'(1972) 71 (282) African Affairs.

20 HWO Okoth-Ogendo, 'Constitutions without Constitutionalism: African political paradox' in D. Greenberg, S.N. Katz, M.B. Oliviero and S.C. Wheatley (eds.), *Constitutions and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993).

21 ibid 254 [emphasis supplied].

(1990-1994); Rapporteur-General of Kenya's National Constitutional Conference (2003-2004); member, Vice-Chair, and Chair of the Research and Drafting Committee of the Constitution of Kenya Review Commission (2000-2005); member of Kenya's Commission for Higher Education (from 1986); member of Kenya's National Standing Committee on Human Rights (1996-2004); Chair of Kenya's Insurance Appeals Tribunal (1989-2002); Chair of Kenya's National Council for Population and Development (1993-2002); Chair of Kenya's Board of Directors of the Centre for the Study of Adolescence (1988-1994); legal auditor to the Government of the Tanzanian on the Privatization of the Tanzanian Telecommunications Company (1996-1998); consultant to the Food and Agriculture Organization of the United Nations and the Government of Tanzania (1993-1995); consultant to the Kenya Government and the World Bank on Land Tenure and Land Policy (1990-1992).

Arising from such diverse roles, and especially from his consultancy assignments, Professor Okoth-Ogendo, virtually throughout his academic career, had the opportunity to prepare numbers of detailed reports – all of which still signify the expansion of his research domain, well beyond the core property-law threshold. It is within this expanded sphere that some of his major public contributions are to be seen: notably, serving as Vice-Chair of the Constitution of Kenya Review Commission, 2002.

VII. ACADEMIC CULTURE: CONCLUSION

The dictionary[22] defines "culture" as: "the customs, ideas, and social behaviour of a particular people or group." Is there an *esprit de corps* that focuses the learned community of a University, or of its disciplinary sub-segment, upon some recognized value, or some culture, built around the broad object of such an entity? Was there any scholarly culture, as a policy commitment of the University of Nairobi's "learned friends"?

From my position as a member of that circumscribed community for more than quarter-century, I would have doubts. But I bear testimony that Professor Okoth-Ogendo belonged to a minuscule category of academics who epitomized real intellectual commitment to the discipline of law, savouring every moment of it, far from viewing it as bare font of daily bread. He was fond of the epigram: "sustaining oneself by the pen" (or in vernacular: "*chiemo gi kalam").*

Symbolically, Okoth-Ogendo made ideal fabric for weaving the yarn of academic culture. This is the abiding challenge for institution-building, in the domain of legal education in Kenya, and in Africa at large. At a more tangible level, Okoth-Ogendo's love of, and pride in scholarship was a definite influence on a whole crop of younger law scholars, and I fall in that category. That is precisely the spirit that imbued scholars such as Dr. Dan B. Ogolla; Professor Francis D.P. Situma (of the University of Nairobi School of Law); Professor Githu Muigai (now the Attorney-General); Dr. S.C. Wanjala (Supreme Court of Kenya); Professor P.L.O. Lumumba (Director, Kenya School of Law); Professor Albert O.

22 A. Stevenson and M. Waite (eds.), *Concise Oxford English Dictionary*, 12th ed. (Oxford: Oxford University Press, 2011) 349.

Mumma (University of Nairobi School of Law); Professor Patricia Kameri-Mbote (former Dean, University of Nairobi School of Law); Professor Phoebe N. Okowa (Professor of Law at Queen Mary University of London); Professor James Otieno-Odek (Court of Appeal); Professor Bernard Sihanya (University of Nairobi School of Law); Professor Migai Akech (University of Nairobi School of Law); Professor Winnie Kamau (University of Nairobi School of Law); and many other younger scholars currently holding responsible positions in academic service and elsewhere.

Within Professor Okoth-Ogendo's multiple categories of bequest to the community of academics and scholars, a remarkable one is his mode of delivering instruction: a focused and unambiguous structure of presentation; well interfaced and lucidly co-ordinated inter-relationships and interplays of ideas; and a singular clarity of communication, in elegant language.

In every respect, Professor Hastings Wilfred Opinya Okoth-Ogendo was a special asset to the University of Nairobi academic community.

CHAPTER 6

OKOTH-OGENDO'S STYLE: DISCERNING THE GURU'S VOICE IN A SCHOLARLY TEXT

Okoth Okombo

Voice refers to how writing "sounds" on the page. Voice is one's style of writing – the tone a writer uses, the words he or she chooses, the way he or she arranges sentences.[1]

I. INTRODUCTION

In Okoth-Ogendo's[2] oral presentations, his voice was unmistakable. Indeed, it was more his voice than his sophisticated argumentation that attracted non-law students, including this writer, to his public pronouncements on various aspects of Kenyan law and public policies, such as the debates on 'The Kenya we want' in the 1980s. The voice had a certain distinctive feature that I will refer to simply as weight, in the sense of a speaker's/writer's expressional signaling of the import, gravity or seriousness of his/her contention on a given subject. There was always an element of weight in his formal utterances, certainly having a contribution to his popular appellation, The Guru.[3] One could discern it in his enunciation, his phraseology, and the authoritative logic of his thought patterns. In principle, there should be a way of establishing the same characteristics in his written texts. On the advice of Professor Charles Okidi,[4] Okoth-Ogendo's (henceforth The Guru) *Tenants of the Crown*[5] was purposively selected as the written text in which to look for the defining characteristics of his voice, treated as the culmination of all the textual factors that constitute his style, with special attention to that subtle element referred to above as weight. Certainly, *Tenants of the Crown* was not regarded as a representative sample of The Guru's writing. This work was not based on the survey method. The author wanted a text that could serve as an

1 Amanda Martinsek (ed), *Legal Writing: How to Write Legal Briefs, Memos, and Other Legal Documents in a Clear and Concise Style* (New York: Kaplan Pub., 2009) 104-105.

2 He seems to have preferred this double-barrelled form of his name, which appears as his surname in *Tenants of the Crown*.

3 In English, this word has more or less lost its original denotation of spiritual authority in Hindi and acquired connotations of intellectual authority, the basis of its usage in this text.

4 This refers to Professor Okidi Odidi of CASELAP, University of Nairobi.

5 HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (African Centre for Technology Studies, ACTS Press: Nairobi, 1991).

exemplar of the best of The Guru's writing and sought guidance from someone[6] who was likely to be adequately familiar with the relevant literature, in the hope that The Guru's voice would be loud and clear in such a text.

Although we usually associate voice with speech, writing authorities state categorically that voice has a meaning in writing. For example, Kinneavy and Warriner,[7] in a discussion of this point, provide the following explanation:

> People have distinctive voices when they write just as they do when they speak. Voice in writing is the unique sound and rhythm of a writer's language -- a writer's personal way of talking to the reader … it helps the reader imagine a real person speaking from the page.

As already indicated above, what characterised The Guru's voice was the weight of his delivery. That is to say, his manner of presentation. Webster's II: New Riverside University Dictionary[8] provides what is easily the most exhaustive dictionary definition of the word "weight". The following two of its nine definitions are particularly instructive in the context of this discussion:

> Weight [noun]….
> 8. The greatest part: PREPONDERANCE
> 9. a. Influence: authority
> b. Forceful quality <The weight of one's argument>

Incidentally, the said dictionary's definition (as quoted above) is reminiscent of The Guru's oral style.[9] In his pronouncements at public lectures and senate meetings at the University of Nairobi, he always summarised his reasoning by talking about the "preponderance of opinion" on whatever was the bone of contention. For example, in his summary of the opinion of the University of Nairobi Senate on the question of whether to close or not close the university on the eve of the first Saba Saba rally,[10] he talked of the "preponderance of opinion" being against closing the university. Similarly reminiscent of The Guru's discourse style are the matters of influence/authority and 'forceful quality' listed under definition 9 of the same dictionary.

This discussion is based on the conviction that such properties of one's speaking voice have discernible correlates in one's writing style. As Kinneavy and Warriner further explain:[11]

> Like your speaking voice, your writing voice can express many different attitudes and feelings, or tones. It can sound happy, angry, sad, serious, sentimental, objective, horrified, offhand, sarcastic -- however you want it to sound … when you write, your words, sentence structure, and punctuation do all the work [done by your voice in speech].

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6 (see note 4 above).

7 James L Kinneavy and John E Warriner, *Elements of Writing* (New York: Holt, Rinehart and Winston Inc, 1993) 517.

8 Anne E Soukhanov, Kaethe Ellis, Laurel Cook & Howard Webber, *Webster's II New Riverside University Dictionary* (Boston, MA: Houghton Mifflin Company, 1984).

9 Especially on matters of word choice (lexical style).

10 This (7 July 1990) was the day when prodemocracy activists organized a rally in Nairobi to emphasize the call for multi-party democracy in Kenya as part of a broader campaign against KANU's one-party rule.

11 Soukhanov *et al* (note 8) 517.

Of the tonal possibilities mentioned above, the closest to our idea of weight, viewed, as preponderance, authority, and forceful quality, are 'serious and objective'. It is the significance of such qualities in The Guru's writing as represented by the textual properties of his *Tenants of the Crown* that we attempt to highlight and explicate. Indeed, it is arguable that his choice to use the word 'crown' in the title of the book to represent the imperial sovereign authority of the British Empire itself represents an element of weight in his writing style.

II. WEIGHT IN THE THEME OF THE GURU'S TEXT

Concerns about land and the rights pertaining to its acquisition and ownership have dominated Kenyan political discourses[12] for a period stretching from the days of Kenya's struggle for independence to the time of the constitutional review debates that culminated in the drafting and subsequent promulgation of the Constitution of Kenya, 2010.[13] Indeed, by the look of things, there is no sign that such concerns will end soon. As Kameri-Mbote states:[14]

> There is probably no issue in Kenya that arrests the attention of the people like land. From colonial times, the solution to the land issue has proven intractable in law and policy. Indeed, at each juncture of political transitions, land has been a core point of contention and contestation.

One can, therefore, regard the choice of land as the theme of what is arguably one of The Guru*'s* most important publications as a clear indication of his predilection for weighty matters. Clearly, as evidenced from the introduction to *Tenants of the Crown*, The Guru was aware that the relevant law "was used to structure political and economic choices during the colonial period."[15] Today, years after his demise, we are aware that the Constitutional provisions on land[16] are arguably the most difficult to implement. In a very real sense, land issues and the relevant laws continue, to use his own words as quoted above, "to structure political and economic choices" in independent Kenya. The first statement in his book's conclusion confirms the Guru's awareness of this, where he asserts:

> The concern of this book has been to explain how the political economy of colonialism not only shaped the evolution of agrarian law in Kenya *but also determined its continuity into the post-colonial era* (emphasis added).[17]

As a member of the first generation of law scholars in Kenya, The Guru must have had a wide range of thematic possibilities to choose from for his research and publication. His choice of land issues must be attributed to something in his personality and perception of things. Something we can relate to his discourse style (the way he talks or writes), for style is essentially a matter of the choices we make, be it in clothing, language, or something

12 See P Kameri-Mbote, 'The Land Question and Voting Patterns in Kenya' (2015) in Kimani Njogu and Peter Wafula Wekesa (eds) *Kenya's 2013 General Election: Stakes, Practices and Outcome* (Nairobi: Twaweza Communications Ltd,2015)34.

13 Republic of Kenya, *The Constitution of Kenya, 2010* (Government Printer, Nairobi, 2010) chapter 5.

14 Kameri-Mbote (n 12) 34.

15 Okoth-Ogendo (n 5) 3.

16 Republic of Kenya. *The Constitution of Kenya, 2010* (Government Printer, Nairobi, 2010) chapter 5.

17 Okoth Ogendo (n 5) 169.

else, including the disputations in which we characteristically engage. We, therefore, see The Guru's thematic choice in *Tenants of the Crown* as an aspect of his style. We also hear his distinctive voice as we read through his arguments and conclusions in handling the unending complexities in this weighty subject of land.

III. WEIGHT IN THE STRUCTURE OF THE GURU'S DISCOURSE

A distinctive characteristic of The Guru's voice in *Tenants of the Crown* is the boldness with which he structures his discourse, typically starting every key argument by presenting the matter in contention, his own position, an expert marshaling of the relevant evidence, and a conclusion that echoes the stated position. As Cannavo[18] explains, "…the way we package an argument can highlight key points in the reasoning and give communicative life to the otherwise cold and winding pathways of argumentation". In principle, "the way we package an argument" constitutes our argument style. Since we make the choice to do it in one way and not in any other way, our choice defines our style and to that extent becomes distinctive in the context in which it has been made. Thus, the way The Guru structures his argument, as described above, constitutes a recognisable argument style.

For example, in Chapter 1, 'The colonial factor in agrarian law', he opens the discussion by stating what is in contention as follows:

> Mungeam has argued that the reason for Britain's assumption of territorial jurisdiction over East Africa was not in the new acquisition's political or economic significance but in the wider field of international diplomacy.[19]

After explaining the point and admitting that there could be some evidence to support it, he proceeds to state his own position as follows:

> This perspective [that East Africa as a whole was important from the point of view of British imperial strategy] gives but a partial explanation of the extent of British imperial concerns on the East African coast at that time.

This boldness, by lending weight to The Guru's claim, becomes an attribute of weight as the dominant characteristic of his discourse style. The reader cannot avoid asking, even silently, to be shown the evidence. This creates an element of suspense, which translates into significance in relation to the expected message. The Guru satisfies this desire by providing what looks like an instance of overkill – more than enough evidence to prove his point. In this case, his evidence to the effect that Britain had commercial interests in its imperial agenda[20] in East Africa includes: the results of a study by Wolff,[21] an 1893 report by Lord Lugard,[22] and reports by Charles Eliot and John Ainsworth.[23] By the sheer weight of The

18 S Cannavo, *Think to Win: The Power of Logic in Everyday Life To Guarantee Success* (India: Magna Publishing Company, 2003).
19 Okoth-Ogendo (n 5) 7.
20 ibid 7.
21 ibid 7-9.
22 ibid 8.
23 ibid 9.

Guru's style of providing evidence, the reader is nearly beaten into submission by the time The Guru's conclusion arrives in the seventh paragraph:

> These commercial possibilities constituted the economic rationale for the construction of the Uganda Railway. Once it was built, the railway fundamentally enhanced the economic potential of the region.[24]

This discourse structure (Contentious Point – Writer's Position -- Evidence – Conclusion) characterises The Guru's general argumentation style throughout the text of *Tenants of the Crown.* The boldness of this style reflects weight in terms of the writer's seriousness based on his convictions with regard to the positions that he adopts in the issues under discussion. He does not hide in hollow prevarication and sophistry. Instead, he boldly lays his cards on the table, thereby giving weight to his points of view and positions in a particular debate.[25]

A. Weight in The Guru's Paragraph Structures

The boldness that is characteristic of The Guru's writing is clearer in the structures of his paragraphs than it is in the overall discourse structure discussed above. The paragraphs in *Tenants of the Crown* are generally composed in a canonical manner, usually starting with a topic sentence, which states the main idea of the paragraph, followed by supporting sentences, and ending with a clincher sentence – which wraps up The Guru's main point or argument in a given paragraph. The following paragraph,[26] taken from chapter 4 of *Tenants of the Crown* illustrates this point (numbering added):

1. The main instruments of insurgency were the courts and the administrative personnel.
2. Right from the beginning of colonialism, the courts had not been slow to inject English values into the substantive norms of customary law. (3) This was most noticeable in the administration of criminal and family laws. (4) This was often done through extensive use of the so-called 'repugnancy clause' which adjoined the courts to administer or be guided by customary law only 'in so far as it was not repugnant to justice and morality or inconsistent with any written law. (5) The colonial judges were quite firm in their belief that this clause gave them the freedom to temper customary law with English standards of justice. (6) Said Wilson, J. in a suit involving the enforcement of an unsatisfied judgment in customary law: 'I have no doubt whatever that the only standard of justice and morality which a British Court in Africa can apply is its own British standard. (7) Otherwise we should find ourselves in certain circumstances having to condone such things, for example, as the institution of slavery...' (8) In the area of property law this freedom was used extensively to mould the evolution of customary law

24 ibid.

25 See, for example Austin J Freeley, *Argumentation and Debate: Rational Decision Making* (Belmont:Wadsworth Publishing Company, 1961).

26 Okoth-Ogendo (n 5) 64.

> towards a regime that would lead to the concentration of property rights into fewer and fewer hands. (9) Thus, the courts imported into customary law such radical concepts as prescription, limitation and outright sales.[27]

As may be easily observed, sentence (1) -- the topic sentence -- is placed right at the beginning of the paragraph, making The Guru's main idea in this paragraph abundantly clear. Although, in principle, the topic sentence need not always be placed at the beginning of a paragraph, having it in that position signals clarity of mind in a writer, giving the impression of being focused or serious, an attribute of weight in a writer's style. In the paragraph under discussion, the topic sentence is followed by sentences (2) to (8), which serve as its supporting sentences, to buttress The Guru's argument in this paragraph. Finally, we come to sentence (9), the clincher, which wraps up the argument in favour of the main point stated in the topic sentence. This organisation of the paragraph gives weight in the sense of 'forceful quality' to The Guru's textual voice. In other words, it gives The Guru a persuasive voice. Other relevant properties of the paragraph include coherence and overall paragraph unity. The coherence is based on the logical sequence of sentences, which gives the journey from the topic sentence to the clincher a nod of reasonableness. It emanates from the order in which ideas are arranged and the connections between the ideas. Thus, for example, the beginning of sentence (2) only makes sense because of its relationship to what has been said in the preceding (topic) sentence. Similarly, sentence (3) makes a natural development from the preceding sentences. This interconnectedness of ideas and the sentences that carry them is an instrument of coherence in the paragraph and a great source of weight in terms of the writer's logical appeal to his audiences. The use of the joining word, 'thus', at the beginning of the clincher, sentence (9), testifies to The Guru's consciousness of the logical relationship between his concluding proposition and the preceding sentences. The paragraph derives its unity from the fact that all the sentences in it are contextually related to the main idea borne by the topic sentence. It is thus another indicator of the writer's sense of focus, adding to the weight derived from the clarity of the topic sentence and the coherence of the paragraph as a whole.

B. Weight in The Guru's Sentence Structures

An important source of weight, in the sense of objectivity in The Guru's voice, is his use of sentence structures, which give the text an impersonal tone. The sentences in the following paragraph, picked more or less at random from chapter 8[28] of *Tenants of the Crown*, serve to illustrate this point:

> 1. The overall pattern that emerges from this category of responses is that European producers were not simply given elective representation and a clear majority in the new institutions; they were fully in command of the machinery of agricultural administration. (2) The political machinery of the state had become more closely aligned to settler interests than ever before.

27 ibid.
28 Okoth-Ogendo (n 5)116.

It is important to note that "the overall pattern" said to be emerging in sentence (1) is actually emerging in the writer's (i.e. The Guru's) mind. However, it is presented in a manner that makes it look like an impersonal scientific observation, completely unrelated to the writer's feelings. Similarly, in sentence (2) the actions of the state are attributed to a "political machinery" which seems to act independently of any human agent.

In the whole text of *Tenants of the Crown*, the writer avoids sentence structures that identify him as a participant in the discourse represented by the text of his book. Thus we never come across the use of personal pronouns such as 'I' or 'we' that are normally associated with a writer's awareness of his/her participation in a particular discourse.

The overall effect of such impersonal structures is the creation of an impression that the writer is being scientific and objective in his or her observations and utterances. This perception of objectivity gives weight to the writer's conclusions since they are treated as if they have not been influenced by the writer's personal biases and prejudices. In this regard, his writing arguably epitomises the general inclinations of legal writing, summarised as follows in the words of Amanda Martinsek:[29]

> In your writing, strive for messages that are clear and convincing ... focus on the core of your message. Be sure to communicate this message through the use of compelling logical arguments and the voice that is appropriate for intended audience.

IV. SUMMARY AND CONCLUSION

This contribution was inspired by the writer's personal testimony regarding the distinctive element in the oral discourse style or voice of Okoth-Ogendo, The Guru. Referring to this distinctive element as weight, the writer attempted to determine its textual characteristics in The Guru's writing, based on a stylistic analysis of *Tenants of the Crown*, arguably one of his most significant written texts. The writer's inspiration was based on his personal experiences in listening to The Guru when he made various oral presentations during his professorial career at the University of Nairobi.

The discussion has been based on four properties of the text: the overall theme, discourse structure, paragraph structures, and sentence structures. In all these textual properties of *Tenants of the Crown*, it has been possible to demonstrate the presence of weight as a defining characteristic of The Guru's voice as a writer, just as it was the defining characteristic of his speaking voice. In the theme of the text, weight is related to The Guru's choice of land, a lingering concern in Kenya's public affairs, as the subject of his discussion. In relation to discourse structure, weight is characterised by a presentational argument design of the form: Contentious Point – Writer's Position – Evidence – Conclusion. Paragraph structures show weight in a characteristic arrangement of key discourse elements in the sequence: topic sentence, supporting sentences, and clincher, encompassed in a general display of coherence based on a logical interconnectedness of ideas. In The Guru's sentence structures, weight is characterised by the use of an impersonal tone, creating an air of scientific objectivity.

By taking weight, the apparent distinctive feature of The Guru's oral communication,

29 Martinsek (ed), (n 1).

and establishing it as the characteristic feature of his text in *Tenants of the Crown,* this study suggests strongly that style emanates from one's personality and may be realised in different forms, depending on the expressional possibilities of oral and written communication.

PART II: OKOTH'S CONTRIBUTION TO LAND TENURE FOUNDATIONAL DISCOURSES

CHAPTER 7

IN SEARCH OF THEMATIC UNITY IN LAND LAW: TENURE SECURITY

Gamaliel Mgongo Fimbo

I. INTRODUCTION

I want to thank you Dean Patricia Mbote for inviting me to deliver the first annual lecture in honour of a scholar and friend, Professor Hastings Wilfred Opinya Okoth-Ogendo. In accepting this invitation, I wish to say that I am deeply aware of its value and distinction. It is my honour and privilege to stand here in front of Ogendo's widow and his children, his colleagues, students and admirers. Whatever small contribution I am making today, it is due to the friendship and comradeship of Okoth-Ogendo.

The title of my lecture is 'In Search of Thematic Unity in Land Law: Tenure security.' I believe there is a mixed audience here, an audience of not the same profession as Ogendo. In that light, in this lecture, I have tried to break away from professional narrowness by picking a topic of common interest. At the same time, the lecture has to be specific and professional in order to demonstrate Ogendo's and my professional views on the course, land law. Both Okoth-Ogendo and I have been involved in teaching this course for the whole period of our adult lives.

Land law has something to say about each one of us -- all of us, even the homeless, occupy space and live somewhere, and each, therefore, stands in some relation to land, as owner-occupier, as tenant, as licensee, as squatter or trespasser. Land law is everything, nearly every aspect of law has reference to land: Law of Contract – enforceability contract of sale of land,[1] lease;[2] Law of Torts – trespass to land,[3] nuisance, the Rule in *Rylands v Fletcher*; Administrative Law – judicial review, power of the President to revoke a right of occupancy;[4] Constitutional Law – whether the Regulation of Land Tenure (Established Villages) Act is constitutional;[5] Law of Banking – mortgages of land;[6] Family Law – gift of land between husband and wife;[7] Law of Succession – inheritance to land;[8] Islamic Law

1 *Shirin Rajabali Jessa v Alipio Zorilla* [1973] EA 506. Today, contracts of sale of land are regulated by the Land Act, No. 4 of 1999 Cap 113, section 64. This section is modeled on the Statute of Frauds 1677 (UK), section III and IV.
2 *Souza Figueiredo and Co v Moorings Hotel Co. Ltd* [1960] EA 926 CA (UG).
3 *Jela Kalinga v Omari Karumwana* [1991] TLR 67.
4 *Patman Garments Industries Ltd v Tanzania Manufacturers Ltd* [1981] TLR103 CAT.
5 Act No. 22 of 1992 Cap 267 R E 2002; *Attorney General v Lohay Akonaay* [1995] TLR 80 CAT.
6 *Guaranty Discount Co. Ltd v Credit Finance Corporation Ltd* [1963] EA 345. CA(UG).
7 *Mohamed Nyakioze v Sofia d/o Musa* (1971) HCD n. 413.
8 *Didas Rwakalila v Thomas Matondane* [1992] TLR 314.CAT.

– whether Islamic Law applies to the suit land.[9]

A. State and Law

The underlying theme, which guides us in the teaching of land law, is the relation between State and law. Our stand is that law is an effective instrument for the articulation and implementation of State policies and objectives.[10] Of course most of you are aware of Lenin's often-quoted statement that law is an extension of politics. Regarding the complexity and pervasiveness of law, we would happily quote from a leading authority:

> Legal education is, of course, in many ways, a far more difficult sphere than technical or scientific education. Laymen may see legal training as a limited kind of education concerned with rules and the intricacies of procedures. But properly conceived, law is not simply a discipline concerned with the content of rules and the techniques of litigating; law is a facet of culture, economics and politics, a manifestation of power and a device for channeling and restraining it; law is one means for organising society; it is a complex sociological phenomenon, a pervasive feature of organised society, and destined to grow in diverseness and complexity as societies change and as knowledge about human behaviour grows. Viewed in these terms, law is both important and difficult.[11]

Yet the study of law need not be dull, as we shall show below. In his Historical Law Tracts, Lord Kames once stated: "Law treated historically becomes an entertaining study; entertaining not only to those whose profession it is, but to every person who has any thirst for knowledge".

Even tracing the root of title of a landholder can be as refreshing as it is informative. Take the case of a conveyancer informing a purchaser the root of title of some land in the State of Louisiana, which I quote:

> Please be advised that in the year 1803 the United States of America acquired the territory of Louisiana from the Republic of France by purchase; the Republic of France had in turn acquired title from the Spanish Crown by conquest, the Spanish Crown having originally acquired title by virtue of the discoveries of one Christopher Columbus, a Genoese sailor, who had been duly authorised to embark upon his voyage of discovery by Isabella, Queen of Spain; Isabella, before granting such authority, had obtained the sanction of His Holiness the Pope; the Pope is the Vicar on earth of Jesus Christ; Jesus Christ is the son and heir apparent of God; God made Louisiana.[12]

B. Land, an Arena of Struggles

In Africa, land was an arena of struggles between the colonised and the coloniser. The coloniser sought to wrest control over land from the colonised. In this process, law was used

9 Sec of *State for Foreign Affairs v Charlesworth, Pilling & Co.* [1901] AC 373.PC(K).

10 See GM Fimbo, 'Land, Socialism and the Law in Tanzania' (1973) (6) 3 Eastern Africa Law Review 215; GM Fimbo, 'The Right of Occupancy in Tanzania: The Political Economy of an African Land Tenure System' (1974) 7(2) Eastern Africa Law Review 121.

11 International Legal Center, *Legal Education in a Changing World*, (New York: Uppsala, 1975) 33-34.

12 RE Megarry, *Miscellany at Law – a Diversion for Lawyers and Others*, p 149-150. Enraged conveyancer answering an inquisitive purchaser about the title prior to 1803 of certain land in Louisiana.

as a sword. A Kenyan settler, Colonel Ewart Grogan, once remarked graphically:

> We have stolen his (Kikuyu's) land. Now we must steal his limbs. Compulsory labour is the corollary of our occupation of the country.

Significantly, section 1 of the *Imperial Decree,* published on 26/11/1895 declared, in part:

> …all land in German East Africa shall be regarded as unowned. Ownership to such land is vested in the Empire.

Titles to such land were to be obtained through the Governor either by conveyance of ownership or by lease. The British colonial State in Tanganyika enacted similar laws. The "whole of the lands of Territory whether occupied or unoccupied on the date of the commencement of this Ordinance are hereby declared to be public lands", stated the *Land Ordinance, 1923, Cap 113.* The Governor of Tanganyika, under the Tanganyika Order in Council, 1920, enacted the Ordinance. The Ordinance placed the control of public land in the hands of the Governor. It gave power to the Governor to make grants of land on Rights of Occupancy for periods not exceeding 99 years. The Governor could grant land to companies, other legal persons and individuals. Thus, the Land Ordinance provided a legal framework for plantation agriculture. By 1960, nearly 2.5 million acres of land had been granted on rights of occupancy for agricultural and pastoral purposes.

The 1915 Kenya Crown Lands Ordinance exemplified the audacity in the acquisition and control of African lands. It stated in section 5 that Crown land shall mean all public lands in the Colony which are for the time being subject to the control of His Majesty by virtue of any treaty, convention or agreement, or by virtue of His Majesty's protectorate, and all lands which have been acquired by His Majesty for the public service or otherwise howsoever, and shall include all lands occupied by the native tribes of the Colony and all lands reserved for the use of the members of any native tribe. The Governor had power and authority to grant, lease or otherwise alienate Crown lands as he might think fit.

Likewise, in the post-independence period, the State in Tanzania has insisted on vesting the radical title in land in the President in order to maintain control over land as against the peasantry. In the early years of independence under President Julius Nyerere's *Ujamaa* Socialism, the state undertook land tenure reforms by way of conversion of freehold titles to government leases as well as attempts at conversion of customary tenure to statutory tenure in selected areas. With liberalisation of the economy under President Ali Hassan Mwinyi (1985-1995), there emerged a firm policy to facilitate development of a market in land. At the same time, there were two contradictory movements regarding customary tenure, that is to say, extinction of customary tenure by legislation,[13] on the one hand, and declaration of confirmation of customary tenure in policy documents on the other.[14] President Benjamin Mkapa's tenure (1995 - 2005) was characterised by an unequivocal facilitation of develop-

13 Land Tenure (Established Villages) Act, No. 22 of 1992 Cap 267 RE 2002.

14 United Republic of Tanzania (1995) National Land Policy, 1995.

ment of a market in land and confirmation of customary tenure.[15]

In this lecture, my task is threefold:

- To inform some of you and to remind others what land law is about;
- To inform you about Ogendo's theoretical contribution to the teaching of land law in East Africa;
- To provide a thematic unity in the teaching of land law; in this regard, I am, through this lecture, popularising the theme of *tenure security*.

I wish to propose that besides the main theme of the instrumental role of law in society that I have alluded to above, there is a sub-theme of tenure security that ties up all the topics in land law. I wish to submit that the theme of tenure security is progressive, since it enables us to interrogate the plight of our people with regard to their lands.

For the most part, my lecture is anchored upon an outstanding piece of work by Okoth-Ogendo written in 1978 but published in 1991.[16] It was prepared specifically for the first in-house seminar on law teaching in the Faculty of Law, University of Nairobi. At a general level, there was concern regarding the type of graduate to be produced. Let the preface speak for itself regarding the occasion:

> There were several basic worries, *inter alia,* the type of graduate we wanted to produce at the end of the three-year period, what he was being taught and how it was being taught. There was also concern about lack of stated goals, which should be pursued in the process of legal education.[17]

With regard to land law, Okoth Ogendo proposed discussion on some specific problems, namely, (a) a wrong assumption that the students have mastered the foundation courses of the first year, (b) distinction between theory and substance; how much time should be allotted to theory in a discipline that is inundated with rules, (c) how to cope both theoretically and substantively with the multiplicity of legal cultures to the operation of a legal system – the imported legislative laws operate alongside indigenous normative systems, and (d) dearth of relevant literature on Kenyan law.[18]

Ogendo's specificity to land law enables me to dwell upon the content of the course.

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15 Land Act No. 4 of 1999, Cap 113 (T). See GM Fimbo, *Land Law Reforms in Tanzania* (Dar es Salaam: Dar es Salaam University Press, 2004); GM Fimbo, 'Participation of Local Communities in Land Administration and Management' (2003) 1 Nyerere Law Journal 1; K Gastorn, 'The Impact of Tanzania's New Land Laws on the Customary Land Rights of Pastoralists: A Case Study of the Simanjiro and Bariadi districts' (2008) *Recht und Politik in Afrika* Bd. 7.

16 HWO Okoth-Ogendo, 'Teaching the Law of Immovable Property: A Personal Assessment' (1991) in K Kibwana, EM Ndiritu and GK Rukwaro (eds), *Law Curriculum Development in an African Context: The Kenyan Experience* (Faculty of Law, University of Nairobi: Nairobi, 1991) Chapter 5, 39-54.

17 K Kibwana, EM Ndiritu and GK Rukwaro (eds.), *Law Curriculum Development in an African Context: The Kenyan Experience*, (Faculty of Law: University of Nairobi, Nairobi, 1991) Preface, p. vii. The seminar took place from September 13, 1978 and lasted for three days.

18 Okoth-Ogendo, 'Teaching the Law of Immovable Property' (n 16) 47.

II. LAND LAW COURSE CONTENT: A LEGAL LABYRINTH?

A. What is Land Law about?

Land law is a compulsory course taught in the second year of study for the Bachelor of Laws degree,[19] whether the degree is obtained after three or four years of study. Okoth observed that in most faculties of law, students seem to think that it is impossible to master land law. He then asked, where does the prejudice come from? I think he was asking that question with tongue in the cheek as I shall show below. He added:

> Whatever the answer, its impact on teaching is that students have a psychological barrier against the law of immovable property, which has to be removed before useful progress can be made.[20]

In the Introduction to *Megarry's Manual of Real Property,* it is affirmed that the English law of real property (land law) is a subject of great difficulty for the beginner because of the complexity of the language. The advice that is rendered runs as follows:

> For these reasons, those coming new to the subject must not expect to understand everything at a first reading. In this subject more than any other, it is economical of time and effort to read fast and often. Much that is incomprehensible at first will be clear on a second reading, and perhaps obvious on a third.[21]

On the other hand, there are words of encouragement from Okoth-Ogendo: he rightly observed that in our case the technicalities are disappearing and stated:

> The common problems discussed above perhaps worry the property law *teacher* more than many because of the two other problems peculiar to the subject itself. The first and most important of these is the complexity and technical nature of the subject.
>
> …
>
> That the law of immovable property is full of technicalities both of language and substance cannot be gainsaid. But many of these technicalities are disappearing as some of the ancient derivatives from the law of England are slowly swept away. For example, the introduction of the Torrens system of registration has greatly simplified conveyancing, as has the abolition of strict settlements. We do not even talk about the *fee tails*, estate *per autre vie,* springing and shifting *uses* and *interesse terminii* any more except perhaps to announce their demise in our law or in isolated historical anecdotes.[22]

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19 It is a first year course at Harvard University. See AJ Casner and W Barton Leach, *Cases and Text on Property* (Little, Brown and Company: Boston, Toronto, 1951) Preface.

20 Okoth-Ogendo, 'Teaching the Law of Immovable Property'(n 16)46. In their book, *A Practical Approach to Land Law,* 1991, Judith-Anne Mackenzie and Mary Phillips state in the Preface, "Both of us have been fascinated by land law ever since our first encounters with the subject as undergraduates. Accordingly we have always been disappointed to note that the majority of law students (and many practitioners) regard the subject with dislike."

21 OV Baker, *Megarry's Manual of the Law of Real Property*,Fourth Edition (Stevens & Sons Limited: London, 1969) Chapter 1, 1.

22 Okoth-Ogendo, 'Teaching the Law of Immovable Property'(n 16) 45.

Okoth opined that once a teacher or student has mastered the history of the relevant jurisdiction with which he is concerned, land law is no more difficult than any other branch of the legal system. There are yet other words of encouragement from Harvard University. This is how renowned authors talk about themselves and their attempt to motivate their students:

> If this course is to perform its disciplinary function, you will doubtless agree with us that (a) it must be hard; it must stretch your abilities; (b) the problems must not be beyond your capacity; … and (c) approximation and superficiality must never be accepted. So expect to be extended; have confidence that intelligent effort will enable you to master the subject …
>
> You ought to enjoy this course. We are devoting our professional lives to property law because we like it. We are challenged by it and find amusing its wealth of human interest. If there is any rule that requires a property book to be dull, it has been our aim to violate it.[23]

B. Land Law Syllabus

When Okoth (1968/69) and I (1967/68) were in the second year of the Bachelor of Laws. degree at the University College of Dar es Salaam, the land law syllabus had an English and East African complexion;[24] it included statutory and customary laws[25] relating to land; types of interest in land and their incidents in customary law; types of interest in land and their incidents in territorial law, including freehold, leasehold, easements, profits, restrictive covenants, life interests, licences -- (references would be made to the English law of real property, the Indian Transfer of Property Act, and East African statute law); classification of property -- real and personal property, definition of land. It was this syllabus, which was adopted by the new faculties of law in 1970 at the Makerere University and the University of Nairobi.

In the University of Dar es Salaam's *Faculty of Law Handbook, 1978/79*,[26] the land law syllabus included private sector transactions – landlord and tenant, mortgages, trusts of land, easements; Collective Sector – Range development schemes, village settlements and *Ujamaa* villages besides what is stated above.

I am isolating these topics in order to demonstrate the complexity of the course designated as land law. Owing to this complexity, in the 1974/75 academic year,[27] I prepared, overzealously, a course outline of 38 pages and my students were not amused.[28] The front page declared confidently:

> The course is divided into three parts, as shown below. The texts and other reading materials prescribed and recommended are indicated in each part. Students are

23 AJ Casner and W Barton Leach, *Cases and Text on Property* (Little, Brown and Company: Boston, Toronto, 1951) 7.

24 See Appendix I below. Our Land Law teacher was Dr Rudolph William James, a citizen of Guyana in South America. Names of students who studied Land Law with Okoth during 1968/69 academic year are shown in Appendix II.

25 See Appendix III for list of legislation.

26 University of Dar es Salaam, *Faculty of Law 1978-1979 Handbook*, p. 17.

27 Second year students in the 1974/75 academic year are shown in Appendix IV.

28 Current students at the University of Dar es Salaam's School of Law are better treated since during semesterisation and modularization, the land law course has produced two courses, Land Law I for Semester I and Land Law II for Semester II.

advised to read as many of the references as possible. Any changes, additions and amendments to the course will be announced as we go on. You are *warned* that the references given here are *not* exhaustive.

PART 1: AN INTRODUCTION TO THE LAND LAWS OF EAST AFRICA

PART II: ALIENATION AND OCCUPATION OF PUBLIC LANDS

PART III: PRIVATE SECTOR TRANSACTIONS

At that date we endeavoured to cover the land laws in the East African region. We discussed the Land Acquisition Act 1894 of India, the East Africa Land Regulations 1897, Crown Lands Ordinance 1902 and 1915, Kenya Highlands Order in Council 1939, Native Land Tenure Rules 1956, Native Lands Registration Ordinance 1959, Land Consolidation Act, Land Adjudication Act (Kenya); the Land Regulations 1897, Uganda Order in Council 1902, Crown Lands Ordinance 1903, Public Lands Act 1962 and 1969, Crown Lands (Adjudication) Rules 1958, Public Lands Adjudication Rules, 1967, Obusuulu and Envujjo Law 1927 (Uganda), and many others.

We, at Dar es Salaam, still make constant references to the land laws of Kenya and Uganda[29] for three reasons. Firstly, the East African Community[30] that has been re-established encourages mobility of labour. Secondly, the University of Dar es Salaam School of Law receives five Ugandan students yearly under the exchange programme administered by the Inter-University Council of East Africa (IUCEA). Thirdly, the Tanzanian-German Centre for Post-Graduate Studies in Law (TGCL) is open to graduate students from all five-member countries of the East Africa Community (EAC).

As presented in English textbooks, land law caters, principally, for the State and for the propertied classes of society, the landowners. I shall show below that land law need not be one-sided if the teacher adopts consistently the theme of tenure security.

C. Ogendo's Land Law Flow-chart

With the mass of land law legislation, case law and other materials at hand, a land law teacher has to find an integrating mechanism in order to enable students to see what Okoth called "the internal logic of the entire course".[31] Like many others, he found land law a complex subject for meaningful coverage. Okoth identified five broad headings, namely:

1. foundations;
2. nature and content;
3. ascertainment;
4. alienation;
5. extinction.

29 See our recent casebook, GM Fimbo, *The Land Law of Tanzania, A Case Book* (Nairobi: LawAfrica, 2013) which carries selected judgments from Tanzania, Kenya and Uganda.

30 East African Community (EAC) Secretariat in conjunction with the German Agency for Technical Co-operation (GTZ) (2002) The Treaty for Establishment of the East African Community, Arusha.

31 HWO Okoth-Ogendo, 'Teaching the Law of Immovable Property'(n 16) 46.

He called them 'themes', but I have avoided that term; I would reserve it for a more fitting phenomenon, which I shall name later in this lecture. He developed these headings from a set of five questions, which I have taken the liberty to modify slightly:

- Where did land law come from?
- What rights does land law confer?
- How does one ascertain those rights?
- How does the landowner dispose of those rights voluntarily?
- How can the landowner lose those rights involuntarily?

Okoth then ingenuously designed a brilliant land law flow-chart for illumination. It runs as follows:

LAND LAW FLOW CHART

AGRARIAN LAW **THE LAW OF IMMOVABLE PROPERT** **URBAN PLANNING LAW**

A: FOUNDATIONS C: ASCERTAINMENT D: ALIENATION E: EXTINCTION

1 Colonial factor
2 Importation of law
3-4 Settlement (1902 - 1915)
5-6 Settlement (1915 - 1955)
7-8 Administration of African land use
9-10 Impact on African tenure and use
11-12 Africanisation of white highlands
41 Theory of registration
42 Registrable transactions
43 Process and affect
44 Characteristics of land market
45 Transfers
46 Succession
47 Bankruptcy
48 Regulation of agricultural land
49 Land control boards
50 Control of urban land
51 The problem
52 Limitation
53 Effect of Lapse
54 Compulsory acqusition
55 The process
56 Compensation

B: NATURE AND CONTENT OF PROPERTY

(a) Propery Theory
13 The idea of property
14 The classification of property rights

(b) Categories of property Rights

Primary Rights
15 The fee simple estate
16 Absolute estate
17 Customary estate

Derivative Rights

Mortgages and Charges
27 Nature
28 Creation and extinction
29 Remedies
30 Right of redemption
31 Essentials

Easements and profits
32 Creation and extinction
33 Essentials
34 Enforcement

Restrictive Covenants

(c) Structure of Proprietary Holding
35 Concurrent owership Structure
37 History of trusts
38 Trusts of lands
39 Powers and duties
40 Perpetuties

Leaseholds
18 Terminology forms
19 Creation and transfer
20-21 Termnation
22 Obligation
23 Enforcement
24-25 Rent acts

Licences
26 Nature and creation

If I may now talk to Ogendo's land law flow-chart, we find in it agrarian law, the law of immovable property[32] and urban planning law. He conceived, as I do, that both agrarian law and urban planning law were species of land law. That said, I do not think that the labels 'agrarian law', 'the law of immovable property' and 'urban planning law' add value to this competent flow-chart. Okoth identified numerous topics under each of the five headings:

A. Foundations – colonial factor, importation of law, settlement (1902-1915), settlement (1915-1955), administration of African land use, impact on African tenure and use, Africanisation of white highlands.

B. Nature and content of property --
   (a) Property theory – the idea of property, classification of property rights
   (b) Categories of property rights
   Primary rights – the fee simple estate, absolute estate, customary estate
   Leaseholds – terminology forms, creation and transfer, termination, obligation, enforcement, Rent Acts
   Licences
   Derivative rights:
   Mortgages and charges – nature, creation and extinction, remedies, right of redemption
   Easements and profits – essentials, creation and extinction
   Restrictive covenants – essentials, enforcement
   (a) Structure of proprietary holding – concurrent ownership structure, history of trusts, trusts of land, powers and duties, perpetuities

A. Ascertainment – theory of registration, registrable transactions, process and effect

B. Alienation – characteristics of the market, transfers, succession, bankruptcy, regulation of agricultural land, land control boards, control of urban land

C. Extinction -- the problem, limitation, effect of lapse, compulsory acquisition, the process, compensation.

The strength of the land law flow-chart is that it is capable of adaptation by any teacher in a university in any African country. Under Foundations, the colonial factor and its impact upon African land tenure is bound to be different, at the same time I would add sources of land law; under Nature and content of property - *Primary rights,* appropriate forms of

32 'Law of Immovable Property' is Ogendo's own innovation. In this contribution, he uses 'Land Law' and 'Law of Immovable Property' interchangeably.

tenure such as mailo land[33] or the right of occupancy would be inserted. Let me make seven further comments:

Firstly, the land law flow-chart confirms Ogendo's assessment that Land Law is a complex course for both student and teacher.[34] *Secondly*, adequate time ought to be allotted to the heading, Nature and content of property. *Thirdly*, I would add 'Registrable estates/interests' under Alienation. *Fourth*, Alienation can conveniently be taught before Ascertainment. *Fifth*, testate succession properly falls under Alienation; however, intestate succession does not although it is a form of parting with an interest in land involuntarily. *Sixth*, owing to the interlocking nature of the topics, land law requires extra effort to modularise.[35] *Finally*, the land law flow-chart is not static. It traces a rights holder from the moment of vesting of the interest in land, its registration and partial transfer of the interest by way of lease, licence or mortgage. If the interest has not, in the meantime, been transferred fully through sale, we consider succession to the interest in land as well as the interest's extinction by way of limitation of actions, compulsory acquisition or revocation culminating in compensation.

I shall show that at each stage, there are other parties involved besides the interest holder, the landowner: these parties may be spouses, lessees, licensees, mortgagees, trustees, beneficiaries under a trust of land, caveators, grantees of public or common rights of way, grantees of way leaves and even wrongful occupiers or trespassers. This dynamism distinguishes Ogendo's characterisation from approaches of other land law teachers and authors, including those I have cited in this lecture.

III. TEACHING APPROACH

A. Liberalism

The law academics in the formative years at the University College, Dar es Salaam, were expected to perform three tasks: to impart knowledge of the law as it exists; to impart that knowledge against the social and economic background of East African countries; and to make the law graduates problem solvers. The educational philosophy of the Faculty of Law was stated in the *University College, Dar es Salaam: A Guide for Schools*. It stated boldly:

> Legal education for East African lawyers must therefore entail more than the accumulation of knowledge about rules of law … The good lawyer is the one who knows also something of the society in which the law operates and the processes by

33 Mailo land tenure refers to a land tenure system that came into effect in the Buganda kingdom in Uganda following the signing of an agreement between the kingdom and the British protectorate in 1900. It refers to a system of land holding whereby the owner or landlord has perpetual ownership with transferable rights while at the same time recognizing the right of tenants on such land of living thereon and utilizing such land. See, Joseph Ssemutoke, 'Explaining the different types of land tenure' (Daily Monitor, February 11, 2016) <http://www.monitor.co.ug/Magazines/HomesandProperty/land-tenure-home/689858-2619680-iv4ifmz/index.html> accessed 15 February 2017.

34 Okoth-Ogendo, 'Teaching the Law of Immovable Property' (n 16) 45-46.

35 During modularization at the University of Dar es Salaam, School of Law, 'Land Law' produced Land Law I (for Semester I) and Land Law II (for Semester II). At the University of Dar es Salaam, a module is explained as follows: "A module is conceived as a compilation of course material to enable independent and self-contained competencies to be achieved within a particular duration. A course is made up of one or more modules, and the size of a course will depend on the number of modules that constitute the course." Office of the Deputy Vice-Chancellor, Academic, Research and Consultancy (2007), *Guidelines for Semesterisation and Modularisation of Academic Programmes,* (Dar es Salaam: University of Dar es Salaam, October 2007), paragraph 3.1, p. 3.

> which the law may change and be changed by that society. Thus we teach the law as it exists in East Africa today, but we do not stop there; **we use this law as a firm basis upon which future developments may be considered … But over and above all this, they will have studied that law against the social and economic background of the East African jurisdictions**, and will be in a good position to offer useful contributions to discussions on the problem of the law that ought to be in East Africa.[36]

One of our teachers, Dean Yash Pal Ghai, has written that the teachers tried hard to relate the law to the social and economic condition of East Africa and that it was in the framework of liberalism. They even organised short courses on law and development with the help of funds from the Ford Foundation.[37]

B. Historical Socio-economic Approach at Dar es Salaam

Further refinements were made in 1978. The Faculty of Law at Dar es Salaam, during the deanship of JL Kanywanyi, produced a handbook that popularised the expression "all-round society-conscious lawyer". The objectives of the faculty were stated in these words:

> The basic aim of the Faculty of Law is to produce first-degree graduates to serve in the public sector and the lawyers are trained in such a way as to enable them to be **society conscious.**
>
> In addition to the undergraduate programme, post-graduate programmes are offered for LL.M. as well as Ph.D. The aim of the postgraduate programmes is to train students in advanced knowledge of the chosen subjects through more intensive and broader theoretical grounding as well as through research. By and large, the aim is to produce **all round society conscious lawyers.**[38]

This was the period of nationalist developmentalism. An important element of developmentalism was monopoly of provision of legal education and monopoly of employment in the public sector. Law graduates were to be employed in the Judiciary, Attorney General's Chambers, other government offices and parastatal organisations.

The Faculty of Law *Prospectus for the Year 2000/20001* rationalised the above development as follows:

> Following the adoption of Socialist policies in 1967 (Arusha) and the Leadership Code (Mwongozo of 1971), the Faculty of Law yet again re-examined its mission and courses. The mission of the Faculty was redefined to be the teaching of law from the **socio-economic and historical approach** with the view of producing all-round society conscious lawyers. This redefinition of the mission led to a major overhaul of curriculum in the academic year 1972/73.[39]

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36 University College, Dar es Salaam (1965), *A Guide to Schools* p. 16-17.

37 YP Ghai , 'Legal Radicalism, Professionalism and Social Action: Reflections on Teaching Law in Dar es Salaam' (1986) in IG Shivji eds., *Limits of Legal Radicalism, Reflections on Teaching Law at the University of Dar es Salaam* (Dar es Salaam: Faculty of Law, University of Dar es Salaam, 1986) chapter 3, 26, 27.

38 University of Dar es Salaam, Faculty of Law, 1978-1979 *Handbook*, p. ii.

39 University of Dar es Salaam, Faculty of Law *Prospectus for the Year 2000/2001,* p. 7.

It has been observed that there was no general agreement about the socio-economic framework.[40] Nevertheless, it was in this context that the land law course outline referred to above was produced.[41] Little did we know that liberalisation of the economy would be ruthlessly ushered in Tanzania in less than a decade.

C. Liberalisation of the Economy

The 1980s formed the foundation of the liberalisation phase under World Bank prescriptions; the private sector was seen as the engine of growth and the following steps were prescribed in succession in Tanzania: privatisation of parastatal organisations, liberalisation and marketisation of higher education and a new *Employment Policy, 2008* emerged. In this policy, the private sector is envisaged to be the major employer.

In the context of free market economic policy whereby the government is no longer the major employer, the Private Sector is anticipated to take the leading role in employment creation hence becomes the potential major employer and key stakeholder in achieving the National Employment Policy objectives.[42]

D. UDSM Institutional Transformation Programme

The UDSM Institutional Transformation Programme (ITP) was born out of liberalisation policies. The ITP was anchored upon the University of Dar es Salaam (UDSM) Corporate Strategic Plan (CSP) which was approved by the Council in 1994. The CSP contained a mission statement with six items. I shall reproduce here one of these:

> To be the main supplier of key policy makers, experts and personnel in charge of all key positions in **industry**, public institutions, government, **private institutions and non-governmental organisations.**

So, with liberalisation of the economy, the wielders of political power felt that the role of the University of Dar es Salaam had to change and the institution had to align itself accordingly. Would courses and their teaching accommodate the changed and changing circumstances?[43] Suffice it to say that the change to semesterisation at the University of Dar es Salaam as well as modularisation of courses were among the most notable consequential events.[44]

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40 A Paliwala 'Personal and Political Influences in Legal Education in 1971 and 1972' (1986) in IG Shivji eds., *Limits of Legal Radicalism, Reflections on Teaching Law at the University of Dar es Salaam* (Dar es Salaam: University of Dar es Salaam, 1986) 59.

41 ibid 7.

42 ibid 41.

43 On the purpose of curricula review it is stated, "To ensure continued relevance and effectiveness, all teaching programmes and individual courses shall be reviewed at least every five years. Curricula reviews shall aim at ensuring that each programme: Is constantly aligned with the core missions of the University in particular and of the country's higher education policy in general; Continues to focus on the core professional competencies targeted by its stated mission" – Office of the Deputy Vice-Chancellor, Academic, Research and Consultancy, *Guidelines for Semesterisation and Modularisation of Academic Programmes* (Dar es Salaam: University of Dar es Salaam, 2007) 7.

44 I have discussed these developments in my chapter titled 'Fifty Years of Legal Education in Tanzania: Development of the LL.B. Curriculum', in GM Fimbo (ed.) , *Fifty Years of Legal Education in Tanzania*(Faculty of Law, University of Dar es Salaam: Dar es Salaam, 2011) 1-- 42. A module is conceived as "a compilation of course material to enable independent and self-contained competencies to be achieved within a particular duration. A course is made of one or more modules, and the size of a course will depend on the number of modules that constitute the course," -- Office of the Deputy Vice-Chancellor, Academic, Research and Consultancy (2007), *Guidelines for Semesterisation and Modularisation of Academic Programmes* (Dar es Salaam: University of Dar es Salaam, 2007) 3.

Dean Dr Edmund Sengondo Mvungi, (now deceased), noted that the market-led economic policies that the country had put in place demanded quite a new type of lawyer capable of delivering legal services required by the globalising market. He stated:

> The outputs of this new academic programme should be competent professional lawyers capable of meeting the challenges of the market. It is envisaged that with the cooperation of the Council of Legal Education it will be possible to administer Bar examinations immediately after the students have completed their University examinations.[45]

Prof Issa Shivji is not enthused by our quest to produce lawyers for the globalising market. He states that we are chasing the phantom of producing corporate lawyers. He paints a picture of our new lawyer who will be involved as consultant (always playing second fiddle to the international consultant) to draft legislation on privatisation; setting up enabling institutional frameworks in which corporate capital can function without let or hindrance.[46]

E. Historical Socio-economic Approach at Nairobi

With regard to the LL.B programme at the Faculty of Law, University of Nairobi, Okoth had raised the same question regarding quality of output; what kind of lawyer are the programmes of this faculty designed to produce? In answering this question, he touched upon the ability to solve problems:

> Very briefly, I would like to think that our programmes are designed to develop the following values in the following order of priority:
>
> (a) the ability to think and analyse issues clearly and with consistency;
> (b) the ability to observe and interpret national trends and to translate these into concrete policies and programmes; and
> (c) the ability to identify and solve real life problems in the context of any available **law** forum.[47]

His colleagues at the Faculty of Law had noted that while some lecturers taught pure legal rules, others injected a dose of social and economic aspects of law to make legal enquiry more 'holistic,' 'relevant' and 'exciting'. By 1989 a consensus had been reached on the type of graduate:

> It was agreed that the Faculty should produce a graduate who is sensitive to his social settings. To achieve this, therefore, legal rules should be taught in their **historical and socio-economic context**. However, this did not mean that lecturers should foist their own personal views on the students or that the historical socio-economic approach should jeopardise students' mastery of legal rules.[48]

45 SEA Mvungi, 'The Faculty of Transformation in the Provision of Legal Education' (2002) in SEA Mvungi (ed.) *Forty Years of the Faculty of Law* (Dar es Salaam: University of Dar es Salaam, 2002) 34.

46 IG Shivji, 'Lawyers in Neoliberalism: Authority's Professional Supplicants or Society's Amateurish Conscience', being valedictory on the occasion of formal retirement from the University of Dar es Salaam, 15 July, 2006, p. 26.

47 Okoth-Ogendo, 'Teaching the Law of Immovable Property: A Personal Assessment' (n 16)51.

48 Preface, p. viii.

In my submission, while the type of law graduate envisaged by our universities has changed, the historical socio-economic approach to the teaching of law remains relevant, potent and applicable. I shall now turn to our search for thematic unity of the land law course.

IV IN SEARCH OF THEMATIC UNITY IN LAND LAW: TENURE SECURITY

In his 'Summary and Future Growth Points', Okoth reverted to the problems he had pointed out. He sought guidance on how to cope with these problems and in particular those arising from: "(a) deficiencies in first year teaching; (b) **my unfinished search for thematic unity in the course** (c) tutorial and coursework assessment techniques; and (d) examination procedures."[49]

I have already stated that the underlying theme that has guided us has been the relation between state and law. Our stand has been that law is an effective instrument for the articulation and implementation of state policies and objectives. I shall now provide specific guidance on Okoth's second aspect, namely, the search for thematic unity in the land law course.

Besides the above theme on the instrumental role of law, we should be able to conceive other plausible themes, such as state interest in private property or state administration and control of land. Both of these themes can be employed to explain satisfactorily all legislation relating to land in the context of the dualist character of our land tenure, namely, statutory and customary. However, in this lecture, I am popularising the theme of tenure security, whose articulation is attempted below.

It was the late Prof Patrick McAuslan who, in 1996, articulated the central issue of English land law as being the tension between market freedom and protection of occupiers of land. In his words:

> The central issue in English Land Law is and always has been the tension between, on the one hand, freedom to deal with land in the market and, on the other, protection for the users, and occupiers of land and increasingly nowadays consumers in the market for land.[50]

What McAuslan called 'tension' is referred to as 'contradiction' in political economy. It is, in reality, a contradiction between persons: a vendor and purchaser transaction deals with relations between the landowner, owner of dead capital and the purchaser, owner of live capital. A mortgagor and mortgagee transaction can be visualised in the same way, and so can a landlord and tenant transaction. It must be pointed out that McAuslan did not engage in the tenure security discourse, which is our subject today.

The contradiction between market freedom and protection for users is reflected in the Land Act, Cap. 113 of Tanzania. While aiming at facilitating development of a market in land, the state, in this Act, tries to protect the occupiers. Section 3 declares:

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49 HWO Okoth-Ogendo,'Teaching the Law of Immovable Property: A Personal Assessment' (n 16) 53.

50 PWB McAuslan, 'Scholarly Origins of Preaching and Practice: Lord and Professor in the Understanding of Modern Land Law' (1996), presented at the Alistair Berkeley Seminar, May 1996, 13.

> 3 (1) The fundamental principles of the National Land Policy which it is the objective of this Act to promote and to which all persons exercising powers under, applying or interpreting this Act are to have regard to are –
> (j) to facilitate the operation of a market in land,
> (k) to regulate the operation of a market in land so as to ensure that rural and urban small-holders and pastoralists are not disadvantaged.[51]

There is nothing new in this contradiction. One may recall a momentous historical contradiction between the landed gentry on the one hand and the emerging industrial bourgeoisie on the other in England; a contradiction that led to enactment of the statute Quia Emptores, 1290 and Tenures Abolition Act, 1660. The contradiction was resolved with the industrial bourgeoisie being the victors, culminating in commoditisation of land. Eventually, freehold land became freely transferrable and conveyance by 'feoffment with livery of seisin'[52] became obsolete. It seems fair to say that in the above quoted section 3 of the Land Act, Tanzania's political leaders did not invent a new contradiction; they merely restated it.

From this contradiction, we are able to deduce a guiding theme of tenure security. In my submission, the theme of tenure security cuts across all headings ingenuously fashioned by Okoth-Ogendo. In this part of the lecture, I intend to dwell on this theme of tenure security.

A. Foundations

Here we trace the process of grabbing land by colonialists from colonial subjects and importation of the English law of real property (land law). We focus upon tenure security of native landholders and courts' articulation of customary tenure. For instance, in *Mtoro bin Mwamba v. Attorney General*, the Court of Appeal held (on 14 May 1953) that a native's interest in land was merely usufructuary.

> The position then is that, since the appellant has no document of title at all, he did not have a provable title to ownership, which would have been accepted by the German Administration. The most that he could have proved under German law was a right of usufruct in respect of the land, which he or his predecessor in title has occupied for at least two years. It must follow, therefore, that all that he can claim as being saved by the proviso to section 3 of the Land Tenure Ordinance is his *usufructuary* interest lawfully acquired before 26 January 1923, and it matters not whether he traces this back to Washomvi custom or to the *Sheria*.[53]

A new jurisprudence is developing whereby customary tenure is recognised as property for purposes of constitutional protection. In a recent case, *Attorney General v Lohay*

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51 Like the colonial state, the state in Tanzania imposes an approval requirement for certain dispositions of land - Land Act Cap 113, section 37. See Village Land Act, section 31.

52 'Feoffment with livery of seisin' meant the process of conveyance of land in ancient England whereby the transferor would hand over a twig or clod at or near the land being transferred to the transferee as a symbol of conveyance, while reciting such transfer to the witnesses.

53 *Mtoro bin Mwamba v Attorney General* (1953-1957) 2 TLR 327,341 (per Sir Newnham Worley, Vice-President). CA(T)

Akonaay, the Court of Appeal of Tanzania stated:

> For all these reasons therefore we have been led to the conclusion that customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of art. 24 of the Constitution. It follows therefore that deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution.
> …
> What is fair compensation depends on the circumstances of each case. In some cases a reallocation of land may be fair compensation. Fair compensation however is not confined to what is known in law as unexhausted improvements. Obviously where there are unexhausted improvements, the Constitution as well as the ordinary land law requires fair compensation to be paid for its deprivation.[54]

We are also of the firm view that where there are no unexhausted improvements, but some effort has been put into the land by the occupier, that occupier is entitled to protection under art. 24 (2) and fair compensation is payable for deprivation of property.

B. Nature and Content of Property

Primary Rights: the granted right of occupancy and the 'deemed' right of occupancy or customary right of occupancy: With regard to the granted right of occupancy we discuss validation of dispositions, which were made without approval from the Commissioner for Lands.[55] With regard to both the granted right of occupancy and customary right of occupancy, we focus upon tenure security with regard to landowner's capacity to mount a suit in trespass to land[56] or house owner's claim for damages against a power company on account of outbreak of fire arising from an electric fault.[57] We touch upon qualification on the land rights by way of creation of easements,[58] restrictive covenants, creation of public rights of way or communal rights of way and way leaves[59] over the land.

With regard to leaseholds, we investigate lessee's tenure security in the leased property. Is the landlord entitled to view the leased property at any time, even at night?[60] Is the landlord free to undertake activities in neighbouring land that interfere with the tenant's quiet enjoyment of the leased property?[61] Is the landlord entitled to evict the tenant at any time?[62] In Kenya and Uganda where the Rent Acts still apply, lessees are more secure than in Tanzania.[63] Finally, can the lessee become owner of the leased premises through leasehold enfranchisement?[64]

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54 Attorney General v Lohay Akonaay and Joseph Lohay [1995] TLR 80,90. CA(T).
55 Land Act Cap 113, section 53.
56 Ramadhani Kambi Mkinga v Ramadhani Saidi [1985] TLR 140.
57 Israel Kwayu v Tanzania Electric Supply Company Ltd & Another, High Court of Tanzania (Land Division) at Dar es Salaam, Land Case No. 73 of 2004.
58 Land Act, Cap 113 section 146.
59 Land Act Cap 113, section 151(1), 151(5), 151(4).
60 Land Act, Cap 113, section 88(2) (a).
61 Land Act, Cap 113, section 88(1)(b).
62 Land Act, Cap 113, section 101(2).
63 The Rent Restriction Act, Cap 339, was repealed by Act No. 11 of 2005.
64 Customary Leaseholds (Enfranchisement) Act, 1968, Cap 377; Leasehold Reform Act, 1967, CH 88 (UK).

In the law of mortgages, we investigate the mortgagor's tenure security via maxims, 'once a mortgage always a mortgage' and 'there must be no clog or fetter on the equity of redemption'. The latter maxim means not only that the mortgagor cannot be prevented from eventually redeeming his property, but also that he cannot be prevented from redeeming it free from any conditions or stipulations in the mortgage.[65] In recent years, further protection has been afforded to the mortgagor whereby a court can declare a mortgage void or can make an order that the mortgage should take effect subject to conditions if the mortgage was obtained through fraud, deceit or misrepresentation by the mortgagee.[66] Similarly, a spouse of the mortgagor is protected against eviction from the matrimonial home at the instance of the mortgagee unless there is written evidence to the effect that he or she assented to the mortgage.[67] And it is the responsibility of the mortgagee to verify that the mortgagor has or does not have a spouse.[68]

There is a further consideration relating to a spouse's opportunity to obtain independent advice before assenting to a mortgage of a matrimonial home. In *Barclays Bank Plc. v. O'Brien*[69] the facts can be summarised as follows: a husband runs a business, he seeks a loan from a bank and the bank requires security for the loan; the husband offers the matrimonial home as security. The issue is whether a lender or mortgagee has an obligation or a responsibility to ensure that a spouse has independent advice before being persuaded to agree to allow the matrimonial or family home to be used as **security** for a loan for the other spouse's business. We would refer to the speech of Lord Browne-Wilkinson:

> It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of a rich bank to obscure an important public interest, *viz* **the need to ensure the wealth currently tied up in the matrimonial home does not become economically sterile.** If the rights secured to wives by the law renders vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of capital to business enterprises. It is therefore essential that a law designed to protect vulnerable ones does not render the matrimonial home unacceptable as security to financial institutions.

Lord Browne-Wilkinson would wish to protect the vulnerable, the weak, namely, wives and, at the same time, he would want the matrimonial home to be acceptable and attractive to the banks, the mortgagees. Lord Browne-Wilkinson identifies the public interest to be that the matrimonial home does not become economically sterile; in De Soto's words, it should not remain *dead capital*.[70]

I always ask my students two questions: *First*, are spouses' interests and those of banks reconcilable? *Second*, how does one articulate the public interest involved?

With regard to squatters in urban and peri-urban areas, we discuss whether customary

65 Land Act, Cap 113 section 121.
66 Land Act, Cap 113 section 141.
67 Land Act, Cap 113 section 114(1) (a) (b).
68 Land Act, section 114(2).
69 [1993] 4 All ER 417.
70 Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2002).

tenure applies in urban areas;[71] with regard to squatters, we discuss the process of regularisation of interests in land under the Land Act whereby occupation and use of land is recorded, adjudicated and registered in instances where the persons in occupation of land appear to have no apparent lawful title to land.[72] Further, we discuss issuance of residential licences to persons occupying land in urban areas or peri-urban areas "without official title".[73]

With regard to customary tenure in rural areas, we discuss the tension between the granted right of occupancy and the deemed or customary right of occupancy;[74] we discuss validation of grants of land made during the 1970s under what was known as 'Operation Vijiji'.[75] The thrust of the discussion then shifts to adjudication of interests leading to registration of customary right of occupancy under the Village Land Act.[76] In spite of all these developments, we still have to address the ominous threats posed to customary tenure by expansion of urban boundaries and accompanying declaration of planning areas,[77] creation and expansion of national parks,[78] game reserves, forest reserves, water catchment areas, wetlands and threats posed by investors – large scale agriculture, investors in mining, oil and gas,[79] infrastructure development, Exclusive Processing Zones (EPZ) and creation of new cities such as Kigamboni New City through the Kigamboni Development Agency (KDA). In May 2014, the *Daily News* newspaper reported that the Government was committed to executing the Kigamboni New City project "promising handsome compensation and **resettlement of residents of the area to another city**".[80]

Therefore, in order to enhance tenure security, it has been recommended that land should become a constitutional category.[81] Land is currently a constitutional category in Uganda and Kenya. However, it is important to recall that a study in Papua New Guinea[82] has shown that although customary lands are constitutionally protected, they are just as vulnerable to mining operations as they are in Tanzania.

C. Ascertainment

We discuss registration of grants of public land, registration of dispositions, overriding interests, caveats and injunctions as well as registration of documents. Subsection (2) of sec-

71 Village Land Act, Cap 114 section 14; *Mwalimu Omari and Ahmed Baguo v Omari Bilali* [1999] TLR 432 C A; See GM Fimbo, 'The Court of Appeal of Tanzania: A Decade of Land Law Development' (1989) 16 (2) *Eastern Africa Law Review* 101.

72 Land Act, Cap 113, section 57(2) (b).

73 Land Act, Cap 113 section 23.

74 Land Act, Cap 113, section 34(3); *Methuselah Paul Nyagwaswa v Christopher Mbote Nyirabu* [1985] TLR 103 CA.

75 Village Land Act, Cap 114 section 15.

76 Village Land Act, Cap 114 section 48. See JW Bruce and SE Migot-Adholla, *Searching for Land Tenure Security in Africa* (Kendall/Hunt Publishing Company: Dubuque, Iowa, 1994) chapter 6, 119-140.

77 Under the Town and Country Planning Ordinance 1956, Cap 355 R E 2002, now Urban Planning Act, 2007.

78 Hon Festus Limbu, MP, observed recently in the National Assembly that the total area of Tanzania national parks equals the land area of the Republic of Uganda. See *Lkengere Faru Parutu Kamunyu & 52 Others v Minister for Tourism, Natural Resources and Environment & Three Others* [2000[TLR 160.

79 JM Kironde, 'Making Property Rights Work for the Poor in Tanzania' (undated), Working Paper for Tanzania, High Level Commission on Legal Empowerment of the Poor (unpublished) 25. See *Afrika Mashariki Gold Mines Ltd v Nyirabu Magigo and Others* [2002] TLR 261.

80 *Daily News*, Thursday, 29 May 2014, 'Kigamboni City "no pipe dream",' cover page.

81 United Republic of Tanzania, Ministry of Lands, Housing and Urban Development, *Report of the Presidential Commission of Inquiry into Land Matters* Vol. 1 (Uppsala, Sweden:, 1994) Chapter 15, 145.

82 MV Mhina, *Transnational Investment, Environmental Degradation and Human Rights: A Cross-national Case Study Based on Petroleum and Mineral Industries in Selected Developing Countries*, (Ph.D. Thesis, University of Dar es Salaam, 2013) 236.

tion 2 of the Land Registration Ordinance 1953[83] stated:

(2) The Registrar shall maintain in the land registry a land register for the registration of the title to land in Tanganyika and the recording of dispositions, transmissions and encumbrances of and over registered land.

Once registered, the title of the owner is paramount. The relevant provision states:

Section 33(1) The owner of any estate shall, except in the case of fraud, hold the same free from all estates and interests whatsoever, other than –

(a) any encumbrances registered or entered in the land register;
(b) the interest of any person in possession of the land whose interest is not registerable under the provisions of this Ordinance.

D. Alienation

We are concerned with the tenure security of the transferee, the new registered owner, hence the requirement, in the Land Registration Act, of registration of dispositions.

Section 41(2) No disposition unless registered shall be effectual to create, transfer, vary or extinguish an estate or interest in any registered land.

We are concerned with tenure security of original occupiers who are referred to in paragraph (b) of subsection (1) of section 33, Land Registration Act, Cap 334, above[84]including the widow's right of residence in the matrimonial home.[85] Special regard is had to the purchaser of land wherein equitable estates exist and the doctrine of purchaser without notice is applicable. The polar star of equity[86] states as follows:

Legal rights are good against all the world; equitable rights are good against all persons except a *bona fide* purchaser of a legal estate for value without notice, and those claiming under such a purchaser.

According to Megarry, the plea of purchaser of a legal estate for value without notice is "an absolute, unqualified, unanswerable defence."[87]

Similarly, regard is had to the purchaser of land from a registered legal personal representative. Sections 67 and 80 of the Land Registration Act, Cap 334, of Tanzania state:

> 67. On the death of the owner of any estate or interest his legal personal representative, on application to the Registrar in the prescribed form and on delivering to him an office copy of the probate of the will or letters of administration to the estate of the owner, … shall be entitled to be registered as owner in the place of the deceased.
>
> 80(1) A legal personal representative may be registered as the owner of an estate or interest with the addition after his name of the words "as executor of the will of … deceased" or "as administrator of the estate of … deceased" as the case may, and in any such case a *bona fide* purchaser for value from such legal personal representative shall not be required, nor shall the Registrar be required, to enquire into any provi-

83 Now Cap 334 R E 2002.
84 *Methuselah Paul Nyagwaswa v Christopher Mbote Nyirabu* [1985] TLR 103.
85 *Scolastica Benedict v Martin Benedict* [1993] TLR 1.
86 RE Megarry and HWR Wade, *The Law of Real Property* 3rd Edition (Stevens & Sons Limited: London, 1966) 119.
87 PV Baker, *Megarry's Manual of the Law of Real Property* 4th Edition (Stevens & Sons Limited: London, 1969) 59.

sion of the will, if any, of the deceased or enquire whether the consent of a court, if necessary, has been obtained, or otherwise into the propriety or regularity of such disposition and no such disposition amounted to a breach of trust.

E. Extinction

We address limitation of actions, revocation of the right of occupancy and compulsory acquisition of land. In limitation of actions,[88] we are concerned with tenure security of the occupier as against the landowner. Megarry and Wade state that it is more important that an established and peaceable possession should be protected than that the law should assist the agitation of old claims[89]Cheshire explains limitation in this manner:

Most systems of law have realised the necessity of fixing some definite period of time within which persons who have been unlawfully dispossessed of their land must prosecute their claims. It is, no doubt, an injustice that after this period has elapsed the wrongdoer should be allowed to retain the land against the person whom he has dispossessed, but it would be an even greater injustice **after any interval of time, however long**, to commence proceedings for recovery of possession.

If A, having ejected B, is allowed to remain in long and undisturbed possession of the land, the impression will grow that his title is superior to B's and the public should be allowed to deal with him on that footing.[90]

Who are these members of the public? They are potential purchasers, lessees or mortgagees. So, the proper province of a limitation statute is to afford tenure security to persons in occupation of land.

We focus upon tenure security of the holder of a granted right of occupancy with regard to revocation by the government.[91] Who has power to revoke a granted right of occupancy, for what reasons and on following what procedure? For both 'granted right of occupancy' and customary tenure, we investigate compulsory acquisition of land[92] (eminent domain) as well. Who has power to acquire land, for what reasons and on following what procedure?

V CONCLUSION

You agreed to make an intellectual journey with me. We, together, traced the role and place of land and land law in society -- what land law is all about, its content and its teaching. We have outlined Okoth-Ogendo's theoretical contribution to the teaching of land law in East Africa. We did this in remembrance of Okoth, a leading East African scholar. We then attempted to build a thematic unity in the land law course. We sought to demonstrate that

88 Law of Limitation Act, Cap 89; *Peter Wanyoike Gathure v A. Beverly* [1965] EA 514; *Peter Thio Kairu v Kuria Gacheru* (1988) 2 KAR 111 CA (K).

89 Megarry and Wade (n 86) 996.

90 GC Cheshire, *The Law of Real Property* (Stevens & Sons Limited: London, 1966) 783-784.

91 Land Act, Cap 113, sections 44-50; *Patman Garments Industries Ltd v. Tanzania Manufacturers Ltd* [1981] TLR 304. CA.

92 Land Acquisition Act, Cap 118 section 4; *Attorney General v Sisi Enterprises Ltd* [2006] TLR 9.

tenure security is the theme that cuts across all headings ingenuously fashioned by Okoth, namely, Foundations, Nature and Content of Property, Ascertainment, Alienation and Extinction. I owe this lecture to Professor Dr. Hastings Wilfred Opinya Okoth-Ogendo, LL.B. (Hons.)(EA), BCL (Oxon), JSD (Yale). Now, I must come to the end of this lecture with a quotation. On the death of his friend, Hortension, what did **Cicero** pronounce?

I grieve because there was taken from me, not, as many thought, a rival, who stood in the way of my reputation, but a partner and companion, in a glorious calling.[93]

93 Brutus Cicero 1.2 (on the death of Hortension).

CHAPTER 8

BEYOND PRIVATE OWNERSHIP: ALTERNATIVE PARADIGMS FOR RURAL AND URBAN TENURE REFORM IN POST-APARTHEID SOUTH AFRICA

Ben Cousins[1]

I. INTRODUCTION

Professor Okoth-Ogendo directed attention to foundational issues in his writing on land tenure in Africa, and this is one of several reasons why his work remains critically important for those engaged in research and policy making on tenure reform. He asks, for example, '*What it is that constitutes property in land in the African social order?*'[2] Assuming that this question must be framed in terms of 'ownership' is misleading, he says, since a coincidence of power to execute a range of functions in relation to something, and exclusive control of it, as in private property, is neither universal nor inevitable. Following Sheddick,[3] Okoth-Ogendo argues that there is a fundamental distinction between *access* to such power and its *control*, while recognising that these are 'correlates of each other', that is, in practice they are inseparable from one another.[4] He also demonstrates how diverse definitions of power and control are and the manner in which they are articulated with each other in different social, cultural and political contexts.

In post-apartheid South Africa, a key goal of land policy has been the reform of 'communal' or 'customary' land tenure in order to address its chronic legal insecurity and thus meet constitutional imperatives for tenure security for those whose tenure was rendered insecure through past racially discriminatory law or practice. Twenty-one years after the first democratic elections in 1994, however, no such reforms have been implemented, and the government's proposals continue to be mired in controversy. Less remarked, but also highly significant, is a widespread failure to extend formal property rights to the urban poor.

Okoth-Ogendo participated as an expert witness in a successful constitutional court challenge to South Africa's Communal Land Rights Act of 2004, which was struck down in

1 DST/NRF Research Chair in Poverty, Land and Agrarian Studies at the University of the Western Cape.

2 HWO Okoth-Ogendo, 'Some Issues of Theory in the Study of Tenure Relations in African Agriculture'(1989) 59 (1) Africa *7.*

3 VGJ Sheddick, *Land Tenure in Basutoland* (London: HM Stationery Off., 1954).

4 Okoth-Ogendo (n 2) 9.

2010. He submitted an affidavit that outlined the nature of land rights in Africa and analysed the problematic conception of land rights underlying the Act. His writings[5] continue to be widely cited in current debates in the country.[6] At the heart of these is the hegemonic status of private property, equated with 'ownership' in South African law, which underpins development planning and service delivery but severely distorts understandings of land rights and tenure security. Alternative paradigms of property are the bases of challenges to this hegemony, and it is in relation to these that Okoth-Ogendo's work is particularly influential. Debate increasingly focuses on urban as well as rural land tenure policies, given rapid urbanisation and the growth of large informal settlements, as well as the increasing dysfunctionality of the system of issuing individual title deeds for government-built housing.

This chapter[7] focuses on alternative paradigms within efforts to implement land tenure reform in South Africa today. It begins by noting the current status of tenure reform policies, and locates them in the wider context of a failing programme of land reform. The chapter then describes the nature of the incompatibility between the dominant system of registered private property rights and associated institutions and practices ('the edifice') and the complex realities of a variety of 'social tenures' on the ground, which are fundamentally different from private property. This incompatibility, or disjunction, has negative impacts on the tenure security of the majority of citizens.

The chapter discusses four different paradigms for tenure reform. One involves the extension of individual titling of land to the rural and urban poor. Another focuses on adaptive modifications of the dominant system of private property that allows incremental improvements in tenure security at the local level, through administrative and legal innovation, but without formal titling. Advocates of this approach continue to see registered title as the ultimate goal or endpoint. A third approach seeks effective protection of social tenure rights through legal recognition and support, does not envisage individual titling as the destination, but does not directly challenge the hegemony of the dominant system. The fourth approach involves a more fundamental shift: providing full recognition of and large-scale support for land rights that do not have the characteristics of the exclusive, Western legal form of property, as well as state support and oversight of their functioning. If adopted as policy, this would require major adjustments to how development planning, service delivery and payment for services are conceptualised, planned and implemented. The chapter concludes by assessing the strengths and weaknesses of these paradigms, taking into account current political realities in South Africa.

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5 See, for example, HWO Okoth-Ogendo, 'The Nature of Land Rights under Indigenous Law in Africa' (2008) in Aninka Claassens and Ben Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (University of Cape Town Press and Ohio University Press: Cape Town and Athens, 2008) 95-108; HWO Okoth-Ogendo, 'Some Issues of Theory in the Study of Tenure Relations in African Agriculture'(1989) 59 (1) *Africa* 6-17; HWO Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' Occasional Paper No. 24 (Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape, 2002)

6 See, for example, Tara Weinberg, 'The Contested Status of "Communal Land Tenure" in South Africa' *Rural Status Report* 3. (Cape Town: Institute of Poverty, Land and Agrarian Studies, University of the Western Cape, 2015).

7 The material here draws heavily on collaborative work with Donna Hornby, Rosalie Kingwill and Lauren Royston, all associated with the LEAP project on tenure reform; thanks to them for many stimulating discussions. The notion of a dominant 'edifice' of private property rights and associated institutions and practices first emerged in that context. Any shortcomings in this chapter, however, are my responsibility alone.

II. POLICY CONTEXTS: LAND TENURE REFORM IN RURAL AND URBAN SOUTH AFRICA

A. Post-1994 Land Policies and their Failure

The transition to democracy in South Africa in 1994 saw government promising to create secure rights in land for black South Africans. These had been under attack since the arrival of the first European settlers in the Cape in the 17th century. Land reform was portrayed as the central and driving force of a wider programme of rural development aimed at eliminating rural poverty.[8] In urban areas, a large-scale housing programme would provide low-cost housing and basic services to the poor, with security of tenure to be assured in a variety of forms including rental from the state and collective forms of home ownership, as well as individual rights.[9]

By 2015, the goal of creating stronger and more secure forms of land rights for the majority has not been achieved. In rural areas, the state has failed to restore much of the land claimed through its restitution programme or to redistribute a substantial proportion of commercial farmland. Against a revised target of transferring 30 per cent of such land by 2014, only around 8 or 9 per cent has been transferred to date, and the poverty reduction impacts of many such transfers are questionable.[10] Of the land that has been restored or redistributed, much of it is now held by groups of beneficiaries, owning land in private ownership through institutions such as Communal Property Associations and trusts. However, government has not provided effective oversight of the processes through which these institutions have been established, or oversight of their subsequent functioning. As a result, many are dysfunctional and the *de facto* tenure security of members of these groups is weak.[11]

Farm workers and farm dwellers have not received effective protection against evictions from commercial farms, which continue to take place both through post-1994 legislation and outside the law.[12] In relation to communal areas, the Communal Land Rights Act of 2004[13] was struck down by the Constitutional Court in 2010. Thus a law to secure the land rights of residents is still not in place, despite being a constitutional requirement, [14]and reports abound of abuse and corruption by traditional leaders in areas with significant

8 African National Congress, *The Reconstruction and Development Programme* (Johannesburg: Umanyano Publications, 1994) 20.

9 ibid 23-24.

10 R Hall, 'Who, What, Where, How, Why? The Many Disagreements about Land Redistribution in South Africa' in: Ben Cousins and Cherryl Walker (eds), *Land Divided, Land Restored. Land Reform in South Africa for the 21st Century* (Auckland Park: Jacana, 2015) 127-144; Cherryl Walker, 'Sketch Map to the Future: Restitution Unbound' in: Ben Cousins and Cherryl Walker (eds), *Land Divided, Land Restored. Land Reform in South Africa for the 21st Century* (Auckland Park: Jacana,2015) 232- 249.

11 HSRC, *Diagnostic Study of the Functioning of the Communal Property Association in Land Reform in South Africa* (Pretoria: Council for Scientific and Industrial Research, 2005),

12 Marc Wegerif, Beverly Russell, and Irma Grundling, *Still Searching for Security: The Reality of Farm Dweller Evictions in South Africa* (Polokwane: Nkuzi Development Association; Johannesburg: Social Surveys, 2005).

13 Communal Land Rights Act, No. 11 of 2004.

14 See Section 25 (6) of the Constitution.

landed resources such as minerals.[15]

In urban areas, around 2.8 million houses have been built through state-funded programmes, and around 900,000 serviced sites provided.[16] However, as a result of 'inefficiencies' of various kinds, such as delays caused by cumbersome bureaucratic procedures, problems have been experienced in issuing house owners with title deeds and over one million beneficiaries lack these at present.[17] In addition, 11 per cent of Reconstruction and Development Programme houses have been transacted despite a ban on doing so for an initial period of eight years, many through informal transfers outside the official system.[18] Title deeds for these properties are no longer an accurate record of current ownership.

The number of people hoping to be granted a government-built house has continued to grow, fueled in part by rural-urban migration. As a result the housing delivery backlog has increased and in 2014 amounted to an estimated 2.3 million houses.[19]There has also been a rapid increase in informal settlements across the country, located both in and on the edges of cities, towns and small rural towns. By 2011 these housed 3.3 million people, or 6.3 per cent of the population according to official statistics,[20] but this may well be an underestimate.

The number of people living in houses, flats and rooms added to existing properties expanded by 83 per cent between 2002 and 2006. In 2010 it was estimated that around 850 000 households (or 35 per cent of all households that rented accommodation) occupied 'small-scale rental units', and of these 47 per cent were shacks.[21]It is unlikely that many of these have rental contracts. In some cities tribunals have been established to mediate disputes between landlords and tenants, but these tend not to include so-called small-scale rental arrangements in their deliberations. In inner cities there are large numbers of people, possibly as many as 120,000 in places such as Johannesburg alone, occupying 'bad buildings' or rental accommodation in very poor conditions.[22]

Table 1 shows that the great majority of South Africans now hold land and occupy dwellings outside of the formal system of private property.[23] Given the continuing failure of the economy to generate formal employment opportunities, together with the likely impacts

15 A Claassens and Boitumelo Matlala, 'Platinum, Poverty and Princes in Post-apartheid South Africa: New Laws, Old Repertoires' in Gilbert Khadiagala, Prishna Naidoo, Devan Pillay and Roger Southall (eds), *New South African Review 4* (Johannesburg: Wits University Press, 2014); A Manson, 'Mining and "Traditional Communities" in South Africa's "Platinum Belt": Contestations over Land, Leadership and Assets in North-West Province c. 1996–2012'(39 (2) Journal of Southern African Studies 409.

16 See <http://mg.co.za/article/2014-07-31-state-to-tackle-housing-title-deed-mess/> accessed 9 March2015.

17 R Gordon, M Nell and A de Lollo, *Investigation Into the Delays in Issuing Title Deeds to Beneficiaries of Housing Projects Funded by the Capital Subsidy* (Pretoria: Urban Land Mark, 2011).

18 Lauren Royston, 'In the Meantime … Moving Towards Secure Tenure by Recognizing Local Practice' in Mark Napier, Stephen Berrisford, Caroline Wanjiku Kihato, Rob McGaffin and Lauren Royston (eds), *Trading Places. Accessing Land in African Cities* (Somerset West: African Minds for Urban LandMark, 2013) 59.

19 See <http://mg.co.za/article/2014-07-31-state-to-tackle-housing-title-deed-mess/> accessed on 9 March2015.

20 Housing Development Agency, *South Africa: Informal Settlement Status* (Johannesburg: Housing Development Agency, 2013).

21 Urban LandMark, *Managing Urban Land. A Guide for Municipal Practitioners (*Johannesburg: Urban LandMark) (2011) 82.

22 Kate Tissington, *Minding the Gap. An Analysis of the Supply of and Demand for Low-income Rental Accommodation in Inner City Johannesburg.* (Johannesburg: Socio-Economic Rights Institute (SERI), 2013).

23 These are rough estimates only and the numbers may well be higher.

of current government policies in relation to land and housing, it seems likely that this proportion will increase over time.

Location	Number of people	% of SA population (total of 51.8 million)
Communal areas	17 million	32.8%
Farmworkers and dwellers	2 million	3.9%
Informal settlements	3.3 million	6.3%
Backyard shacks	1.9 million	3.8%
Inner city buildings	200,000	0.38%
RDP houses – no titles	5 million	9.6%
RDP houses – titles inaccurate/outdated	1.5 million	3.0%
Total	30.72 million	59.7%

Table 1: Numbers and proportion of South Africans holding land or dwellings outside the formal property system in 2011[24]

B. New Policies since 2013

A range of new land reform policies has been introduced in recent years. These include the State Land Lease and Disposal Policy,[25] the Recapitalisation and Development Policy,[26] the Agricultural Landholding Policy Framework,[27] the Land Tenure Security Policy for Commercial Farming Areas,[28] the Strengthening the Relative Rights of People Working the Land Policy,[29] and a draft Communal Land Tenure Policy.[30] In the first half of 2014 the Restitution of Land Rights Amendment Act[31] was passed, which allows an opportunity to

24 Sources: D Budlender 2008; Urban LandMark 2011; HDA 2013; Royston 2013; Visser and Ferrer 2015; own estimates. Debbie Budlender, 2008. 'Estimates of communal area population', affidavit prepared for litigation, *Tongoane and others v Minister of Agriculture and Land Affairs*, Case No. 11678/2006, Gauteng High Court, Pretoria; Urban Land Mark, *Managing Urban Land. A guide for municipal practitioners (*Johannesburg: Urban LandMark, 2011); Housing Development Agency, *South Africa: Informal Settlement Status* (Johannesburg: Housing Development Agency, 2013); L Royston, 'In the meantime … Moving towards Secure Tenure by Recognizing Local Practice' in Mark Napier, Stephen Berrisford, Caroline Wanjiku Kihato, Rob McGaffin and Lauren Royston (eds), *Trading Places. Accessing Land in African Cities* (Somerset West: African Minds for Urban LandMark, 2013); Maragreet Visser and Stuart Ferrer, *Farm Workers' Living and Working Conditions in South Africa: Key Trends, Emergent Issues and Underlying And Structural Problems* (Pretoria: International Labour Organisation, 2015).

25 Republic of South Africa, *State Land Lease and Disposal Policy* (Department of Rural Development and Land Reform, 2013).

26 Republic of South Africa, *Recapitalisation and Development Policy* (Department of Rural Development and Land Reform, 2013).

27 Republic of South Africa, *Agricultural Landholding Policy Framework* (Department of Rural Development and Land Reform, 2014).

28 Republic of South Africa, *Land Tenure Security Policy for Commercial Farming Areas* (Department of Rural Development and Land Reform, 2013).

29 Republic of South Africa, *Strengthening the Relative Rights of People Working the Land Policy* (Department of Rural Development and Land Reform, 2015).

30 Republic of South Africa, *Communal Land Tenure Policy* (Department of Rural Development and Land Reform, 2015).

31 Restitution of Land Rights Amendment Act, No. 15 of 2014.

lodge new land claims for a further five years, until June 2019.[32]

As analysts have pointed out, many post-apartheid rural policies exhibit strong continuities with those of the past, in particular in relation to their underlying assumptions about 'viable' farming and rural livelihoods. These privilege large-scale commercial models and provide little or no support for smallholder farming.[33] Land reform has been undermined by severe weaknesses in state capacity as well as underfunding, with the budget for land reform never constituting more than 1 per cent of the national budget. Tenure reform has been particularly marginal within the overall programme.[34]

The main beneficiaries of recent land policies are relatively wealthy elites, both new (i.e. black) and old (i.e. white) – the latter as consultants, mentors, investors and 'strategic partners' of black beneficiaries. Despite official rhetoric, the rural poor have effectively been abandoned by the state.[35] This is particularly clear in relation to people living on communal land, where traditional councils dominated by chiefs have been established. This has enabled notorious apartheid-era Tribal Authorities to be reconstituted. The law requires that 40 per cent of council members be elected and that one third be women, but in many areas the required elections have not taken place, and the state provides little oversight of their functioning.[36] Traditional leaders are in alliance with the ruling party, and constitute the key beneficiaries of 'empowerment' deals with mining and other companies investing in these areas.[37]

The state seems intent on strengthening the powers of traditional leaders, but these policies are being met with fierce opposition by rural communities allied with civil society activists, in the Alliance for Rural Democracy.[38] A notable victory for the Alliance in

32 The Restitution of Land Rights Act of 1994 allowed claims to be lodged up to 31 December 1998, by which date 79,602 claims had been lodged.

33 See Michael Aliber, Themba Maluleke, Tshililo Manenzhe, Gaynor Paradza and Ben Cousins, *Land Reform and Livelihoods. Trajectories of Change in Limpopo Province, South Africa* (Cape Town: HSRC Press, 2013); Ben Cousins and Ian Scoones, 'Contested Paradigms of "Viability" in Redistributive Land Reform: Perspectives from Southern Africa' (2010) 37 (1) Journal of Peasant Studies 31; R Hall, 'Land Reform for What? Land Use, Production and livelihoods' in R. Hall (ed), *Another Countryside: Policy Options for Land and Agrarian Reform in South Africa* (Cape Town: Institute for Poverty, Land and Agrarian Studies, School of Government, University of the Western Cape, 2009) 23-61; P Hebinck, D Fay and K Kondlo, 'Land and Agrarian Reform in South Africa's Eastern Cape: Caught by Continuities' (2011) 11 (2) Journal of Agrarian Change 220; E Lahiff, '"Willing Buyer, Willing Seller": South Africa's Failed Experiment In Market-led Agrarian Reform' (2007) 28 (8) Third World Quarterly 1577.

34 Ben Cousins and Ruth Hall, 'Rights without Illusions: The Potential and Limits of Rights-Based Approaches to Securing Land Tenure in Rural South Africa' in Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds), *Socio-Economic Rights in South Africa. Symbols or Substance*? (Cambridge: Cambridge University Press, 2013).

35 Ruth Hall, 'Who, What, Where, How, Why? The Many Disagreements about Land Redistribution in South Africa' in Ben Cousins and Cherryl Walker (eds), *Land Divided, Land Restored. Land Reform in South Africa for the 21st Century* (Auckland Park: Jacana, 2015) 127-144;Cherryl Walker, 'Sketch Map to the Future: Restitution Unbound' in Ben Cousins and Cherryl Walker (eds), *Land Divided, Land Restored. Land Reform in South Africa for the 21st Century* (Auckland Park: Jacana, 2015) 232- 249.

36 Centre for Law and Society, *Questioning the Legal Status of Traditional Councils in South Africa* (Cape Town: Centre for Law and Society, University of Cape Town, 2013).

37 Aninka Claassens, 'Law, Land and Custom, 1913-2014: What Is at Stake Today?' in Ben Cousins and Cherryl Walker (eds), *Land Divided, Land Restored. Land Reform in South Africa for the 21st Century* (Auckland Park: Jacana, 2015) 68-84.

38 For many examples see <http://www.cls.uct.ac.za/publications/customcontested/>. Accessed 22 February 2017.

2013 was its defeat of government's attempts to pass the notorious Traditional Courts Bill,[39] which sought to centralise dispute resolution in the chieftaincy. The contested politics of 'customary law' is set to continue in 2015 with legislation such as the Traditional Affairs Bill[40] and a Communal Land Tenure Bill[41] likely to come before parliament.

The draft Communal Land Tenure Policy[42] describes a 'transfer of title' model, with the state transferring private ownership of communal land to traditional councils or CPAs, and community members holding 'institutionalised use rights' only. Ownership and control of the commons will be in the hands of the institution that takes title. Investment facilities will be established to allow these institutions to enter into business deals with investors. Since the rights of community members are effectively downgraded, the policy, should it become law, is likely to be subject to another constitutional court challenge. Its transfer of title model is almost identical to that embodied in the Communal Land Rights Act of 2004 which was struck down by the Court in 2010.

In relation to urban development and human settlements policy, in recent years government appears to have abandoned a previous commitment to embracing flexibility and diversity. In 2004 the so-called 'Breaking New Ground' document[43] stated that the slum eradication approach to informal settlements would be replaced by one designed to ensure tenure security through a series of pragmatic interventions. These included a shift away from the single-option, titled model to a choice of tenure arrangements, and towards more responsive, flexible and effective delivery. But this vision has not been realised to date. The Department of Human Settlements and provincial government departments still prioritise fully subsidised, low-density, detached and freehold family accommodation over other delivery modes, tenure systems and accommodation choices. According to Clark and Tissington:

> Municipalities and provinces therefore generally refrain from incremental upgrades, preferring instead to leap straight from 'pure' informality (with no tenure rights, no services and no formal structures) to 'pure' formality (with full ownership rights, formal bulk infrastructure and services, and formal top structures). In adopting this approach, municipalities are reluctant to depart from tried and trusted standard layouts, tenure models and modes of delivery of basic services.[44]

In both rural and urban contexts then, the state continues to valourise only one model of land tenure: formal ownership through title deeds. Despite paying lip service to the recognition of informal systems, the offer of a range of land tenure options and flexibility in planning and delivery processes, in practice the state is heavily biased towards a paradigm that sees private property as the only system able to offer truly secure land rights. Yet a ma-

39 Traditional Courts Bill of 2013, Department of Justice.

40 Traditional Affairs Bill, of 2015 Department of Co-operative Governance and Traditional Affairs.

41 Communal Land Tenure Bill of 2015, Department of Rural Development and Land Reform.

42 Communal Land Tenure Policy of 2015, Department of Rural Development and Land Reform.

43 Department of Human Settlements, *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* (Pretoria: Department of Human Settlements, 2004).

44 Michael Clark and Kate Tissington , 'Courts as a Site of Struggle for Informal Settlement Upgrading' in Liza Cirolia, et al (eds), *Pursuing a Partnership Based Approach to Incremental Informal Settlement Upgrading in South Africa* (Cape Town: UCT Press, 2016) Chapter 20.

jority of South Africans, most of them poor, live outside this system, and it appears that they will continue to do so for many decades to come.

III. INCOMPATIBILITIES BETWEEN FORMALISED PROPERTY AND 'OFF-REGISTER' LAND TENURE SYSTEMS

A. Formal Property Systems in South Africa

The dominant system of property holding in South Africa constitutes an imposing ensemble of laws, institutions, practices and professions. Property law is based on a binary distinction between a dominant system of 'ownership' and all other systems.[45] 'Ownership' rights (also termed 'real rights') take precedence over all other forms of land tenure, which are tolerated at best, within a lower-order sub-structure. Ownership is realised only when the standards of the national land information system, or cadastre, are complied with. This has three components. The first is spatial, and involves the geometric description of land parcels. Linked directly to the spatial component is a textual one that involves the registers that record ownership, bonds and servitudes in relation to the land parcel. Thirdly, these spatial and textual records must be updated over time to reflect sales, inheritance, subdivisions, the addition of servitudes, and so on, all of which must be registered on the deed. This is the temporal component of the cadastre.

The key features of this system are tightly interlocked with each other, since the spatial, textual and temporal dimensions must be closely aligned to each other before the deed can be registered. As a result the system is highly inflexible. Registered owners have significant powers over use and disposal of the property, although occupiers and users do enjoy some protections, many resulting from post-1994 land reform legislation.[46] Ownership is subject to legal rules of inheritance and succession, which in Western law are premised on ideas of singular ownership rather than shared or overlapping rights. Subordinate rights may, however, be surveyed and registered, as in a servitude.

The foundation of this imposing edifice is the proprietary power of the owner whose name appears in the Deeds Registry. Owners have fiscal obligations to government, with property registers linked to registers for rates, taxes and services. The financing of government is dependent on owners meeting these obligations. Township development, property surveying and conveyance of titles are functions undertaken by trained, private professionals, who are responsible for ensuring that the exacting requirements of the whole system are complied with.

Older forms of conditionality in land holding rights, based on family consent, social obligations, and rights of access by others have been largely obliterated by the powers of alienation accorded to those whose names are registered on title deeds. Registration of own-

45 For a more detailed account, see Rosalie Kingwill, 'An Inconvenient Truth: Individual Tenure and 'Customary' Property Relations', in H Mostert, L Verstappen, & J Zevenbergen (eds), *Land Tenure Security: Perspectives on Individualisation. Contemporary Studies in Legal and Applied Research Vol IV* (Cape Town: Juta, 2014).

46 Malcolm Langford, 'Housing Rights Litigation: *Grootboom* and Beyond' in Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds), *Socio-Economic Rights in South Africa. Symbols or Substance*? (Cambridge: Cambridge University Press, 2013) 187; AJ van der Walt, 'Property, Social Justice and Citizenship: The Transformation of Property law in Post-apartheid South Africa' (2008) 19 Stellenbosch Law Review 325.

ership underpins the practice that land is an exchangeable asset, the market value of which can increase over time. The ability to offer land as collateral for a bank loan is the key focus of arguments that private property, or formalisation of property, is essential for poverty reduction in the developing world.[47]

There is little doubt that this dominant system of property rights is both effective and efficient for the middle and upper classes, as it is for most formal sector businesses. But how appropriate is it for the millions of poorer South Africans who constitute the majority? Is it likely that the poor will be able to use land titles to acquire bank loans, start businesses and lift themselves out of poverty?

The academic literature abounds with critiques of this simple and appealing but fundamentally wrong-headed notion.[48] However, these critiques have had little impact on ideologues in South Africa who promote a land titling agenda on the grounds that it is pro-poor.[49] Few commentators acknowledge the full scope of the underlying problem: that the land rights of the poor majority in South Africa are likely to remain legally insecure for as long as the private property system is allowed to dominate thinking about tenure reform.

B. Social Tenures in South Africa

Land tenure systems in terms of which most South Africans hold their land or dwellings cannot confer what the legal system defines as 'ownership' and 'real rights'. They do not meet the stringent requirements of the cadastre and thus remain 'off-register', which means that they are not fully recognised and secured in law. They are diverse in their patterns of land use and livelihoods, social relations, values and norms, and the form and robustness of local institutional arrangements. Their diversity and heterogeneity means that it is impossible to prescribe standardised, one-size-fits-all solutions to their problems.[50] Nevertheless, these property regimes share some significant commonalities in relation to underlying principles, as well as in the nature of the problems that people living within them often experience.[51]

Firstly, informal land tenure systems in South Africa are characterised by *local oversight of processes of claiming, recognising and transferring rights, as well as dispute resolution*. Such oversight takes place through institutional structures of varying degrees of formality that are responsible for managing or administering land rights and associated duties. Often

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

48 Espen Sjaastad and Ben Cousins, 'Formalisation of Land Rights in the South: An Overview' (2009) 26 (1) Land Use Policy 1; Daniel W Bromley, 'Formalising property relations in the developing world: The wrong prescription for the wrong malady' (2009) 26 (1) Land Use Policy 20.
Antara Haldar and J Stiglitz, 'Analyzing Legal Formality and Informality: Lessons From Land-Titling and Microfinance Programs' in: David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics. Institutions for Promoting Development in the Twenty-First Century* (New York: Oxoford University Press, 2013)112-148; Celestine Nyambu-Musembi, 'Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa' (2007) 28 (8) Third World Quarterly 1457.

49 Leon Louw, 'Transfers of Land can Unlock Dead Capital' (Business Day, 14 May 2014); Allister Sparks, 'Give the Poor the Land They're On' (Business Day, October 23, 2013).

50 The analysis of social tenures in this section is directly informed by Okoth-Ogendo's work.

51 For an overview of the extensive literature on rural areas and in-depth case studies, see Annika Claassens and Ben Cousins, 2008; for material on urban areas, see Tissington 2013, Urban Land Mark 2011, and Royston 2013.

these are nested or layered in character, depending on the nature of the rights and the group affected by the land uses in question.[52]

Secondly, in all these regimes *social and political relations, identities and dynamics* directly inform the recognition of which people hold rights and duties in relation to land and dwellings, as well as how institutional arrangements are structured (such as through elections or other means of legitimation, including through reference to 'customary law'). In other words, they are socially and politically embedded, and are highly relational in character. A key criterion for the recognition of a claim is often need, as distinct from the ability to pay for land.[53]

Thirdly, these regimes are generally *less oriented to strict and well-defined rules than to socially and politically defined processes*, that is, they are much more 'processual' in character than the rule-oriented dominant system.[54]

Fourthly, there is a great deal of *flexibility* in relation to both defining which people qualify as legitimate rights holders and in defining the relevant unit of land or dwelling to which people hold rights namely with regard to both social and territorial boundaries.[55] This is one key reason why these systems often fail to meet the requirements of the cadastre that form the basis of the dominant property system in South Africa.

Case studies suggest that although there is significant capacity for self-organisation in relation to land rights management by South Africans, one should beware of idealising these 'social tenures'. People inside such systems experience many problems, including gender discrimination and abuse by local power holders such as chiefs, traditional councils and shack lords, who are often dominant actors within local-level institutional arrangements. The 'second-class' legal status of these tenures, which means that they are not recognised by the national cadastre, has the result that there is little or no oversight of their functioning, and thus they cannot always guarantee the land rights of their members against deprivation or abuse. Local institutional arrangements are often weak and ineffective in contexts such as newly established informal settlements; even in longer-standing settlements, local conflicts and tensions over land rights can be overwhelming.[56] Nevertheless, a majority of social tenure systems confer effective day-to-day, that is *de facto,* tenure security - at least until

52 Ben Cousins, 'Characterising "Communal" Tenure: Nested Systems and Flexible Boundaries' in Aninka Claassens and Ben Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act,* (Cape Town and Athens: University of Cape Town Press and Ohio University Press, 2008) 109–37.

53 Aninka Claassens and Sizani Ngubane,'Women, Land and Power: The Impact of the Communal Land Rights Act' in Aninka Claassens and Ben Cousins (eds), *Land, Power and Custom. Controversies Generated by South Africa's Communal Land Rights Act*, (Cape Town and Athens: University of Cape Town Press and Ohio University Press, 2008) 154–83.

54 See ibid and for discussions of the process-oriented nature of customary law, see John Comaroff and Simon Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago: Chicago University Press, 1981).

55 Aninka Claassens, 'South African Proposals for Tenure Reform: The Draft Land Rights Bill' in Camilla Toulmin and Julian Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa* (London: International Institute for Environment and Development and Natural Resources Institute, 2000) 247-66; Ben Cousins, 'More than Socially Embedded: The Distinctive Character of "Communal Tenure" Regimes in South Africa and its Implications for Land Policy' (2007) 7 (3). Journal of Agrarian Change 281.

56 Robin L Turner, 'Continuing Divisions: "Tradition," Land Restitution, and Barokologadi Communal Identity' (2013) Paper presented at 'Land Divided: Land and South African Society in 2013, in Comparative Perspective Conference' University of Cape Town, 24 – 27 March 2013.

development planners or private investors begin to arrive on the scene, or until a corrupt traditional leader abuses his power for personal gain.[57]

Stylised differences and contrasts between the dominant property system and the diverse set of social tenures inhabited by most South Africans are summarised in Table 2. This highlights the systemic character of the incompatibilities and disjunctions between the two kinds of property regimes, highlights the lack of official support for social tenures, and identifies the key obstacles to securing the land and dwelling rights of the poor.

The dominant system of private ownership registered in the cadastre	***Social and off-register tenure systems***
'Ownership' of 'real rights' is strongly recognised by law. This takes precedence over other forms of tenure	Rights are 'off-register' and not fully recognised and secured in law, but local and often low-status registers sometimes exist
Ownership is realised after compliance with standardised national land information system (or cadastre). This is rule-oriented and inflexible in character	Rights are socially embedded, with wide variations in land use, livelihoods, social relations, norms and values, and institutional arrangements. Systems are flexible and processual in character, rather than rule-oriented
Centralised oversight of the national cadastre by the state and professional associations	Local oversight of processes of claiming, recognising and transferring rights
Proprietary powers vested in owner whose name appears in the register. Rights are clearly defined in law	Social and political relations, identities and dynamics inform the recognition of rights holders. Rights are relational in character
Registered owners have 'real rights' to use and dispose of property	Rights are subject to local norms, values and practices that often restrict alienation
Ownership is subject to legal rules of inheritance and succession	Inheritance and succession are subject to social norms and practices, and rights are often shared and overlapping rather than singular in character
Ownership rights are not divisible, but subordinate rights may be surveyed or registered	Rights are shared amongst family members or co-members of a group, and often involve rights to common property
Core unit is an accurately surveyed land 'parcel'	Spatial boundaries are flexible and dynamic and vary with the relevant social unit or layer of social organisation, and the type of land use. Boundaries are often overlapping
Owners have fiscal obligations to government; property registers are linked to registers for rates, taxes and services	Rights holders are poor and tend not to pay rates or taxes, or pay for services
Government finances are dependent on owners meeting fiscal obligations	Government often provides free services cross-subsidised by others
Township development, surveying and conveyancing are undertaken by trained private professionals	Only a few NGOs or government departments offer support services, in isolated cases. Mostly rights holders have no external support
Private ownership is a problematic system for the poor because of the high costs of conveyance and transfer and rates and taxes, as well as the inflexibility of the system	Common problems include lack of services and support by the state, abuse by the powerful (e.g. chiefs), gender discrimination and conflict. If local oversight is ineffective, tenure insecurity results

Table 2: Contrasting features of land tenure systems in South Africa

57 Martin Adams, Ben Cousins and Siyabu Manona, 'Land Tenure and Economic Development in Rural South Africa: Constraints and Opportunities' in Ben Cousins (ed), *At the Crossroads: Land and Agrarian Reform in South Africa into the 21st century* (Cape Town: Programme for Land and Agrarian Studies, School of Government (University of the Western Cape/Braamfontein, National Land Committee, 2000) 111-128.

IV. DISJUNCTIONS AND THEIR CONSEQUENCES

There are many incompatibilities between the two systems of property rights, and the key consequences are fourfold. *Firstly*, 'ownership' and 'real rights' always trump off-register, social tenures, which means that the latter are systemically discriminated against, compromising their members' security of tenure. This remains the case despite some post-1994 reforms that offer protections against arbitrary eviction from privately owned land.[58]

Secondly, the fact that social tenures receive little external support and minimal oversight of local arrangements by the state or other agencies creates many opportunities for abuse by powerful local interest groups. Sometimes power elites capture institutions such as committees, traditional councils, civics or residents' associations and manipulate them for their own purposes. Chiefs in many areas are now selling land to outsiders, with little regard to the long-term consequences for community members. Lack of oversight and support allows discrimination against women to continue -- unless women are able to organise themselves to push for reforms, which is not always possible.[59]In some instances traditional leaders are sympathetic to the pent-up demand by single women with children for land in their own right, and local adaptations of 'custom' emerge in response, but there is little state support for such reforms.[60]

Thirdly, there are few available avenues for recourse when abuses occur within social tenure systems. One avenue is customary dispute resolution through a variety of localised processes,[61] but these are difficult to invoke when traditional leaders are themselves involved in corruption or abuse. The other is the courts, which are expensive, slow and in practice often inaccessible to the poor. If a case does reach the courts, the lack of proper legal recognition of social tenures mitigates against full protection of rights holders, although in some key cases victories have been won that prevent eviction unless alternative accommodation is

58 Malcolm Langford, 'Housing Rights Litigation: *Grootboom* and Beyond' in: Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds), *Socio-Economic Rights in South Africa. Symbols or Substance*? (Cambridge: Cambridge University Press, 2013) 187-225; Stuart Wilson and Jackie Dugard, 'Constitutional Jurisprudence: The First and Second Waves' in: Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds), *Socio-Economic Rights in South Africa. Symbols or Substance*? (Cambridge: Cambridge University Press, 2013) 35-62.

59 Aninka Claassens and Sizani Ngubane, 'Women, Land and Power: The Impact of the Communal Land Rights Act' (2008) in Aninka Claassens and Ben Cousins (eds), *Land, Power and Custom. Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town and Athens: University of Cape Town Press and Ohio University Press, 2008) 154–83.

60 Ben Cousins with Rauri Alcock, Ngididi Dladla, Donna Hornby, Mphethethi Masondo, Gugu Mbatha, Makhosi Mweli and Creina Alcock, '*Imithetho yomhlaba yase Msinga*: The living law of land in Msinga, KwaZulu-Natal.' Research Report 43 (Cape Town: Institute for Poverty, Land and Agrarian Studies, University of the Western Cape, 2011).

61 S Mnisi-Weeks, 'Regulating Vernacular Dispute Resolution Forms: Controversy Concerning the Process, Substance and Implications of South Africa's Traditional Courts Bill' (2012) 12 (1) Oxford University Commonwealth Law Journal 133.

provided.[62] It appears that *Grootboom* and similar cases have indeed constrained large-scale evictions in urban areas, but their systemic impact has been constrained by the limitations of the 'core of the housing system – both its inherent dysfunctions and its economic limitations'.[63]A key element of that core is registered title.

Fourthly, the fact that social tenures are off-register means that they are not well served by systems of planning, development and service delivery. Many of the areas in which social tenure are located are 'peripheral or marginal, mainly determined by forces of the financially dominated land market which places a low value on these areas'.[64]

Given the deprivations inherited from the apartheid era, the state has had to provide subsidised or free housing, infrastructure and services to poor people located in new and old suburbs, shacks and communal areas. However, the heavy burden of cross-subsidisation borne by relatively small numbers of taxpayers and titled property-owners means that the long-term sustainability of free infrastructure and services is often questioned. Local government institutions tend to view the poor as a liability, and see the long-term solution as people becoming rate-paying title deed holders fully integrated into the cadastre. In the interim, the poor are grudgingly provided with free services, but often these are of poor quality, contributing to service delivery protests.[65]

One issue identified by free market enthusiasts as a key problem is the inability of the holders of off-register land or housing rights to offer these as collateral for bank loans. However, studies have found that entrepreneurs with title deeds in townships are reluctant to put their houses at risk in order to obtain a business loan.[66] As Rust[67]notes, given the volatility of South Africa's economy and the uncertain nature of the businesses operated by low-income earners, perhaps they are right to be risk-averse and to attempt to protect their

62 The 'Grootboom community' consisted of 390 adults and 510 children who resided in the Wallacedene informal settlement. After heavy rainfall had left the settlement waterlogged in 1998 they moved onto an adjacent property, meant for low-cost housing. In May 1999, the local municipality sent in bulldozers to demolish their settlement. Rendered homeless, the community moved onto the Wallacedene sports field. Urgent legal action was launched on 31 May 1999, with the applicants requesting that the respondents "provide adequate and sufficient basic temporary shelter and/or housing for the applicants and their children" pending permanent accommodation and that "adequate and sufficient basic nutrition, shelter, health and care services and social services" be provided to all of the applicants' children. The rights of the children under Section 28 of the constitution were upheld. The High Court ordered that "tents, portable latrines and a regular supply of water" be provided within three months. No order was given for adults without children. The municipality appealed the order to the Constitutional Court, which held that the nationwide housing program fell short of the obligations on the national government under section 26 of the Constitution. There was a failure by the authorities to make provision for the immediate amelioration of the circumstances of those in desperate need. A declaratory order stated that Section 26 of the Constitution imposes on the national government obligations to devise, fund, implement, and supervise measures to provide relief to those in desperate need. 2000 ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)

63 Malcolm Langford, 'Housing Rights Litigation: *Grootboom* and Beyond' in Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds), *Socio-Economic Rights in South Africa. Symbols or Substance*? (Cambridge: Cambridge University Press, 2013) 221.

64 Urban LandMark, *Managing Urban Land. A Guide for Municipal Practitioners (*Johannesburg: Urban LandMark, 2011) 29.

65 Barbara Tapela, *Social Water Scarcity and Water Use*. WRC Report No. 1940/1/11 (Pretoria: Water Research Commission, 2012).

66 FinMark, *The Township Residential Market* (Johannesburg: FinMark Trust, 2004).

67 Kecia Rust, 'Supporting the Housing Asset Triangle' in Development Bank of Southern Africa and Graduate School of Public and Development Management, University of Witwatersrand, *Are Hernando de Soto's Views Appropriate for South Africa?* (P&DM Occasional Paper Series, No. 1, 2007) 44-52.

homes at all costs. This echoes findings from elsewhere in the world.[68]

Government's proposals for communal tenure reform do not address these incompatibilities and disjunctions. It is clear that tenure systems derived from customary norms and values are prime examples of social tenure, but there are significant variations within these tenure systems, even at the local level[69] as well as within broadly similar cultural groupings. However, some general characteristics can be identified. Land rights derive from accepted membership of a group; claiming, recognition and dispute resolution processes take place primarily at the local level (within family networks, neighbourhoods and wards) rather than at the centralised offices of the chieftaincy or traditional council; and social and physical boundaries tend to be flexible and overlapping at layered or nested levels of social and political organisation.[70]

As described above, the draft Communal Tenure Policy of 2015 envisages the transfer of private ownership of surveyed parcels of land to the centralised authority of traditional councils or CPAs, with families being accorded only 'institutionalised use rights'. It does not involve recognition of the distinctive character of these forms of land rights and does not adequately secure them in law. It deals with social tenure rights by rendering them secondary to the private ownership of supposedly representative institutions, and without providing adequate measures for the downward accountability of such institutions to citizens with rights.

In general, the underlying insecurity of the *de jure* property rights of most South Africans contributes to their marginality within the wider political economy. The inability of the cadastre and the edifice to recognise these rights contributes to continuing structural inequality and the poverty that results. This implies that both rural and urban development policies need to address this problem as an urgent priority; failure to do so, as is the case at present, merely reproduces the marginality of the poor and is likely to provoke rising levels of discontent. A range of approaches to the problem has been suggested, and these are described next.

A. Individual Titling

Some favour individual titling of the poor in both urban and rural South Africa. They often draw on de Soto's[71] arguments that secure titles allow the poor to offer their land or housing as collateral for bank loans, which could be used to establish their own enterprises and thus move out of poverty. Free market enthusiasts such as Sono[72] suggest that

68 Antara Haldar and J Stiglitz, 'Analyzing Legal Formality and Informality: Lessons From Land-Titling and Microfinance Programs' in David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics. Institutions for Promoting Development in the Twenty-First Century*, 2009)112-148.

69 Ben Cousins with Rauri Alcock, Ngididi Dladla, Donna Hornby, Mphethethi Masondo, Gugu Mbatha, Makhosi Mweli and Creina Alcock. '*Imithetho yomhlaba yaseMsinga*: The living law of land in Msinga, KwaZulu-Natal.' Research Report 43. (Cape Town: Institute for Poverty, Land and Agrarian Studies, University of the Western Cape,2011).

70 Aninka Claassens and Ben Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town and Athens: University of Cape Town Press and Ohio University Press, 2008); D Fay, 'Kinship and Access to Land in the Eastern Cape: Implications for Land Reform' (2005) 31 (1) Social Dynamics 182..

71 de Soto, *The Mystery of Capital* (n 47)..

72 Themba Sono, *From Poverty to Property. Themba Sono's Five Steps to Real Transformation* (Sandton: Free Market Foundation, 1999) 25.

'this would change the fortunes of millions of South Africans overnight'. Sparks[73] bases his advocacy of titling on de Soto's notion of 'bringing dead capital to life'.[74]In 2011 the main opposition party in South Africa, the Democratic Alliance, attempted to secure support in parliament for a private member's bill on state-sponsored titling of all land, arguing that giving people unencumbered ownership of their land is essential to secure their tenure and to ensure increased productivity, rural job creation and food security.[75]

A pilot scheme to convey individual titles to residents of Tumahole Township in the northern Free State is described by Leon Louw of the Free Market Foundation.[76] Collaboration between the Foundation, the local council, the deeds registry, local conveyancers and a bank has lowered the cost of converting occupation rights to titles from R10,000 to R1,800 per home. The cost of the programme if extended nation-wide would run into 'billions of rands', however, and Louw recommends sponsorship to meet these costs, since many residents cannot afford even the lower cost. The usual hyperbole accompanies his description: 'such an action would unleash R1-trillion of wealth into the economy and empower households on a scale far exceeding popular affirmative fantasies'.

Subsidised titling may well be attractive to urban dwellers in employment who can afford to pay for rates and municipal services. These constitute a growing but still relatively small proportion of the total population, perhaps 10-15 per cent at most. It is true that many rural and urban South Africans desire a document that records their property rights, that they might see as a 'title', to help them protect their land from powerful chiefs or predatory outsiders. This is not the same, however, as registered rights to a precisely surveyed land parcel owned by one person or at most two spouses, which is costly to acquire and to maintain. Many such people also assert that land or housing must be co-owned by family members, and should not be alienable, which contradicts fundamental features of private property.

The relevance of individual titling for the poor and unemployed is thus doubtful. The argument that titling will unleash the 'dead capital' of the poor has been demolished by many scholars.[77] Haldar and Stiglitz[78] examine the empirical evidence in de Soto's home city of Lima in Peru, where titling on a large scale was undertaken, and show that the col-

73 Allister Sparks, 'Give the Poor the Land They're On' (Business Day, October 23, 2013).

74 de Soto (n 47) 3.

75 See e.g Democratic Alliance (DA), 'We need bold moves on land reform, not populism' <https://www.da.org.za/2015/02/south-africa-deserves-da-government-serious-accelerated-effective-land-reform/ > accessed 25 February 2017. See also, DA, 'The Da's Vision For Land Reform In South Africa' (2009) <https://www.da.org.za/archive/the-das-vision-for-land-reform-in-south-africa/ > accessed 25 February 2017.

76 Leon Louw, 'Transfers of Land can Unlock Dead Capital' (Business Day, 14 May 2014).

77 S Lawry, C Samii, R Hall, A Leopold, D Hornby and F Mtero, *The Impact of Land Property Rights Interventions on Investment and Agricultural Productivity in Developing Countries: A Systematic Review* (Campbell Systematic Reviews, 2014) 1 (Creative Commons, funded by the UK's Department of International Development);
Daniel W Bromley, 'Formalising Property Relations in the Developing World: The Wrong Prescription for the Wrong Malady' (2009) 26 (1) Land Use Policy 20.

78 Antara Haldar and J Stiglitz, 'Analyzing Legal Formality and Informality: Lessons From Land-Titling and Microfinance Programs' in David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics. Institutions for Promoting Development in the Twenty-First Century* (New York: Oxoford University Press, 2013)112-148.

lateral effect did not emerge. As discussed above, there is no empirical support for this proposition in the South African context either.[79] The fact that the owners of large numbers of government-built houses are disposing of their homes and moving back to informal shacks is a reality that cannot be ignored.

B. Pragmatic Solutions: Incremental Tenure and Adaptations of the Dominant Private Property System

Another approach to the incompatibilities and disjunctions identified above is to adapt the dominant system so that the land and dwelling rights of the poor can at least be partially recognised. This will convey a degree of tenure security, sufficient to enable basic developmental processes to be initiated. The focus is on developing pragmatic solutions within dominant frameworks, which will take different forms in rural and urban areas. Advocates of this approach acknowledge that adaptations offer only 'second best' solutions but they are seen as practical options that tenure reform practitioners can implement without requiring fundamental shifts in policy and law.

Innovative adaptations have emerged in relation to informal settlements. 'Incremental tenure' is seen by its advocates, such as the non-governmental organisation Urban Landmark, as consistent with current government policy to 'upgrade' informal settlements. It thus envisages the 'ultimate delivery of individual ownership', but 'provides for increasing levels of security during the period before this goal is achieved'.[80] Practitioners highlight alternatives to full private ownership, such as leases, rental arrangements and servitudes, as both short-term and long-term solutions.[81]

Incremental tenure is described as allowing a municipality to begin to invest in infrastructure and facilities, and facilitating the necessarily slow processes of dispute resolution at local level.[82] Four basic steps are involved: (i) administrative recognition; (ii) legal recognition; (iii) developmental regulation; and (iv) township establishment.

Administrative recognition involves gathering information on existing tenure practices and local management practices, including on how community members understand ownership, whether or not local registers exist, how transactions take place, how land is used within livelihood strategies, and how disputes are settled.[83] These allow local agreements to be built on the basis of existing and socially legitimate practices. Each household in the settlement could receive a document acknowledging that they occupy a dwelling, and local government bodies could issue an occupation permit to the household.

Legal recognition is appropriate where the informal settlement will not be relocated. It could take the form of a municipality providing blanket legal protection of the settlement

79 Cousins *et al* 2005.

80 Gordon et al (n 17) 61.

81 Lauren Royston, 'In the meantime … Moving towards Secure Tenure by Recognizing Local Practice' in Mark Napier, Stephen Berrisford, Caroline Wanjiku Kihato, Rob McGaffin and Lauren Royston (eds), *Trading Places. Accessing land in African cities* (Somerset West: African Minds, for Urban Land Mark, 2013).

82 Gordon et al (n 17) 62.

83 ibid 64.

by rezoning the area, or by using a Town Planning Scheme to do so.[84] This would enable land use planning, regulation, integration into municipal administrative systems and the provision of infrastructure. Legal recognition 'immediately increases tenure security because it brings the settlement into a regulatory framework where land use and tenure can be effectively managed', and places the settlement on the path towards township establishment. [85]

Developmental recognition involves the regulation and improvement of the settlement.[86] It takes place through developing layout plans, setting up systems for land use management and building controls, providing services, introducing land administration systems (including local registers), and issuing leases, servitudes, permits or municipal services accounts, thus providing residents with identifiable addresses. The content of land rights can vary greatly and may or may not involve powers to alienate land. A local land office could be established within the settlement, where meetings would take place, record-keeping systems developed, and registers kept and land disputes resolved. *Township development* is the final step towards the 'award of individual ownership to beneficiaries', through the opening of a township register, thus enabling the registration of title deeds.

In rural areas, current policy frameworks do not address cases where small rural towns are growing and expanding onto surrounding communal land, and new residents require plots on which to erect dwellings. Here, neither 'customary' processes of confirming claims to land nor official processes of township development are appropriate, and hybrid forms of land rights have emerged within market transactions that are not backed by legal contracts. Manona[87] has described an innovative attempt in Sterkspruit in the Eastern Cape to manage these processes. This has involved establishing a local land office to oversee transactions, enable the witnessing of agreements and validate documents that assert rights of occupation.

This innovation illuminates the pent-up demand for secure land rights that exists in situations such as these, as well as the need for local administrative arrangements that oversee processes of claiming, recognising and transferring land rights. It also illustrates the limits of adaptation strategies in the shadow of the edifice. Without the backing of law, such innovations are highly vulnerable to the withdrawal of official support.

Most advocates of incremental tenure appear to accept that registered private property within a national cadastre is desirable, and constitutes the ultimate goal of reform. Individual private property is seen as superior because it offers the highest degree of individual security and is most compatible with the workings of a modern market economy. The diagram of the tenure security continuum in Urban Landmark's guide to urban land management[88] displays a movement from 'less individual or group security' towards 'more individual security' along a continuum, from least to most desirable tenure form.

84 ibid 70.
85 ibid 71.
86 ibid 73, 74.
87 Siyabulela Manona, '"Informal" land rights under siege 18 years into democracy', Draft paper presented at the lunchtime seminar series of Law Race and Gender (LRG) – Rural Women Action Research Project (RWAR), University of Cape Town, on 30 March 2012.
88 Gordon et al (n 17) 62.

C. Intermediate Solutions: Winning Greater Legal Protection of the Status of Rights within Social Tenure Systems

Some approaches do not accept that private ownership through registered title deeds represents the most desirable end goal for tenure reform. Royston,[89] for example, argues that this goal is both infeasible and can prejudice attempts to secure social tenures. In her view, the key focus should be on tenure reform that 'realistically achieves progress towards more security over time, whether or not it results in title or some other legal form of tenure'. It makes 'pragmatic sense to work with what currently exists – both in law and in local practice', with a strategic intent – 'adaptation, meaning adapted practice and adapted law'. In this view, the project of law reform is long-term in nature, and must be influenced by adapted practice. In the meantime, improvements in tenure security should be the goal.[90]

A similar emphasis on intermediate solutions informs recent proposals for the use of the Interim Protection of Informal Land Rights Act of 1996 (IPILRA) as a framework for the protection of the land and dwelling rights of the rural and urban poor.[91] The main thrust of this Act is procedural, constraining alienation of informal land rights in the absence of the consent of rights holders, and informal rights are only loosely defined. Despite its brevity and lack of regulatory guidelines, a judicious strengthening of the Act and the approval of practical guidelines for its implementation could provide basic but effective protection of rights within social tenures. This could include simple land rights registration procedures, implemented at the local level but integrated into a national database.

Linked to better use of IPILRA is a proposal to establish a Land Rights Ombudsman that could act in support of land rights in both urban and rural areas, and in land reform contexts.[92] Since both the creation and the realisation of rights is dependent on the state, either directly or through its oversight of non-state institutions, appeals to the state to fulfill its obligations may be insufficient.

This suggests the need for an independent, impartial and objective body such as an Ombudsman to investigate complaints and process requests for assistance from land rights holders and others, and to facilitate solutions in situations of conflict and disagreement. This body could hold powers of both investigation and conciliation/arbitration. Its purpose would be to ensure that the state and other institutions fulfill their obligations to confer, recognise and protect land rights, and to promote agreed solutions outside of the courts. Its role would be complementary to those of government departments, relieving them of the responsibilities of investigating to resolve the host of individual claims, complaints and disputes around land.

A key question arises: what general principles would guide the approach and decisions of an Ombudsman, given that many requests for assistance would be made by the holders of land and dwelling rights in social tenures, by definition local in scope, socially embedded and diverse? If social tenures are recognised as distinct from the systems that comprise the edifice, the answer cannot be derived from conventional property law. Part of the answer is

89 Royston (n 81) 70.
90 Gordon et al (n 17).
91 Manona (n 87) above.
92 Ben Cousins, 'A Proposal for a Land Rights Ombudsman in South Africa' (2014) unpublished paper.

to see the Ombudsman as providing support and backup to local processes of negotiation, assisting conflicting parties to find mutually acceptable solutions when an impasse has been reached. However, if arbitration is required, then some agreed basis for decisions is required.

One possibility is to see the answer as twofold in character. *First*, in stable situations where the socially defined basis of land and dwelling rights is clear and widely accepted, these norms and values can be explicated and guide arbitration. A model is provided by customary dispute resolution processes, which are multi-layered and process-oriented, and capable of incorporating 'modern' values such as equal rights for women.[93] The notion of 'living law'[94]is relevant here. Many social tenures involve generalised acceptance of a set of core norms, values and principles, even in the case of recently established informal settlements.

Second, in less stable situations where the very basis of land and dwelling rights is contested (e.g. where the social identity of the original occupiers is not agreed), then much more general principles accepted by society as a whole are required. In South Africa today these include equality, the need for transformation of the legacies of the past, recognition of 'need' as a basis for claiming rights and the social unacceptability of homelessness, as well as principles that guide decision-making and negotiation processes, such as inclusivity, transparency and due process. The fundamental underlying principle here is agreement on the parameters of robust processes to guide the search for negotiated solutions.

An intermediate approach in communal tenure regimes informed by customary norms and values is the promotion of dynamic versions of these values that reflect current realities and aspirations, including those of democratic citizenship and rights to equality and participation in decision-making. The key notion here is that of 'living customary law', as distinct from the codified versions found in textbooks and precedents.[95]

Claassens[96] characterises relevant Constitutional Court judgements as reflecting perception of the living law of custom as 'flexible, adaptive and solution-oriented' in character. She argues forcefully that current government policies seek to close down the potential for progressive social change (such as in strengthening the land rights of women) by vesting all decision-making on land in the hands of centralised and unaccountable bodies such as traditional councils. The living law approach, however, 'potentially widens the making of customary law beyond chiefs and bureaucrats to include the multiple actors who are engaged in confronting, negotiating and changing property relations and power in day-to-day

93 S Mnisi Weeks, 'Regulating vernacular dispute resolution forums: Controversy concerning the process, substance and implications of South Africa's Traditional Courts Bill' (2012) 12 (1) Oxford University Commonwealth Law Journal 133.

94 Barbara Oomen, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (Oxford, Pietermaritzburg and New York: James Currey, University of KwaZulu-Natal Press and Palgrave, 2005).

95 Tom Bennett, 'Official' v 'Living' Customary Law: Dilemmas of Description and Recognition' in Aninka Claassens and Ben Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town and Athens: University of Cape Town Press and Ohio University Press, 2008).

96 Aninka Claassens , 'Customary Law and Zones of Chiefly Sovereignty: The Impact of Government Policy on Whose Voices Prevail in the Making and Changing of Customary Law' (2008) in Aninka Claassens and Ben Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town and Athens: University of Cape Town Press and Ohio University Press, 2008) 361.

local struggles'.[97]

Although Claassens does of course propose fundamental legal reforms to secure rights in social tenures,[98] the promotion of living customary law could also be located within the scope of intermediate solutions. Here, government should desist from strengthening the powers of chiefs and traditional councils over land and resources and provide more support to residents seeking to express their views on what should constitute the customary law of land. Opening up such arenas for debate and discussion has the potential to shift the balance of power within these forms of social tenure, and enable local-level oversight processes to offer more effective protection of rights.

The hegemony of the edifice of private property is not directly challenged in these intermediate solutions. They involve measures to mitigate the insecurity of rights in social tenures, and adaptations of the dominant system to enable planning and development. They might represent more feasible approaches to tenure reform in the short to medium-term than fundamental legal reform, which requires strong political will.

D. Fundamental Legal Reform: Providing Full Recognition of and Support to Social Tenures as Alternative Forms of Property

Some proposals for tenure reform in South Africa have sought to directly confront the edifice of private property. As described in Claassens[99] and Cousins,[100] a draft Land Rights Bill[101] was developed in the late 1990s that attempted to give full recognition in law of the underlying land rights of those people who occupy communal land. Here, rights holders would have had a choice between group and individual systems of land rights – but subject to majority decisions where this involves a transition from a group to an individual system. Land rights would have vested in members of group systems, not in institutions such as the chieftaincy or traditional councils, or in legal entities such as Communal Property Associations. Group members would have had the right to choose which institution should manage and administer land rights on their behalf. Group systems would have had to provide 'bottom line' protections for their members, consistent with constitutional principles of democracy, equality (including gender equality) and due process.

The Bill did not accept that exclusive, Western-legal style land rights were the only paradigm, and proposed instead a system of statutory or 'protected rights'.[102] These would have had the status of property rights, in that the law would protect their holders from deprivation without their consent or by expropriation. Rights holders would be the key decision makers on matters related to that land, and derive full benefits from its use or

97 ibid.

98 ibid 375-77.

99 Aninka Claassens, 'South African Proposals for Tenure Reform: The Draft Land Rights Bill' in Camilla Toulmin and Julian Quan (eds) Evolving Land Rights, Policy and Tenure in Africa, (London: International Institute for Environment and Natural Resources Institute 2000) and Ben Cousins, "Legislating Negotiability: Tenure Reform in Post-Apartheid South Africa", in: K. Juul and C. Lund (eds), Negotiating Property in Africa, Westport: Greenwood.) Cousins, Ben, 2002. "Legislating Negotiability: Tenure Reform in Post-Apartheid South Africa", in: K. Juul and C. Lund (eds), Negotiating Property in Africa, Westport: Greenwood 2002)

100 ibid.

101 Land Rights Bill of 1999.

102 Claassens (n 99) and Cousins (n 99).

transfer. The Minister of Land Affairs would continue to be the nominal owner of the land, but with delimited powers. These protected rights would have vested in the individuals who use, occupy or have access to land, but these rights would be subject to those shared with other members.

This approach would require the definition of the boundaries of the group, but these boundaries would not coincide with a demarcated land parcel recognisable in the cadastre, nor those of apartheid-era Tribal Authorities. Claassens describes the proposal for flexible boundaries as follows:

> …the boundary of the group would be determined with reference to who (which group of people) is affected by the particular decision. Thus, if the decision is about a change in grazing practice then the people affected by the change must be consulted, not the entire 'tribe'. Decisions affecting smaller numbers of people would require consultation of smaller groups, and those affecting large numbers would require that larger groups be consulted… this approach would impact on the resolution of endemic disputes about who is entitled to represent whom. The intention is that such disputes would be settled not by purely subjective or historical factors, but by a more objective test – what is the decision in question? Who is affected? Do the majority of those people endorse the decision or not?[103]

The draft Bill allowed protected rights to be registered on demand, but the rights would have existed whether registered or not. Protected rights, defined by statute, would have confirmed in law the rights of households occupying and using land in communal areas without having to first resolve, in each and every case, disputes over land ownership. The Bill recognised that the creation of land rights in a piece of legislation would not be sufficient, and institutional support was also required. The proposed solution was a Land Rights Officer based at magisterial district level, backed by Land Rights Boards at District Council level. Officers would:

> …. help rights holders enforce their rights and assist (and monitor) accredited structures. These officials would also have a key role to play in assisting to resolve disputes about overlapping rights, boundaries, and the delineation of disputed rights. They would have a pivotal role in the process of accrediting local structures, and in the registration of rights. They would also play a 'watchdog' role in relation to internal processes of alienation of land, deprivation of rights and the awarding of adequate compensation.[104]

Could such a paradigm be broadened to include all social tenures, wherever located? There do not seem to be any reasons why it should not, given the inherent flexibility of the approach. Its main weakness is seen by some as unrealistic assumptions about the problem-solving capacities of large groups of people. Another criticism is that it does not provide

103 Ibid. n 99
104 ibid 259.

a lasting solution to the insecurity of land tenure since it does not convey 'full' property rights and shores up the indeterminacy (and thus insecurity) inherent in social tenure. This argument is problematic; it accepts the problematic premises of the edifice of private property, which is currently failing a growing majority of South Africans, and is vulnerable to the counter-argument that attempting to incorporate this majority into the edifice is itself unfeasible.

Adopting this paradigm would have major implications for development planning and service delivery procedures and systems. If social tenures are to be fully supported, then high levels of precision in surveying of plots of land would need to be abandoned; social and territorial boundaries that are flexible and shift over time would have to be accepted; co-ownership would need to be capable of being registered; standard township development procedures would need to be adjusted; new systems for the collection of rates and taxes would have to be developed; and professionals such as lawyers, surveyors and planners would have to be re-trained. Most importantly, new sets of skills would have to be developed by many actors, focused on the processual dimensions of land holding: facilitation, mediation, dispute resolution, and oversight of governance. The broad implication is that formal systems would have to make adjustments that enable them to embrace the key features of the social tenure systems they would now need to support.

V. ASSESSING THE ALTERNATIVE PARADIGMS

I conclude with a brief assessment of the different approaches discussed in this chapter, and examine complementarities and trade-offs among them, as well as their political feasibility.

a. *Individual titling* is at present an option only for people who are socially mobile, improving their incomes and thus able to pay the high costs involved. It offers security of tenure, but at a price. Over the long run, if the socio-economic status of the majority of people improves significantly, it might become the tenure system of choice for most South Africans in urban and perhaps even rural areas. At present, however, and probably for many decades to come, it is not a realistic option for the very large numbers of people who do not fit these criteria, and for whom social tenures are much more likely to offer secure property rights, especially if they were officially recognised and supported.

b. *Incremental tenure* is a practical approach to the upgrading of informal settlements in the short-term, and versions of this approach might also be appropriate for people building homes on communal land outside small rural towns. It offers local government bodies a way to begin to supply infrastructure and services in the absence of registered titles. Similarly, recognition of the tenure rights of residents of abandoned inner city buildings would help to initiate developmental processes. However, it is unrealistic to expect incremental tenure to lead over time to individual titling of many of the poor in the short to medium term. The fact that so many government-built houses are not yet titled, and that there is a thriving off-register market for purchase and rental of such dwellings, suggests a poor fit between the realities of low cost property and the requirements of the edifice of private property. This is likely to persist for many years to come.

c. *Securing greater legal protection of social tenure rights* is a more realistic option than incremental tenure for the majority of poor South Africans. It is consistent with the broad

thrust of public policy in democratic South Africa, and in particular with the approach to tenure security adopted by the courts, and the Constitutional Court in particular.[105] Making the provisions of IPILRA permanent rather than 'interim', recognising that communal land rights vest in people and not in institutions, and offering support through a Land Rights Ombudsman are all eminently achievable goals. They do not require a fundamental shift in the paradigms of the professions that support the edifice (for instance, lawyers, surveyors, planners) but it does require greater flexibility in the workings of the formal system, and thus a greater degree of adaptation of the dominant system than does support for incremental forms of tenure. Currently, however, state support for the traditional leader lobby means that key elements of this option are politically contested. Adopting such an approach will require political commitment to securing the land rights of the poor even in areas where traditional leaders exist.

d. *Fundamental legal reform and full support for property rights in social tenure systems* is, in my view, the most desirable tenure reform option, but is clearly the most difficult paradigm to win support for. Some analysts are skeptical of arguments that assert the robustness of social tenures, and others query the capacity of the South African state to provide appropriate support for these forms of property rights. It is true that at present we do not have a state that is both willing and able to protect alternative forms of property rights. Creating the institutional capacities required for effective support seems particularly daunting. However, these are primarily political questions, since capacity can surely be created over time through investment of resources in skills and institutions, and the fundamental issue is political will.

It may be possible to pursue some of these options simultaneously, rather than having to choose between them. Incremental tenure and other adaptations of the edifice are the easiest to advocate and implement, but even these are not widely accepted by local government bodies. More experimentation and piloting of this approach on the ground would no doubt provide many useful lessons.

Given the unlikelihood that incremental forms of tenure will unfold seamlessly towards the goal of full individual titling, this approach could be combined with continued advocacy for limited legal recognition of rights in social tenures and the means to provide them with support. It is critically important that practitioners and scholars continue to engage in research in order to document the realities of land and dwelling rights outside the edifice, including local institutional arrangements for their oversight and the informal markets through which they are transacted.

Winning widespread acceptance of the legitimacy of social tenures and the need for their legal protection is vital in the current conjuncture, in the context of continuing struggles over the powers of traditional leaders over land. Defensive measures are inherently limit-

105 *Alexkor Ltd & another v Richtersveld Community & others* 2003 (12) BCLR 1301 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Jaftha v Schoeman; Van Rooyen v Scholtz* 2005 (2) SA 140 (CC); *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 (Pty) Ltd and Another (338/10) [2011] ZASCA 47 (30 March 2011); *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC); *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v the City of Johannesburg and others* 2008 (3) SA 208 (CC) (*Olivia Road*); *Abahlali baseMjondolo v Premier of KwaZulu Natal Province and Others* 2010 (2) BCLR 99 (CC).

ed, however, and fundamental legal reform that challenges the hegemony of private property and the edifice erected on its basis should, I argue, remain the long-term objective.

VI. CONCLUSION

Perhaps the most fundamental obstacle to full legal recognition of social tenures is the unquestioned adherence of South African policy makers, lawyers and academics to Western-legal conceptions of property. These continue to inform thinking and policy advocacy in the country, despite innovative court rulings on land reform, tenure rights and inheritance of property. Alternative understandings of property relations have gained little ground in mainstream academic curricula, and even land activists have only a rudimentary grasp of the key debates. Private property and the edifice built on its foundations remain truly hegemonic in South Africa today.

Okoth-Ogendo's writings are a key resource for civil society groups and academics seeking to develop a more nuanced conception of property for use in policy engagement in Africa. His groundbreaking 1989 article,[106] in particular, illuminates the key differences between private and social tenures. As I have summarised his arguments elsewhere,[107] this suggests that land rights in Africa tend to be attached to membership of a unit of production; are specific to a resource management or production function; and are maintained through active participation in the processes of production and reproduction at particular levels of social organisation. Control of such access is attached to 'sovereignty' (in its non-proprietary sense) and vested in political authority over different levels of social organisation and units of production. Control occurs primarily for the purposes of guaranteeing access to land for production purposes. Variations in power (i.e. rights) derive from social relations, not the market. Control is exercised through members of the units of production; control is not simply the product of 'political super-ordination'.[108]

These powerful and persuasive arguments have underpinned the analysis of social tenures in South Africa in this chapter, and have wide application elsewhere on the continent. I live in hope that they will one day directly inform the drafting of policies and laws aimed at securing the land rights of Africans.

106 HWO Okoth-Ogendo, 'Some Issues of Theory in the Study of Tenure Relations in African Agriculture' (1989) 59 (1) Africa 6.

107 Ben Cousins, 'More than Socially Embedded: The Distinctive Character of "Communal Tenure" Regimes in South Africa and Its Implications for Land Policy' (2007) 7 (3) Journal of Agrarian Change 281.

108 ibid 311.

CHAPTER 9

THE FATE OF RES *COMMUNIS* IN AFRICA: UNFINISHED BUSINESS

Liz Alden Wily

I. INTRODUCTION

Okoth-Ogendo was among those convinced that customary rights, including those owned collectively (commons), must be treated in national laws as a legitimate form of private property with equivalent protection as statutorily granted to non-customary entitlements. He referred to these lands as *res communis*. This agenda began to be advanced in Africa in constitutional and land law reforms in the 1990s, signaling release in some countries from century-long legal treatment of African lands as lands without owners or *terra nullius.* Based on an examination of the content of land laws across the continent in early 2016, this paper assesses progress in recognition of customary rights in land legislation. While influential cases slowly accrue, findings are disappointing; most states continue to locate customary rights as less than real property, and especially affecting common properties. This affects millions of hectares of rangelands, forests and marshlands, which typically remain in the hands of governments as state or public domain, and their customary owners as lawful or unlawful occupants, not owners.

In 2007, Okoth-Ogendo described the land issue as the last colonial question which sub-Sahara Africa must resolve "… to break the gridlock that continues to impede the development process more than four decades after the end of colonialism".[1] Earlier he had noted a common stumbling block; the status of customary rights and communal property in particular: "*For the commons are not* res nullius*, but rather* res communis*; they represent not a species of public property, but of private property for the group that controls it and whose members have access to it,"* he wrote in 2000. *A century of expropriation, suppression and subversion*.[2]

Okoth-Ogendo was indisputably one of Africa's most influential advocates for reforms to remove century-long denial of customary land rights as worthy of protection as property interests. By the time Okoth wrote the above, several African states had in fact taken radical steps in this direction and several, like Ghana, had never suppressed custom-

1 H.W.O. Okoth-Ogendo, "The Last Colonial Question: an essay in the pathology of land administrations systems in Africa". Presented at the Workshop on Norwegian Land Tools Relevant to Africa, Oslo, 3-4 May 2007.

2 H.W.O. Okoth-Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion". Presented at the Workshop on Public Interest Law and Community-Based Property Rights, Arusha, 1-4 August 2000.

ary tenure to the degree experienced elsewhere.[3] Comparable changes got underway from the late 1980s in Australasia and Latin America in regard to indigenous peoples. Although developing independently and without knowledge across regions, challenge to the suppression of customary land rights would slowly mount through the 1990s. This has become a global movement today.[4]

Several scholars have surveyed the origins and course of denial of African customary land interests as other than permissive occupancy and use of presumed unowned land.[5] Such exercises now gain enormously from renewed interest in the relationship of state-making, capitalist transformation and the making and unmaking of property,[6] an old subject on which Marx was the analytical master. While these linkages should absorb us in the troubled present of the uncertainly democratising African state, including Okoth's home country, Kenya, the objective of this chapter is modest: to identify the present-day legal status of what remains the major species of property on the continent, customary tenure.

The term legal status is in this chapter to mean the treatment of customary rights in national land laws. The founding measure of that treatment is the degree to which customary rights are afforded equivalent protection as real property interests as granted to non-customary property interests expressed in statutory entitlements. The mechanisms through which the latter are assured status as property is strikingly uniform across the continent, unsurprising when the narrowness of their origins in European law is tracked. Although with much earlier Roman origins, an influential flowering was in the French *Declaration of the Rights of Man and of the Citizen* (1789) which *inter alia* established for French men (sic) and from this, Africans in the next century under both common and civil law, that state protection of owned lands comes into being only through registration; initially through deeds of purchase or sale, and eventually as geographically located parcels each with its unique identification number. This is useful to note, for one of the markers adopted in this chapter to assess the extent to which a country's modern law acknowledges customary land interests as a species of property (*res communis*) is whether the law provides for these interests to be registrable in their own right, or indeed, requires such interests to be registered at all in order to be upheld and protected as property.

A. On the Nature of Property

This last circumstance ranks especially highly where it occurs, for recognition of rights as existing *whether registered or not* suggests a more fundamental transformation is afoot: the extinction of the idea of Africa as historically and even presently as largely unowned (*terra nullius*).

Coming a close second is the question as to how far land interests must be tradable commodities in order to qualify as property. This also has a long history of debate, latterly

3 Liz Alden Wily, "Reconstructing the African Commons" [2001] 48 (1) Africa Today 77.

4 E.g. <http://www.landrightsnow.org/en/home/ > accessed 18 February 2016.

5 Liz Alden Wily, "Customary Land Tenure in the Modern World. Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa" (Washington DC, Rights and Resources Initiative, 2012).

6 U Patnaik and S Moyo, *The Agrarian Question in the Neoliberal Era Primitive Accumulation and the Peasantry* (Pambazuka Press: Cape Town, 2011).

so famously declared essential by Hernando de Soto[7] in his exploration of such detachability from social norms being the reason why capitalism works so well in the West and so weakly elsewhere.

Such matters are important to the several billion rural dwellers globally who depend upon customary land tenure to secure land.[8] This is a specie of property that exists in sufficiently diverse form and nuance that for many a perplexed policy and law maker, it is easier to simply stipulate that real property may only exist as an absolute right to an equally absolutely fixed area of land, owned as absolutely by a single individual or registered entity, and regulated as absolutely by fixed provisions of state law administered by state bodies through registration of possession in inherited European forms. Historically, national law has had great difficulty accepting that even a group of named persons may act (and for the purposes of land law) be acknowledged as a natural person, let alone accepting communities -- those messy, changeable entities -- as real owners with legal personality. Indeed, as outlined later, the means through which communities are so accepted remains problematic even in legislatures willing to secure collective rights in principle.

Looking back from a somewhat reformed early 21st century, it seems predictable that such inroads as colonial and early independence governments permitted customary landholders, were limited to their houses and farms.[9] These were to be registered in the name of the (usually male) household head, cancelling traditional family tenure in the process. Such was the object of conversionary titling opportunities offered to Africans in Francophone laws of 1925 and 1955 and as delivered in individualisation, titling and registration programmes in Anglophone Africa from the 1960s.[10] All were premised on assumed necessity to extinguish customary interests in the interest of economic growth.

B. The Centrality of Community Based Jurisdiction in the Customary Regime

The inseparability of community with customary land tenure needs emphasis. In sum, communal tenure routinely exists in customary (i.e. community-based) regimes, in three forms: first, in socio-political form, as *the jurisdiction* over land rights exercised by the community. This is expressed in principles and values (norms) or in conscious rules the community applies to land use and hence to landholding. These norms and rules may be long-practised (traditions or customs) or partly or even entirely new. Present-day norms may be market-driven or reshaped in line with constitutional requirements such as obligation to equitably serve women's rights or to permit outsiders marrying into the community to be granted secure rights. Community based norms are also significantly reconstructed through democratisation, impacting systems for decision-making within the community.[11] What does not

7 Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London: Bantam Press, 2000).

8 Rights and Resources Initiative, *Who Owns the World's Land? A global baseline of formally recognized indigenous and community land rights* (Washington, DC: RRI, 2015).

9 FAO, *The State of Food and Agriculture: World and Regional Reviews Marine Fisheries and the Law of the Sea: A Decade of Change* (Rome, FAO, 1992).

10 John Bruce and Shem Migot-Adholla (eds.), *Searching for Land Tenure Security in Africa* (Washington DC: The World Bank, 1994).

11 Liz Alden Wily; Governance and Land Relations. A Review of Decentralization of Land Administration and Management in Africa (International Institute for Environment and Development: London, 2003).

change is the anchor of norms as deriving from the community. This is such a uniform attribute in customary/indigenous tenure across the globe that the term *community tenure* is now normally preferred to customary tenure. Such rephrasing is also advantageous when locating these systems as fit for the 21st century and as a useful institutional building block for devolving land governance. That is, the survival of customary tenure depends less upon the survival of community as traditionally constituted rather than upon the extent of legal force enabling modern communities to determine and govern land rights within their localities. How far the community's rules for exercising this are traditional or novel are secondary to this governance requirement.

C. Community as a Social and Spatial Sphere

Also key to the community in the customary sphere is its existence as a definable community land area, territory or domain, the limits of which are accepted by neighbouring communities, periodic contestation and adjustments aside. Even nomadic pastoralists as most numerously occupying Sahelian and Central Asian drylands usually identify core home territories, although complemented by seasonal rights in transit and remoter zones, and which rights obtain status over time as customary access rights that also need to be upheld by settled communities. As resources decline, contestation between these parties is frequent.[12]

Within the community land area, distinctive levels of community land may be identified. A dominant version expresses common ownership of the entire domain, most easily referred to as local root title, and from which individual, family and other rights held by community members descend. In another version, collective root title stops short at the doorstep of house plots and sometimes permanently farmed lands. In some instances (e.g. in parts of Namibia, South Africa, Sierra Leone and Ghana) there is contention in the present century between community members and those chiefs who have reinterpreted traditional powers as land allocators as their original ownership, disposing of their peoples' lands accordingly.[13]

Within most of these and other versions, communality accrues in the form of definable parcels of shared lands, and for which the term *commons* is appropriate. While limited in some fertile and highly populated areas (e.g. Rwanda), and/or where family tenure rather than community tenure has historically prevailed, a distinction between common access and common ownership may pertain (e.g. Gabon). More generally, commons exist abundantly in all continents; these could amount to an extraordinary 60 per cent of the total global land area, largely in the form of local rangelands, forests and marshlands.[14] It is these commons that endure most physical encroachment and contested claim today.

The most common contestation is simply between the state and local communities. The former often claims these lands as ownerless and/or as necessarily national or public property, especially in the case of forests and wetlands. Accordingly past and present land

12 London, International Institute of Environment and Development: URED, 2000)

13 For example, since Independence in 1990, the King of the Kavango in northern Namibia has 'sold' 45 per cent of his peoples' lands to elite individuals often from outside the area.

14 Liz Alden Wily, *Time to rethink? A Critique of Rural Land Law in Cote d'Ivoire* (FERN: Moreton in Marsh and Brussels, 2015).

laws frequently vest these assets in the state (on behalf of the national community or otherwise), in turn delegating their management to state agencies. However, communities claim these same lands as historical and present domain, critical for socio-cultural, territorial and livelihood purposes (e.g. grazing, water catchment, forest product use, transhumant seasonal cultivation and fishing). Or, in Okoth-Ogendo's words: "For those societies which recognise and depend on them, the commons are the creative force in social production and reproduction".[15] It is for these reasons that the exercise undertaken below in respect of the status of customary tenure in Africa places special attention upon the handling of off-farm land rights in national law. It will become apparent that many modern national land laws still treat off-farm collective property in the customary sector as *terres sans maîtres*, *herrenlos*, or *terra baldios*; all forms of *terra nullius*.

II. THE CUSTOMARY DOMAIN IN JANUARY 2016

Africa comprises nearly three billion hectares of land (excluding waters) in 54 States.[16] Although necessarily simplistic given limited data, the customary domain may be estimated by excluding urban areas, terrestrial protected areas, and registered non-customary entitlements generally referred to as private land.[17] This approach also excludes areas formally defined as Government, State and Public Lands where a distinction is made between these and customary (or tribal or communal lands), such as is possible for example in Ghana, Botswana and Zimbabwe). Or where the two classes entirely overlap to exclude reasonably calculated proportions of Government, State and Public property aside from terrestrial protected areas (e.g. DRC, Libya, and Sudan).[18]

Some statistics continue to surprise. Despite at least 40 per cent of Africans residing in towns and cities (expected to rise to 56% by 2050) the proportion of land absorbed by urban areas is minor at just below four million hectares. On a country basis this ranges from 0.02 per cent (Chad) to 0.8 per cent (Tunisia) and 1.1 per cent (Mauritius). Privately titled rural lands are also much more limited than expected if less reliably fixed, given the paucity of official data for two thirds of African countries. Where official data or reliable estimates exist, the extent of privately titled rural land area is diverse; for example, less than 2 per cent of the country area of Cote d'Ivoire, Central African Republic, Chad, Democratic Republic of Congo and Gabon, but respectively 87 per cent, 79 per cent and 38 per cent of Rwanda, South Africa and Namibia are subject to formal private entitlement. Even with generous estimates where official data is scarce, only 10 per cent of the continent overall is subject to private title. This is less surprising given the sustained tendency for governments to denote deserts and other arid lands (e.g. Sudan, Egypt, Chad, Mauritania) and intact natural forests (e.g. Gabon, Cameroon, Angola) as generically un-ownable.

A more reliable estimate of lands subject to formally declared Terrestrial Protected

15 Okoth-Ogendo, Tragic African Commons (n 1) 2.

16 Western Sahara is excluded here as a UN-listed Non Self-Governing Territory.

17 Alden Wily, Time to Rethink (n 14).

18 Liz Alden Wily, 'Estimating National Percentages of Indigenous and Community Lands: Methods and Findings for Africa' [2015b]. The Global Platform of Indigenous and Community Lands for methodology, as adopted by LandMark.

Areas (TPA) at 12 per cent overall (excluding inland waters and marine protected areas) is obtainable. Country data ranges from 2.6 per cent in Cape Verde to 44 per cent in Namibia of land area under TPA.

A. A Massive de facto Customary Estate

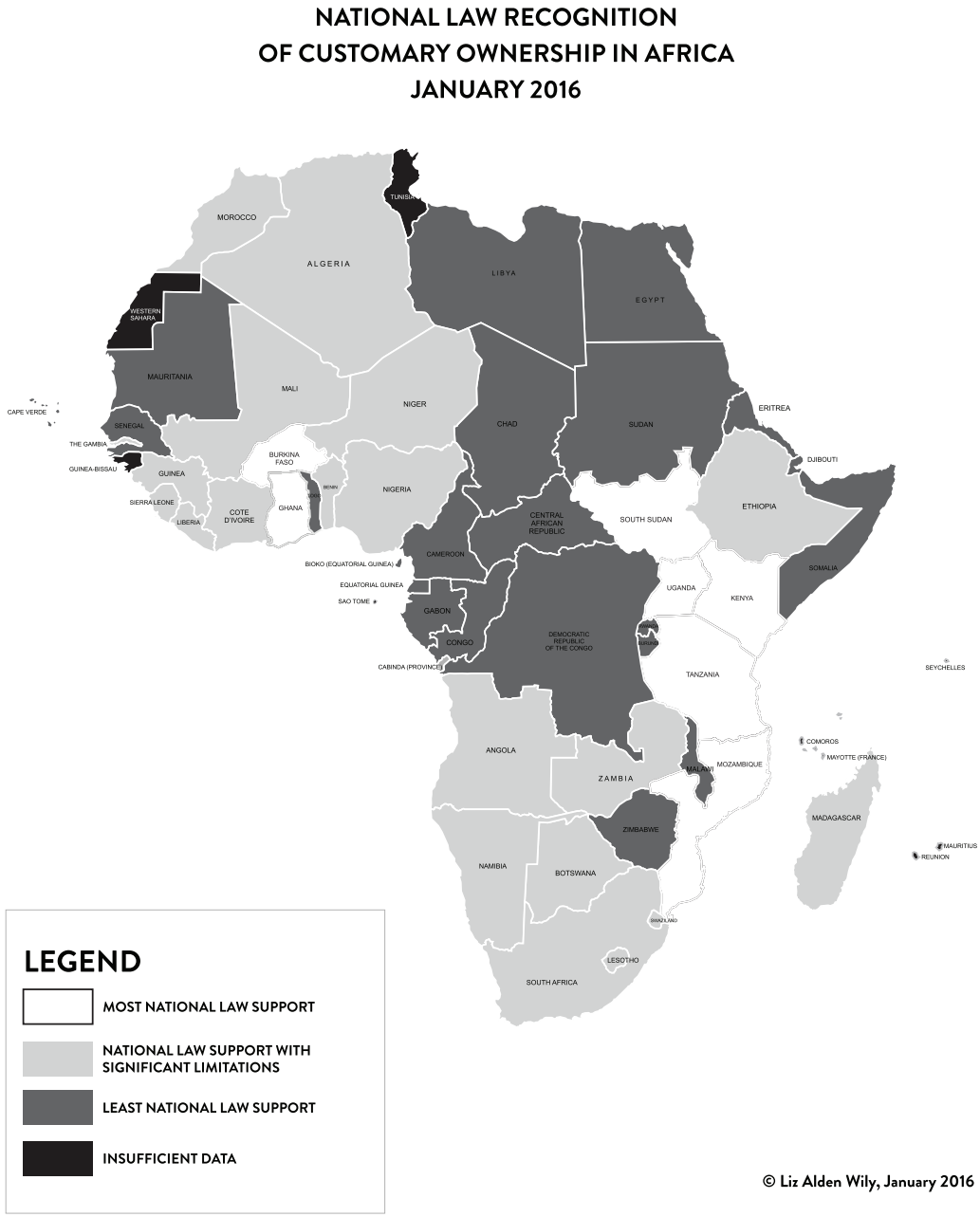
Although roughly estimated due to lacking data for many states on the area of land under private title, the *de facto* customary domain in Africa amounts to roughly 75 per cent of the continental land area, or over two billion hectares.[19] In 25 of 54 countries, the customary domain covers 80 per cent or more of the total country area.[20] To these figures could be added at least one quarter of the above-mentioned Protected Area estate, in light of multiple claims and grievances as to involuntary takings of core customary lands to create these protected areas, combined with sustained local occupation of some of these lands, their legal status as national or government property notwithstanding.[21] In Kenya, contested inclusion of national forests occupied until the present by indigenous forest peoples as public, not community property, is a case in point, even reaching the African Court on Human and Peoples' Rights.[22] (See map below)

19 Liz Alden Wily, 'Communities & the State: Getting the Property Relationship Right for a Safer 21st Century' (2015a). Third Al-Moumin Distinguished Lecture on Environmental Peacebuilding presented on 6 October 2015 at American University, Washington D.C. on behalf of American University, Environmental Law Institution and United Nations Development Programme (on file with the author).

20 Algeria, Burkina Faso, Chad, Comoros, Cameroon, Central African Republic, Democratic Republic of Congo, Egypt, Eritrea, Gabon, Gambia, Ghana, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Niger, Nigeria, Sierra Leone, Republic of Congo, Somalia and Tunisia (Alden Wily (n 18).

21 Liz Alden Wily, 'The Law and Land Grabbing: Friend or Foe?' (2014) 1 The Law and Development Review 207.

22 *Application No. 006/2012 African Commission on Human and Peoples' Rights v The Republic of Kenya*, heard in Addis Ababa in November 2014.



Best legal practice provides that :–

1. Customary rights have equal force & effect as non-customary entidlements (property rights)
2. Recognition & protection as property rights applies whether or not the right is formally registered
3. Recognition & protection as property rights applies whether or not the right is owned by an individual, family, clan, village or other traditionally recognized social unit
4. Recognition & protection as property rights applies whether or not the land refers to residential or farm land or to off-farm lands such as rangelands and forests
5. Authority over community lands is legally vested in community (either in traditional authorities or community level elected bodies)
6. Customary landowners may (voluntarily) register ownership without those rights being converted into non-customary titles that are deprived of customary incidents and community-based regulation.
7. Families, clans, communities or other traditionally formed groups do not need to create legal entities in order to register their ownership.

An important feature of this estimated customary domain is that it mainly comprises forest/woodlands, rangelands and swamplands, used for transhumant or shifting cultivation, wood and non-wood products, grazing and other uses. Permanently cultivated lands (an-

nual and perennial crops) account for only 173 million hectares or 7.3 per cent of the total land area of Sub Saharan Africa.[23] Much of the 43 per cent of sub-Saharan Africa defined as *potential* agricultural land is forests or rangelands and 90 per cent of which is in eight, mainly Congo Basin, states.[24] Formal farming expansion into these lands and acquisition of new title is almost entirely by large farmers and commercial enterprises, not by the millions of farmers who live within and depend directly on these lands for livelihood. Lack of legal recognition of these lands as already owned is the main factor in this trend.[25] Concentration is already well illustrated in the fact that 85.3 per cent of the permanently cultivated 173 million hectares cited above is owned by medium to large farmers while 85 million small farms are crammed into the remaining 14.7 per cent of area.[26] Decreasing size in smallholdings and rising rural landlessness are corollary trends.[27]

In practice, the 2.2 billion hectare customary domain supports the livelihood of up to 650 million rural Africans, projected to rise to 1.3 billion rural occupants in 2050.[28] The area is more modest when a present per capita allotment of 3 ha is noted. Many poorer urban dwellers also depend partially upon food supplies from home villages and their right to return and farm there. Social and economic connections are often so strong between urban and rural communities in especially Asia and Africa that the stark distinction between these domains as classically evolved with industrialisation is less surely the case today.[29] This increases rather than lowers dependency ratios by poor citizens upon rural lands.

B. A Tiny de jure Customary Estate

For all the estimated expansiveness of the customary domain in Africa, secure tenure remains elusive. As calculated in mid-2015, less than 15 per cent of the customary estate was acknowledged as owned by or formally set aside for customary landholders in national land laws, and with uneven levels of security provided for.[30] This poor output is despite massive political change sweeping the continent since 1990 and of which tenure reform has been a regular feature. Many of the 48 new or significantly amended national constitutions since 1990 on the continent improve provisions on property. Those constitutions that have done so most substantially include Mozambique (1990), Uganda (1995), South Africa (1997) and Kenya (2010). Tanzania, Sierra Leone, Eritrea, DRC and Liberia have modified consti-

23 <http://www.tradingeconomics.com/sub-saharan-africa/agricultural-land-percent-of-land-area-wb-data.html and http://www.fao.org/docrep/004/ac349e/ac349e04.htm > accessed 15 April 2015.

24 TS Jayne, J Chamberlain & DD Headey, 'Land pressures, the evolution of farming systems, and development strategies in Africa: A synthesis'(2014) 48 Boserup and Beyond: Mounting Land Pressures and Development Strategies in Africa 1.

25 W Anseeuw, M Boche, T Breu, M Giger, J Lay, P Messerli K Nolte, Transnational Land Deals for Agriculture in the Global South By The Land Matrix Partnership (CDE, CIRAD, GIGA, GIZ, ILC): Analytical Report based on the Land Matrix Database Number 1: April 2012.

26 GRAIN (2014) 'Hunger for land: small farmers feed the world with less than a quarter of all farmland'. <https://www.grain.org/article/entries/4929-hungry-for-land-small-farmers-feed-the-world-with-less-than-a-quarter-of-all-farmland > accessed 26 February 2017.

27 Jayne et al (n 26) above.

28 Liz Alden Wily 'Customary tenure: remaking property for the 21st century'. In M. Graziadei & L. Smith (eds) Comparative Property Law Global Perspectives (Oxford, Edward Elgar pp 458-477).

29 Cristobal Kay, 'Developing strategies and rural development: exploring synergies and eradicating poverty' (2009) 36 (1) Journal of Peasant Studies 103.

30 Alden Wily (n 21) above.

tutions in draft, including intentions to more fully and fairly elaborate land, property and natural resource matters.

Around 30 states have introduced new land laws in the same 25 years, roughly two-thirds of which signal new handling of customary land interests. This is often from a low base, as many post-independence administrations did little more than confirm colonial norms after 1960. Nigeria, Zambia, Ghana, Zimbabwe, The Gambia, Chad, Cameroon, Gabon, Sierra Leone and DRC have *Observatoires* or Commissions of Inquiry mandated to plan reforms. While several like Ghana have new land laws in draft, others have been sitting for years without concrete result, reflecting detectable slowdown since the global financial crisis almost a decade past and the related surge in large-scale land acquisitions in Africa and Asia by global and local capital. [31] Swaziland, Zambia and Senegal are among those where governments have failed to deliver on promising commitments to tenure reform for more than a decade, and others could well follow suit. For example, Gabon has already recently promulgated a new development law that poorly conceals intentions to enable foreign and local entrepreneurs to take over lands for commercial development irrespective of local claims.[32]

A similar revisionism now appears in respect of wildlife, water, mineral, and forest sector legislation. Through the 1990s until the early 2000s the forest sector was noted for breaking new ground including enabling communities to own and declare community forests for local use and protection.[33] In more advanced approaches (among which The Gambia and Tanzania were leads, followed by Namibia, Lesotho and Malawi) new forest laws permit communities to secure these areas outright as their collective property. Such laws have ceased to appear including in the crucial Congo Basin region where millions of hectares of community property is forested, and where what at first seemed an important new opportunity for communities in 2014 is now seen by experts as intended less for community benefit than to enable a thriving private logging sector to access their lands cheaply.[34] Progressive action in Namibia to allow communities to own wildlife in their multiplying conservancies has seen no replication in other wildlife-rich states.[35] Elsewhere, legal change in this and other sectors such as water and mineral development has been limited to requiring agencies to involve local populations in management, creation of user associations, and improved benefit-sharing, with minimal recognition that customarily both small waters (ponds, lakes, streams, marshes) and historically mined surface minerals are integral to the customary, community-owned estate.[36]

Bold constitutional pledges for devolved local government have been as erratically pursued since 1990, delivering at times more de-concentration than devolution of powers, especially to the grassroots. Local government continues to stop short of empowering com-

31 Patnaik & Moyo (n 6).

32 Law No. 002 of 2014, Sustainable Development in the Gabonese Republic.

33 FAO, Proceedings of the Second International Workshop on Participatory Forestry in Africa, 2003.

34 Rainforest Foundation UK, 'Annual Review and Accounts 2014' (RFUK: London, 2014).

35 Nelson, Fred (eds.), *Community Rights, Conservancies and Contested Land: The Politics of Natural Resource Governance in Africa* (London: Earthscan, 2010).

36 E.g see, B van Koppen, CS Sokile, N Hatibu, B Lankford, H Mahoo, and P Yanda, *Formal Water Rights in Rural Tanzania: Deepening the Dichotomy? Working Paper 71* (International Water Management Institute: Johannesburg, 2007).

munity level government. However, where this has been achieved or partially achieved (e.g. Ethiopia, Tanzania and Senegal) or where community level land planning and certification of rights has continued to evolve (as in Benin and Burkina Faso), positive impact upon majority rural land security is detected.[37] This mainly occurs through endowment of land administration powers upon elected village governments, an example of which is given later.

III. ASSESSING LEGAL TREATMENT OF CUSTOMARY TENURE

Patently, resolution of what Professor Okoth-Ogendo described as the last colonial question is neither uniform nor complete. Relatively few new tenure laws fully liberate customary rights from the shackles of legal denial. There are exceptions. Not all colonial era laws were dispossessory in the first instance. Old laws in Swaziland, Bechuanaland (Botswana) Ghana, Sierra Leone and The Gambia protected customary interests early in the 20th century although each with limitations, and which have gathered force since. To aid assessment, since 2000, the author has used the indicators listed below to track the national law status of customary landholding rights in Africa.[38]

1. Customary rights have equal legal force and effect with non-customary entitlements granted or recognised under statutory tenure regimes.
2. These rights and the lands and resources to which they refer are protected whether or not the lands are formally identified, demarcated and registered. Untitled but occupied and used lands are therefore owned until proven otherwise (such as through on-site investigation on a needful, *ad hoc* basis).
3. This applies whether or not an individual, a family, a clan, a village or other traditionally recognised and operating social unit owns the customary right.
4. This applies whether or not the right refers to houses and permanently cultivated farms, or to naturally collective off-farm assets such as forests and rangelands within the community's domain.
5. Authority over customary lands/community land area is vested in the community, either in traditional authorities subject to communal consent or (preferably, in the 21st century) in elected community level bodies.
6. Customary owners as individuals, families or communities may voluntarily formalise their ownership without these rights being converted into non-customary entitlements which risk community based jurisdiction being extinguished.
7. Families, clans, groups and communities do not need to create legal entities within which to vest their ownership.

Other indicators are periodically applied. For example, a useful indicator is to test how far the meaning of national, state or public land has been reformed to enable communities to be recognized as owners of nationally important resources subject to conservation conditions. This reform can do away with the inaccurate presumption that resources of national importance can only safely be vested in state agencies.

37 Land Tenure and Development Technical Committee, Formalizing land rights in developing countries: moving from past controversies to future strategies (Paris, French Agency for Development, 2015).

38 Liz Alden Wily, passim.

An overview of results as of 1 January 2016 is provided below and illustrated in Map 1.[39] Note that changes in ranking annually occur, mainly positively, as new policies slowly find their way into laws. Kenya, Ghana, Malawi, Liberia, South Africa and Senegal have new bills which will directly impact community-based landholding if enacted during 2016 as promised.[40]

A: Most Protection	B: Protection with Limitations	C: Weakest Protection	Insufficient Data
Tanzania, Uganda, Mozambique, Ghana, South Sudan, Burkina Faso, Kenya	Botswana, The Gambia, Lesotho, Mali, South Africa, Swaziland, Madagascar, Benin, Nigeria, Sierra Leone, Morocco, Algeria, Liberia, Angola, Ivory Coast, Ethiopia, Zambia, Namibia, Guinea, Niger	Burundi, Chad, Eritrea, Cape Verde, Libya, Cameroon, CAR, Djibouti, Egypt, Equatorial Guinea, Sudan, Somalia, Mauritania, Gabon, Rwanda, Zimbabwe, Rep. of Congo, Malawi, Senegal, DRC, Togo	Comoros, Mauritius, Seychelles, Sao Tome & Principe, Tunisia, Guinea Bissau

Table 1: National Land Law Protection of Customary Land Rights (January 2016)

A. Findings

(a) No country meets all criteria. For example, among Class A countries, South Sudan's land law (2009) is mainly sound but falls short by allowing government to declare investment zones over community lands without their consent (only consultation is obligatory). Ghana has the oldest system on the continent for protecting customary land rights (1896) but constitutionally appears to encourage landlordism by powerful chiefs or virtual cooption of lucrative natural forests by the state. The equal opportunity given to investors and communities to delimit and register local lands without sufficient administrative oversight and failures to institutionally empower community level land governance lessens the value of other protective advances made in Mozambique's law (1997). Critical institutional developments through which communities may register landownership in common have failed

39 As the above and other indicators not listed here have been adopted by LandMark for global assessments, more details on country results for many African states is available at: <http://www.landmarkmap.org/map/#x=77.54&y=7.79&l=3> accessed 26 February 2017.

40 By the time of going to press, only Kenya and Malawi had succeeded in enactment

to be delivered as promised in Uganda's groundbreaking constitution in 1995 and Land Act, 1998. This has prevented registration of any collective entitlements by the time of writing'. Burkina Faso has a well-developed law for community based land rights administration system but questions have arisen as to the equity of certificates issued with state-issued entitlements. Both Kenya and Liberia have important community land legislation in draft at the time of writing.[41] Critical principles have already been established in Kenya's constitution and enactment of its Community Land Bill; pursuing these is unavoidable, as constitutionally required. Additionally, Kenya's Land Act, 2012, has already established that (unregistered) customary rights have equivalent force and effect with (registered) freehold and leasehold tenure. In contrast, without such protections, Liberia ranks less well until its important Land Rights law is enacted.

(b) Overall, Tanzania offers best practice in its combination of not requiring customary rights to be formally registered in order to be protected while at the same time establishing a community based system through which the elected governments of now 13,000+ villages are made legal controllers of community land matters within their respective Village Land Areas, a domain which covers 69 per cent of the country. Nevertheless, adherence to the law is erratic and community-based rights are more vulnerable in practice than on paper. (Box 2).

(c) But the content of which remains limiting. These include –

  (i) Although providing for individuals to be recognised as lawful owners of house and farm plots, weak to no provision is made for families or communities to secure common properties, making these more vulnerable to lawful co-option by wealthy individuals, especially as no procedure of Free and Informed Prior Consent within the community is required (e.g. Botswana, Madagascar).

  (ii) The laws recognise customary rights as worthy of protection as property but only when these are formally registered (e.g. Benin, Mali) or requiring formation of legal entities to do so (e.g. Morocco, Algeria).

  (iii) While protected to a marked degree, laws require customary rights to be converted into non-customary forms of tenure to be acknowledged as real property interests rather than use and occupancy rights (e.g. The Gambia, Zambia).

  (iv) The governance of customary rights is so severely dominated by remote actors that customary rights are poorly protected from lawful allocations by these institutions (the case in Nigeria, where the Land Use Act, 1978 gives State Governors full authority over customary lands).

  (v) Delivery of constitutional and policy reforms has been poor, the case in South Africa. Africans living in the former homelands retain the same legal status as prior to liberation in 1994 as tenants of state, although with more protection under the Interim Protection of Rights Act, 1996. This is due to the striking down of the Communal Land Reform Act, 2004 in 2011 as unconstitutional in the handling of women's rights and implied encouragement for chiefs to claim ownership of community lands. A revised replacement law is still not enacted.

41 Kenya's Act has since been enacted (August 2016).

(d) The ownership of land by a King dominates landholding to the jeopardy of citizen rights in the customary sector as occupants at his will (the case in Swaziland, and not affecting privately registered owners), or rights are contradictorily provided for in legislation (Sierra Leone, The Gambia).

(e) There are also cases where two or more of the above limit tenure security for majority customary landholders. For example, in addition to discriminating against some ethnicities and settlers in customary communities, Cote d'Ivoire's 1998 land law intends to extinguish the customary sector entirely in 2019.While providing for communities to define themselves as collectives, title cannot be obtained without these groups first registering legal entities in which to vest their lands. This has proven impossibly complex and costly for rural communities and no communities have taken up this opportunity since 1999'. Angola's land law (2004) allows communities to delimit 'useful domain' but which includes only visibly used lands and excluding forests and rangelands. Nor does the law protect communities against allocation of their lands by the State. Niger's Rural Code of 1993 innovatively gave pastoralists priority use rights in dry areas but retains state ownership of these and all other unregistered lands.

(f) The main reason why a country's land law is located under C category is sustained treatment of customary rights as no more than rights of occupation and access to state property or ownerless lands and with limited or no legal provision to overcome this. For example, poor legal conditions for millions of customary landholders in DRC's 1971 land continue despite improved constitutional pledges in 2006. However, this does not mean similar risks prevail in Malawi for as long as its new law (2015) for customary rights is not in legal force. Individuals, as well as families and communities, are accordingly at risk of their lands being allocated to others, or evicted to make way for public purpose developments without payment of compensation other than for loss of crops, trees and structures. Or, in some cases, the founding impediment is failure to recognise customary land rights at all (Senegal, Eritrea, Rwanda, and Ethiopia). Nevertheless, by retaining unfarmed lands as state property, Rwandan communities have lost small but significant communal property. This includes marshlands, which constitute ten per cent of the total country area. It also includes forests traditionally owned by hunter-gatherer Pygmies who have been relocated in settlement schemes. Millions of Ethiopian pastoralists continue to lack tenure security although both the constitution and federal land law permit some lands belonging to settled villages to be held collectively. Overall, to one degree or another, countries listed under C have, in critical ways, maintained colonial norms intact in respect of community lands and especially those held as commons. The situation is most deleterious where dispossessory colonial land law remains least amended (e.g. Djibouti, Somalia, Sudan and Gabon).

Box 2: An Example of Significant Legal Protection of *Res Communis*: Tanzania

Village Land Areas (community territories) may be defined through boundary agreements with neighbouring communities (Village Land Act, 1999, s. 7). Voluntary formalisation of rights to parcels within the Village Land Area is the legal responsibility of the elected village government (Village Council) (s. 8). For this the Council may establish a Village Land Register and issue Certificates of Customary Occupancy to individuals, families or groups or to the community in general (s. 22). It may only do so after the Council has identified and recorded all lands owned in common by the community along with rules of use for each area (s. 12). The community's entitlement has the same legal force and effect as individual or family rights. Rights within Village Lands in turn have equivalent legal force with rights allocated by the Government Land Commissioner in non-village lands, such as in urban areas (Land Act, 1999, s. 4). As all land is vested in the President in trust for the nation, rights are respectively known as granted or customary rights of occupancy, the latter stronger in that they are protected whether registered or not and deemed held in perpetuity, which is not the case for granted rights (Land Act, 1999, s. 4, Village Land Act, 1999, s. 18 & 27). Customary law explicitly applies to customary rights and to rules communities individually make in their regard so long as it is in line with written law. Any tenure actions which discriminate against women or other disadvantaged groups are unlawful (Village Land Act, 1999 s. 20). Commons have explicit protection in the land law. Several thousand villages have defined their common properties within the boundaries of their Village Areas, recording grazing areas, forests, marshlands, water points, and setting aside lands for public services. Forests have been most actively protected so far. As of 2012, more than 1,200 villages had declared village-owned and managed Forest Reserves. This brought 2.3 million hectares into the Protected Areas sector (Government of Tanzania, 2012). Communities manage their Reserves by their own Rules in accordance with a new Forest Act, 2002. Villages also legally manage but do not own over 500 National Forest Reserves covering more than five million hectares.

Communities may retain rights to Protected Areas outside village lands and may own a Protected Area of national importance (Land Act, 1999, s. 2) although no community has yet sought to have such lands formally transferred.

The Tanzanian land laws are also progressive in presuming that house plots and farms are the joint property of spouses, unless they jointly declare otherwise (Land Act, 1999, s. 161). Spousal consent is required for any land transfer (a. 85, 112). Existing seasonal or product access rights acquired through custom by pastoralists or other non-village members must also be upheld or fairly renegotiated with the holders.

A main lacuna of the land laws is in the contradiction between the Land Act and Village Land Act as to the status of common properties not under active occupation and use. Compensation procedures do not pay equitably for farmed and unfarmed lands at compulsory acquisition although livelihood values are equally important. Definition of public purpose now including acquisitions for private investment is also troubling for communities (Land Act, 1999 s. 2 cf. Village Land Act, 1999, s.2; s. 4 (2)).

It would also be incorrect to assume that rural communities in Tanzania do not suffer threats and losses. Government has periodically bullied villages to surrender lands to investors, including to politicians, and collusive deals between the National Parks Authority and international hunting and hotel businesses presently threaten community lands in five wildlife-rich areas. There are mounting cases where central government appears to have redrawn village boundaries to suit investor requirements. The Ministry of Lands complains that village governments are also too easily persuaded to sell their lands to outsiders and for cheap prices without considering the implications. Many checks and balances in the legal and administrative system are not widely known about and/or applied.

Nevertheless, the delimitation of Village Land Areas, inclusive of millions of hectares of valuable common properties, the empowerment of elected village governments as lawful land managers, the right of villagers to apply customary land rules and to have these upheld by the courts, the right of each village to establish its own land register and to issue entitlements, and the prerequisite that all shared lands are set aside and not available for alienation without majority community decision, have already proved to be cost-free bulwarks against rampant incursions, land losses, and uncontrolled concentration of lands in the hands of a few wealthier villagers. In contrast, over-complicated land use planning requirements by a new Land Use Planning Act, 2007, has left many villagers feeling they are in less control of their own lands than the Village Land Act, 1999, promised. Tanzania plans to review its national land policy and law in 2016.

IV CONCLUSION

Progress has been made through reforms since 1990. More than half of all African states have lifted the subordination of *res communis* and the integral community-based systems they operate through to one degree or another. New legislation has been enacted in several of the remainder (e.g. Burundi, Eritrea) but with insignificant change in this area. Rural Africans in these 21 countries are little better off in terms of legal land security than prior to the independence of their nations. Some remain *de jure* tenants of state or even as uncertainly lawful occupants on their own sometimes anciently possessed lands.

The situation is yet more salutary when application of the law is considered. Several even among the more progressive states have fallen short as protectors of their peoples' cus-

tomary rights. This most obviously includes South Sudan where civil war rages but in lesser or more sporadic ways communities in Uganda, Tanzania and Mozambique are also affected. Risks to customary rights rise further in the environment of malfeasance and impunity that characterises governance in many African states.[42] There are even doubts in Okoth-Ogendo's home country, Kenya, that communities will find it easy to formally secure community lands given intended dependence for this upon classical state-administered adjudication, survey and titling. Despite constitutional sanction against disposal of community lands under the care of county councils until each community has identified and registered its land under Community Title, takings from the estimated 33 million hectares that constitute community lands in mainly the dry pastoral north of Kenya continue apace.[43] Land grabbing at scale by governments as well as local and international investors is rife all over the continent as tens of studies now report with increasing frequency and alarm.[44] As observed earlier, there has also been a discernible slow-down in delivering new land policies or law where these threaten to curtail state or elite privileges over unregistered community lands; starkly the case in Zambia, Sierra Leone, Senegal and DRC.

Nevertheless, given the level of protest and conflict these battles over rights produce in so many African states, it cannot yet be said that *res communis* will not have its day. This is despite rising polarizasion among rich and poor landholders. A topical example is Cote d'Ivoire, where both government and civil society actors are reviewing the terms of the country's Land Act, 1998, which proved such a trigger to civil war in 2002 and again in 2010. Contested land rights, often in the face of state grant of private rights or commercial concessions over community lands were a similarly important driver to civil war in Mozambique, Angola, Sudan, Liberia and Sierra Leone and the Central African Republic, and in more localised conflicts in many other states, including Kenya and DRC. Conflict is a harsh route to reform, which, it may be hoped, modern African administrations are less ready to countenance or to be allowed to countenance by their increasingly politicised populations. While we would assure Professor Okoth-Ogendo if he were still with us, that all is not won, neither is all entirely yet lost.

42 Refer to the following governance and land rights assessment tools: Transparency International's Corruption Perception Index (CPI), <http://www.transparency.org/cpi2013>; the Bertelsmann Transformation Index (BTI), <http://www.bti-project.org/index/>; the World Bank indices on a range of governance and land indicators (LGAF), <http://info.worldbank.org/governance/wgi/index.aspx#home> and <http://siteresources.worldbank.org/INTLGA/Resources/Scorecard_All_Oct.72013.pdf> All accessed 13 April 2015.

43 Among many examples of commentary on this, refer these articles accessed on 18 April 2015: <http://www.grain.org/article/entries/5061-harvest-of-hardship-yala-swamp-land-grab-destroys-kenyan-farmers-livelihoods> and <http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/KLA-commercial-pressure.pdf> and <http://www.standardmedia.co.ke/thecounties/article/2000153436/speculators-grab-land-on-lapsset-strip>

44 See <http://www.landmatrix.org/media/filer_public/b2/48/b24869d1-ff17-4cb2-8bc3-5c55ef6a3e0c/lm_newsletter_3-4.pdf> and <https://www.google.com/?gws_rd=ssl#q=althoff+land+matrix>, <http://www.oaklandinstitute.org/land-deals-africa-ethiopia> and <http://www.theecologist.org/News/news_analysis/2481988/liberia_communities_join_to_fight_the_palm_oil_land_grab.html> All accessed 12 April 2015.

CHAPTER 10

THE CONUNDRUM OF INSTITUTIONAL ARRANGEMENTS TO GOVERN COMMUNITY LAND IN KENYA

Collins Odote

I. BACKGROUND

During my second year studies of law at the University of Nairobi, Prof Okoth-Ogendo taught me a course on property law. One of the most memorable lectures saw him come to class with a piece of paper with the drawing of an inverted pyramid. The topic for discussions in that class focused on customary ways of managing land. Okoth made the point that the pyramid was inverted and represented the manner in which the African commons were managed. The idea behind the argument was that African commons were not open access and free goods to be consumed without any rules about their regulation and control. While the pyramid demonstrated complexity in the management of the resource, it posited that there was clarity in its operations. As per Okoth, "that complexity is the result of a number of structural and normative parameters. At the structural level, the commons are managed and protected by a social hierarchy organised in the form of an inverted pyramid with the tip representing the family, middle the clan and lineage, and base the community." [1] Each of the levels had a role in the manner in which the commons was allocated, used and managed. Further that the decisions at each level were made independently by that level based on clear values and principles within the community. This clarity enabled the commons to be used sustainably, efficiently and productively. To an outsider, it may have looked as if there lacked clarity in decision-making, but such a view was erroneous and a failure to appreciate the intricate and linked social relationships which governed the management of commons. For example, the political leadership in the community never had radical title in the land, as is common in Western property conceptions. Okoth clarified this as follows:

> Decision-making at the base of the pyramid, however, further entails responsibility for the protection of the territory of the group as a whole; a function which does not entail appropriation of the radical title to the commons. The location of radical title always was, and remains, in all members of the group past, present and future, constituted as corporate entities.[2]

1 HWO Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' (2010), Keynote Address to Public Interest Law and Community Based Property Rights, Arusha, 1-4 August 2010 Published in Occasional Paper Number 4 of *Land Reform and Agrarian Change in Southern Africa* (PLAAS, 2002) 2. <http://www.plaas.org.za/sites/default/files/publications-pdf/OP%2024.pdf>.

2 ibid.

Despite this clarity, the history of African commons in contemporary times has, however, been categorised by Okoth as tragic.[3] The tragedy, as Okoth argued was not as a result of the nature of the commons, but due to the manner in which western legal conceptions viewed it.[4] The conceptions treated African commons as inferior, the manner of their management as backward and inimical to economic development. The mistreatment once led one scholar to quip whether African land tenure required a distinct set of terminology to define and discuss them.[5] The article also makes a fundamental argument relevant to the current paper, which was the widely held view of dissatisfaction with traditional institutions for governing land in Africa and the need for their reform.[6] Part of those reforms was seen as the move towards western conceptions of land discourse, complete with their institutional arrangements. This involved adopting the western legal system, whose preference is for private tenure as the ideal arrangement for allocating and dealing with rights in land. The end result was the "expropriation, suppression and subversion"[7] of African commons and frameworks for their management. However, despite these efforts African mechanisms for managing land refused to wither away. Instead, "long regarded as a dangerous weed, simply went underground where it continued to grow despite the overlay of statutory law that was designed to replace it."[8]

Starting from the 1980s, there has been a renewed effort within the continent to give prominence to customary mechanisms of managing land.[9] In Kenya, this has been through the adoption of a National Land Policy in 2009[10] and a new constitution in 2010,[11] both of which underscore the importance of communal land tenure as a land holding category. In implementing this requirement, a critical imperative is the need to focus on and ensure legislative clarity on the three elements of an effective tenure regime. These are the entity which is the locus of holding the land, the duration in which the land is held and the description of the land. In describing who owns the land, one is confronted once again with Professor Okoth-Ogendo's inverted pyramid. While the individual and the family are easier to identify, the more problematic institutions are those of the clan and the community. It is against this reality that this chapter proceeds to discuss the complexity of the institutional arrangements for managing communal land as envisaged in Article 63 of the Constitution of Kenya.

The problem that the chapter grapples with is the challenge of operationalising an effective institutional arrangement for community land in the context of modernity and

3 ibid.
4 ibid.
5 K Bentsi-Enchill, 'Do African Systems of Land Tenure Require A Special Terminology' (1965) 9(2) Journal of African Law 114.
6 ibid 114.
7 Okoth-Ogendo, *Tragic African Commons*, (n 1).
8 ibid10.
9 See L Cotula (ed), *Changes in "Customary" Land Tenure Systems in Africa* (London: IIED, 2007) 6-7; RA Clarke, 'Securing Community Land Rights to Achieve Sustainable Development in Africa: A Critical Analysis and Policy Implications' (2009) 5(2) *Law, Environment and Development Journal* 130, 132. <http://www.lead-journal.org/content/09130.pd>; PK Mbote *et al, Ours By Right: Law, Politics and Realities of Community Property in Kenya* (Nairobi: Strathmore University Press, 2013) 7.
10 Republic of Kenya, *Sessional Paper Number 3 of 2009 on a National Land Policy* (Government Printer: Nairobi, 2009) 15.
11 Republic of Kenya, *Constitution of Kenya* (Government Printer: Nairobi 2010) Chapter 5.

its introduction of numerous and sometimes overlapping institutions. How do you create harmony between traditional institutions of governance and formal state institutions? How do you deal with instances where traditional institutions have long since disappeared or are weak and ineffective as evidenced by the operations of councils of elders in several communities in Kenya?

The chapter seeks to unravel this conundrum in seven sections. Following this introduction, section two conceptualises communal property in the Kenyan context before section 3 discusses the provisions of the Constitution on communal land tenure and their implications for management of communal land. Section 4 then picks up the main issue for discussion in the chapter, the place of traditional institutions in governing communal land, discussing the relevance of institutions to tenure arrangements and how traditional institutions addressed land tenure, land use and dispute resolution and continue to do so. Section 5 assesses the institutional provisions in the Community Land Act of Kenya for managing communal land. In Section 6 a brief comparative discussion of the experience of select African countries -- Botswana, Tanzania and South Africa -- is made so as to draw lessons to improve Kenya's institutional architecture. This is the basis on which recommendations are made in Section 7, which also concludes the analysis. The key argument made by the paper is that with the current experience with council of elders in Kenya as a main institution in traditional governance arrangements, unless institutional restructuring is undertaken, traditional institutions have the likelihood of undermining the implementation of communal land tenure in Kenya.

II. COMMUNAL PROPERTY IN KENYA: CONCEPTUAL ISSUES

Discussing communal property in Africa reveals the difficulty or lack of uniformity in the discussions. Pre-colonial African societies were diverse and had no uniform categorisation.[12] Customary law as a term emerged during the colonial period. Its use was largely seen as an inferior system as captured by Francis Snyder below:

Produced in particular historical circumstances, the notion of 'customary law' was an ideology of colonial domination. The concept of 'customary law' itself manifested an attempt to reinterpret African legal forms in terms of European legal categories, which formed part of the ideology of those classes most closely associated with the colonial state. The designation of African law as 'customary' because it was oral, though apparently technical, embodied and masked an essentially political conclusion that it was subordinate to the colonial law of European origin … Both the general conception of 'customary law' and the specific legal forms it encompassed resulted from changing class relationships in the establishment of capitalist commodity production during the colonial period.[13]

Despite this, the term provides a convenient description for generating objective characteristics of land under African systems of ownership.[14] Under African traditional systems,

12 K Akuffo, 'The Conception of Land Ownership in African Customary Law and Its Implications for Development' (2009) 17 African Journal of International and Comparative Law 57, 63.

13 F Snyder, 'The Creation of African Customary Law in Senegal' in Y Ghai, F Synder & R Luckham (eds), *The Political Economy of Law* (Oxford, 1987) 154.

14 For a discussion of this, See Akuffo (n 12) above.

Honore's incidents of ownership[15] were given full meaning. In his description, property encapsulates not only the kind of rights we have when we own, but also further incidents, or features of ownership, including duties and liabilities, which provide a more accurate picture.[16] Flowing from this, therefore land, firstly, did not include both the soil and all the things on it or above it. Instead ownership of the soil was separate from ownership of the fixtures and attachments on the soil, for example trees. Secondly, there are critical nuances to answering the key questions that Bentsi-Enchill[17] states is at the base of a discussion on land tenure, and that is the question about "who owns what interest in what land."[18] Consensus from literature[19] emerges that ownership of land under traditional African society is collective. Individual ownership was largely unknown.[20] In the words of Rayner CJ as quoted by Lord Haldane in the case of *Amodu Tijani v Secretary, Southern Nigeria:*[21]

The next fact which is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village, or the family, never to the individual.

Although land belonged to the collective, variously described in different communities as either the tribe, community or clan, individuals still had distinct rights to the land but these were lesser than and subordinated to the rights of the larger collective. A common thread that runs through tenure rules under African commons is the fact that it is a social institution in which relationships between individuals and groups govern rights, rules and values related to land use.[22] Tenure over common resources involves a "bundle of rights" encompassing access, exclusion and the right to use and extract resources.[23] It also generally includes management rights regarding allocation and transfer.[24] Prof Okoth-Ogendo identified three elements of the African commons: land is "held as a trans-generational asset, managed at different levels of social organisation; and used in function-specific ways including cultivation, grazing, hunting, transit, recreation, fishing and biodiversity conservation."[25]

Access to land under African tenure is an incident of membership and is open both to individuals and groups as long as they meet the laid down criteria for membership. The quantum of access rights that an individual or group has is determined by the levels of membership and the use for which the resource is required. Management decisions are made at several levels depending on the inverted pyramid. The decision-making levels respond to is-

15 AM Honore, 'Ownership' in AG Guest (ed), Oxford *Essays in Jurisprudence* (London: Oxford University Press, 1961) 107; see also <http://fs2.american.edu/dfagel/www/OwnershipSmaller.pdf>. In Honore's categorization, property is seen as a bundle of rights, what in his description are incidents on ownership.

16 JE Penner, 'The Bundle of Rights Picture of Property'(1995-96) 43 UCLA Law Review 711, 713.

17 Bentsi-Echill (n 5) 116.

18 ibid.

19 See, K Akuffo (n 12) 66-67; and Okoth-Ogendo, Tragedy of the Commons (n 1). See also J Hunter and C Mabbs-Zeno, 'African Land Tenure' (1986) 23 (2) Agricultural Administration*109.*

20 ibid.

21 1921 (A.C.) 399.

22 RA Clarke, 'Securing Communal Land Rights to Achieve Sustainable Development In Sub-Saharan Africa: Critical Analysis and Policy Implications' (2009) 5(2) Law, Environmental and Development Journal130,133.

23 ibid.

24 ibid.

25 Okoth-Ogendo, Tragedy of the Commons (n 1) 3.

sues regarding allocation, use and management of resources comprised within the commons on the basis of scale, need, function and process.[26] Additionally, the leadership of the community also has the added task of protecting the territory as a whole. Ben Cousins identified six essential features that would identify African customary law. These include:

- Land rights are embedded in a range of social relationships and units, including households and 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, kinship networks within local communities, among others).
- 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 grazing, forests, and water.
- Rights are derived from accepted membership of a social unit, and can be acquired via 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.
- Access to land (through defined rights) is distinct from control of land (through systems of authority and administration).
- Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access (trasngenerationally), 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.
- 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.[27]

The above characteristics are evident in most commons of Africa. Writing on the Kenyan situation, Bondi Ogolla and John Mugabe[28] confirm their accuracy in the Kenyan context. They highlight the key attributes of access based on membership to a social group, control being vested in the political leadership of the community and rights analogous to private property accrue to individuals who invest labour in harnessing, utilising and maintaining the resource. Such rights can be transferred.[29] Lastly, resources which do not require extensive investment of labour or which by their nature have to be shared are controlled

26 ibid 2.

27 Ben Cousins, 'Potentials and Pitfalls of Communal Land Tenure Reform: Experience in Africa and Implications for South Africa' (2009), Paper for World Bank Conference on Land Governance in Support of MDGs: Responding to New Challenges -- 9-10 March 2009, Washington D.C. Available at <http://77.243.131.160/pub/fig_wb_2009/papers/trn/trn_1_cousins.pdf> accessed 24 February 2017.

28 See BD Ogolla and J Mugabe, 'Land Tenure Systems and Natural Resource Management' (1996) in C Juma and JB Ojwang (eds), *In Land We Trust: Environment, Private Property and Constitutional Change* (Initiative Publishers and Zed Books: Nairobi and London, 1996) 85-116.

29 ibid 98.

and managed by the political unit. Generally, however, land is inalienable under African customary land tenure.[30]

III. CONSTITUTIONAL FOUNDATIONS FOR COMMUNITY LAND RIGHTS IN KENYA

Throughout Africa, customary law and tenure have been viewed as largely static, outdated and out of sync with modern productive needs of society. This has been the justification of tenure reform processes that have focused on individualisation as the preferred tenure arrangement. In Kenya, this was evident from the Swynnerton Plan seeking to modernise agricultural production by individualising land holdings. Following several decades of land reform in post-independent Africa focusing on "free-market models, emphasising the conversion of customary tenure to individualised freehold rights, or alternatively, egalitarian socialist models"[31] recent policy processes across the continent have increasingly recognised the importance of communal arrangements to land ownership, hence their inclusion in legal and policy instruments at the national level. In the process, the challenge has been to provide a framework within which customary land tenure and law can evolve in an orderly way.[32]

The post-independent Constitution gave prominence to private property rights and disregarded customary or communal tenure arrangements.[33] The little protection was in the form of trust lands[34] and group ranches.[35] The constitutional provisions for trust land,[36] while providing nominal protection for customary rules and methods of landholding, also legitimised the continuation of the colonial land system that was designed to transfer customary rights from indigenous communities to settlers.[37]

Constitutional and policy reform sought to correct this error. In 2009, the country adopted the first ever comprehensive national land policy.[38] The policy recognised community land as a distinct tenure category and gave it equal protection to private and public land tenure categories. It also detailed actions to be undertaken to secure and operationalise community land tenure and use in the country. These included: documenting and mapping existing forms of communal tenure; repealing the Trust Lands Act; defining in law the term community and vesting community land in communities; elaborating in law procedure for

30 See JM Migai-Akech, 'Rescuing Indigenous Tenure from the Ghetto of Neglect: Inalienability and the Protection of Customary Land Rights in Kenya, Ecopolicy Series 11 (Acts Press: Nairobi, 2001) 13-4.

31 Julian Quan and C Toulmin, 'Evolving Land Rights, Tenure and Policy in Sub-Saharan Africa: Introduction' in Q Julian and C Toulmin (eds), *Evolving Land Rights, Policy and Tenure in Africa*(DFID/IIED/NRI: London, 2000) 1-29.

32 HWO Okoth-Ogendo, 'Legislative Approaches to Customary Tenure and Tenure Reform in East Africa' (2000) ibid132.

33 See RS Bhalla, 'Property Rights, Public Interest and Environment' in C Juma and JB Ojwang, *In Land We Trust? Environment, Private Property and Constitutional Change* (Initiative Publishers and Zed Books: Nairobi and London, 1996) 61-81; C Odote 'The Dawn of Uhuru: Implication of Constitutional Recognition of Communal Land Rights in Pastoral Areas of Kenya' (2013) 17(1) Nomadic People's Journal 87.

34 C Odote 'The Dawn of Uhuru: Implication of Constitutional Recognition of Communal Land Rights in Pastoral Areas of Kenya' (2013) 17(1) Nomadic People's Journal 87, 90-91.

35 ibid.

36 Chapter IX, Constitution of Kenya (1998, repealed).

37 I Lenaola, *et al*, 'Land Tenure in Pastoral Lands' in C Juma and JB Ojwang, *In Land We Trust: Environment, Private Property and Constitutional Change* (Initiative Publishers and Zed Books: Nairobi and London, 1996) 231-257, 231.

38 Republic of Kenya, The National Land Policy 2009 (n 10) above.

recognition, protection and registration of community land; operationalisation and capacity building for community land governance institutions; and facilitating flexible and negotiated cross-boundary access among communities.[39] This recognition would also give a framework for communal use of land, which recognised various uses including grazing, fishing, shrines and other uses, all as key incidents of communal tenure.

In August 2010, the policy reclassification of land tenure categories was given constitutional recognition. The Constitution provided that community land would "vest in and be held in communities on the basis of ethnicity, culture or similar community of interest."[40] Giving meaning to the constitutional stipulations on community tenure[41] would require enactment of legislation on communal land. The Fifth Schedule to the Constitution required that this legislation be enacted by 27 August 2015, a period of five years after promulgation. The National Assembly did not meet this deadline and used its powers under the Constitution to extend this period by a year.[42] On 21 September 2016, the Community Land Act[43] came into force following its passage by the National Assembly and Senate, and assent by the President on 31 August 2016. The highlights of this law are discussed in the section below.

IV. ROLE OF TRADITIONAL INSTITUTIONS IN MANAGING COMMUNAL LAND

In most African societies, traditional leaders were the basis of governance.[44] These traditional leaders served as political, military, spiritual and cultural leaders and were regarded as custodians of the values of society.[45] They performed many roles, including protecting the weak and vulnerable, protecting the community against external aggression, maintenance of law and order, and dispute resolution. They also had responsibility over land for agriculture, grazing and related functions.

There exists controversy in literature about the functions that traditional leaders played over land. While some saw their role as "owners", the more prevalent view is one where the traditional leaders have political and administrative rights only.[46]The traditional leaders do not have extensive powers to deprive members of their rights to communal lands. Their role "was primarily to guarantee rights of access to productive resources, to regulate use

39 ibid 16.

40 Article 63 (1), Constitution of Kenya, 2010.

41 For a discussion on the rationale and challenges to giving meaning to community land rights, see, P Kameri-Mbote *et al, Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press: Nairobi, 2013).

42 For a discussion of the history of and process leading to the enactment of the Community Land Bill, see generally, C Odote and P Kameri-Mbote (eds), *Breaking the Mould: Lessons for Implementing Community Land Rights in Kenya* (Strathmore University Press: Nairobi, 2016).

43 Act Number 27 of 2016, *Kenya Gazette Supplement* Number 148.

44 United Nations Economic Commission for Africa, *Relevance of Africa's Institutions for Governance (*Addis Ababa: UNECA, 2007) 1.

45 S Rugege, 'Traditional Leadership and Its Role in Local Governance'(2003) 7 Law, Democracy and Development 171, 172.

46 Ben Cousins, 'Embeddedness Versus Titling: African Land Tenure Systems and the Potential Impact of the Communal Land Rights Act of 11 of 2004'(2005) 16 Stellenbosch Law Review 488.

of common property resources and to help resolve disputes."[47] Mechanisms existed to ensure that the traditional leaders were accountable and did not turn themselves into overlords.[48]

Colonialism changed this downward accountability, where leaders were directly accounted to the people. Traditional leaders were co-opted into colonial structures and governance schemes. Accountability shifted from being downwards to the people to upwards to the colonial authorities. The leaders increasingly saw themselves not as trustees but as owners of the land with powers to allocate land rights and enjoy vast powers that 'owners' of land have under Western property conceptions.

Post-independence experience has been mixed. While several countries such as South Africa provide either in their constitutions or statute for recognition of traditional leaders and their involvement in governance, in practice there continues to exist tension between traditional leadership and formal state structures and institutions. In most instances, the role of traditional leaders is restricted to cultural or traditional matters. This coupled with being looked down upon either as a result of the role they played in collaborating with the colonial authorities and modern trends, which sees them as backward, the role of traditional authorities even where they exist is contested and limited.[49] Efforts are increasingly being made to formalise and modernise them through the passage of legislation in several African countries. The process has to be alive to the history and modern day realities. While traditionally such leadership played a critical aspect in the governance of African societies, the introduction of democratic rule with all its faults has led to relegation of the place of traditionally hereditary leadership. This is not to say that they have no role. One area where they have played some role and could still be able to do so relates to the management of communal land.

In discussing the role of traditional leaders and institutions in managing communal land, two arguments have to be taken into account. The first is one of power while the second is about efficacy and sustainability. From a power perspective, if the legislation concedes that communities can own land as communities, then the law should vest them with the power to exercise the rights that accrue from such ownership. AM Honore[50] has aptly captured the various incidents of ownership which right holders to land may exercise. Within the community set-up, and based on history, traditional leaders were a key component of the exercise of ownership rights to land. For effective exercise of land rights to community land, their place is quintessential. In traditional set-ups, they exercise political control over communal land rights.

On efficacy and sustainability, institutions, especially at local level are important for mobilising resources and regulating their use with a view to maintaining a long-term base for productive activity.[51] Further, institutions encourage people to take a longer-term view

47 ibid 508.

48 ibid.

49 For a discussion of the role of traditional authorities in several countries in Africa, including South Africa, Namibia, Botswana and Zimbabwe, see Rugege (n 45) above.

50 Honore (n 15) above.

51 N Uphoff, *Local Institutions and Participation for Development* (IIED Gatekeeper series: Ithaca, NY. USA). Available at <http://pubs.iied.org/pdfs/6045IIED.pdf> accessed 24 February 2017.

by creating common expectations and a basis for cooperation that goes beyond individual interests.[52] But they also have weaknesses as regards sustainability.[53] They can be a contributor to degradation and misuse of resources if they are not objectively managed and when corruption impacts on their performance. Despite these weaknesses, in a study carried out in Eastern Africa, traditional land institutions were found to positively impact sustainable land management.[54] This is consistent with their role as regulators over the use of land in communal arrangements.

V. THE KENYAN INSTITUTIONAL STRUCTURE

Before the advent of colonialism, communities had their own rules and institutional arrangements for managing land and natural resources. The rules were enforced by various institutions at different levels of the community organisation, starting with the individual, family, clan and tribe.[55] While several institutions existed, including clan heads and chiefs, the most prevalent institution in land matters was that of the council of elders.[56]Among the Gikuyu, for example, elders had broad discretion in relation to land disputes and land transactions.[57] Similar powers were evident in the elders of Turkana, Maasai, Luo, Gabra and Mijikenda.[58] They had enforcement powers to ensure that the rules put in place were observed. Some of the sanctions they meted out included fines in the form of livestock, corporal punishment or even banishment from the community.[59]

The powers of these institutions were affected by the imposition of colonial rule and English laws on land management.[60] Colonial and post-colonial land administration undermined traditional resource management institutions, thereby creating uncertainty in access, exploitation and control of land and land-based resources.[61] The consequence has been that in modern times, elders' power in relation to land has been limited. For example, as Bhalla notes, under the old Magistrates Courts Act:[62]

> the elders, that is persons who because of age, experience, or other cause are recognised by custom to be responsible persons having knowledge on the subject are vested with power to decide matters relating to land disputes. But where no elders are found, or the parties to the disputes do not agree on the choice of elders, the

52 ibid.

53 J Mowo *et al,* 'The Importance of Local Traditional Institutions in the Management of Natural Resources in the Highlands of Eastern Africa' (2011) Working Paper Number 34 (Nairobi: World Agroforestry Center, 2011). Available at <http://www.worldagroforestry.org/downloads/Publications/PDFS/WP11085.pdf> accessed 25 February 2017.

54 ibid.

55 BO Ochieng, 'Institutional Arrangements for Environmental Management in Kenya' (2008) in CO Okidi, P Kameri-Mbote and M Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law*. East African Educational Publishers, Nairobi, pages?

56 ibid 195.

57 Jomo Kenyatta, *Facing Mount Kenya* (London: Secker and Warburg, 1938).

58 Ochieng n 55) 195-6.

59 ibid 196.

60 For a discussion of the effect of the imposition of colonial rule on existing land management systems and processes, see HWO Okoth-Ogendo, *Tenants of the Crown: The Evolution of Agrarian Law and Policy in Kenya.* Nairobi: ACTS Press. Also see YP Ghai and JPWB McAuslan, 'Public Law and Political Change in Kenya: A Study of the Legal Framework' (Oxford University Press, Nairobi, 1970).

61 Republic of Kenya, The National Land Policy (n 10)13.

62 Bhalla (n 33) 63.

> District Commissioner has the power to appoint such elders as he thinks fit. Such a technical arrangement runs against the spirit of customary law because it challenges the integrity of the elders.

The provincial administration, therefore, not only took over the role of the elders in dealing with land matters, they also had overall control of most elders. In the end chiefs made many decisions regarding land. Though they did this with the assistance of elders, the accountability of these elders was largely to the chiefs and not to local communities.

This is the background against which the institutional arrangements proposed by the new community land law are being assessed. The enactment of the new law faced many challenges with a key one being the optimal institutional structure to govern community land. In 2013, the then Minister for Lands appointed a Task Force to help advise on a community land legislation. The draft from that Task Force[63] recommended an elaborate structure for governing community land. The Bill established a community assembly comprising of all members of the community, for every community.[64] The community assemblies were to *inter alia*, advise the community land management committees; ratify the decisions of the committee; coalesce all customary laws that are relevant to the community's land; and adopt a constitution and basic rules acceptable by the community.[65] Secondly, the Bill proposed the establishment of community land management committee through election by each community assembly.[66] The Bill bestowed on the committees a broad range of powers and functions which include to manage and administer community land; identify the boundaries of the community land for which it is appointed; liaise with the adjudication team and the National Land Commission (NLC) in recording of rights and interests and issuance of title for the community land by the Registrar; and promote co-operation and participation among community members. Finally, the Bill established a Community Land Board in respect of every sub-county[67] so as to supervise, control and regulate community land management committees in all their dealings with community land.

The Bill was subject to debate and discussions within the country. Government was not happy with the elaborate institutional arrangements. After some back and forth, the 2015 Community Land Bill[68] was gazetted and presented to the National Assembly for debate and enactment. It removed all the provisions on institutional arrangements. Instead, it provided first that: "A community claiming an interest in or right over community land shall be registered in accordance registration with the law relating to societies."[69] The requirement that communities had to be registered under the Societies Act before enjoying the benefits

63 Ministry of Lands, Housing and Urban Development, 2013. *Community Land Bill, 2013*. <http://www.lands.go.ke/index2.php?option=com_docman&task=doc_view&gid=245&Itemid=144>. Accessed 24 February 2017.

64 ibid.

65 ibid.

66 ibid.

67 Section 28(1), 2013 Bill.

68 Available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/KenyaGazetteSupplementNo147.pdf>. accessed 24 February 2017.

69 Republic of Kenya, *Community Land Bill, 2015,* Kenya Gazette Supplement Number 129(National Assembly Bill Number 45), Nairobi, August 11, 2015, Clause 7(1).

of community land brought with it government control and limitations of the Societies Act and departed from customary institutional arrangements and community organisation. Further, the Bill was silent on the institutions for community governance of communal land, only providing that the Cabinet Secretary for lands would promulgate regulations to govern the procedure for registration of community land,[70] that a registered community would manage and administer the community land on behalf of the respective community,[71] and that decisions by the community would be binding if supported by two-thirds of the registered community members.[72]

During consideration of the Bill in the National Assembly, the institutional structure and the registration process were the subject of a lot of debate. In the final Bill passed by the National Assembly, both the County Assembly and Land Management Committee were re-instated as critical community land governance institutions.[73] The Bill went to the Senate, which debated it, too. The Final Bill was assented to by the President on 3 August 2016 and came into force on 21 September 2016.[74] The Act defines communities as a "consciously distinct and organised group of users of community land who are citizens of Kenya."[75] Such group qualifies to be a community if it has characteristics of either common ancestry; similar culture or unique mode of livelihood; socio-economic or other similar common interest; geographical space; ecological space; or ethnicity.[76] The Act provides the procedure for registration of a community which has a claim to any land. The registration process commences with the Registrar of Community Land, by notice in at least one newspaper of nationwide circulation and a radio station of nationwide coverage, inviting all members of a community, which has an interest in a particular community land to a public meeting.[77] The notice must also be given to the national county administrators and county government administrators in the area where the community land is located.[78] At this meeting, the members of the community are required to elect members of the Community Management Committee, whose first task shall be to coordinate the registration of the community.[79] The committee is expected to prepare a comprehensive register of communal interest holders[80] and the name of the community.[81] The committee will then submit the identified name, register of members, minutes of the meeting and the rules and regulations of the committee to the Registrar of Community Land. These will then be used by the Registrar to register the community, hence granting it legal status to be able to own and

70 ibid, Clause 15.
71 ibid, Clause 16(1).
72 ibid, Clause 17(2).
73 See National Assembly Hansard Debate of 19 April 2016 and that 2 April 2016. See <http://www.parliament.go.ke/the-national-assembly/house-business/hansard> accessed 24 February 2017.
74 Act No. 27 of 2016.
75 ibid, Section 2.
76 ibid.
77 ibid Section 7(2).
78 ibid, section 7(3).
79 ibid, Section 7(5).
80 ibid.
81 ibid section 7(6).

enjoy the rights of ownership as provided for in the Act.[82]

There are two main institutions created by the Act for the management of community land. The first institution is that of the Community Assembly.[83] The Community Assembly consists of all adult members of the community.[84] The community decisions will require a quorum of at least two-thirds of the members of the community.[85] Below the Community Assembly is the Community Land Management Committee.[86] The committee consists of between seven and 15 members elected by the Community Assembly from its members.[87] Once elected, the committee undertakes management decisions on behalf of the community. These include day-to-day running of the community; managing and administering registered community land; coordinating development of community land use plans in collaboration with the relevant authorities; promoting the cooperation of and participation among community members in dealing with matters pertaining to the respective registered community land; and prescribing rules and regulations, to be ratified by the community assembly, to govern the operations of the community.[88]

In the implementation of the law and rolling out the above institutional architecture, there are certain challenges that will have to be overcome. Given that some communities already have in place some traditional institutions such as councils of elders that perform land management functions, there may be need to consider future amendments of the law to recognise and use such institutions instead of creating new and perhaps redundant ones. For instance, in South Africa land administration committees are only created in communities where traditional councils do not exist. This is to ensure that the institutions under the law build on and do not replicate existing traditional institutions within the community. Another option would be to ensure that in the election process, the existing members of the traditional institutions get to sit on the land management committees. This way, linkages are created between the traditional institutions and those under the law.

The NLC is recognised as having some roles in relation to community land.[89] These roles relate to land use and development plans, regulations and the conversion of public land to community land. Amendments to the National Land Commission Act[90] in September 2016[91] deleted the previous section 18 which provided for the establishment of County Land Boards. The reality is that the NLC will be operating at county level too due to the requirement that it decentralises its services. Clarity on linkages between community land institutions and the NLC requires some attention. Similar linkages are necessary for the land control boards that have existed and operated under the provincial administration.

82 ibid.
83 ibidSection 15.
84 ibid.
85 ibid, Section 15(2).
86 ibid section 7(5).
87 ibid.
88 ibid, section 15(4).
89 ibid Section 19(5) and section 24(1).
90 Act Number 5 of 2012.
91 Land Laws (Amendment) Act, 2016.

With the restructuring of the provincial administration through the National Government Coordination Act,[92] there have been established offices of county commissioners, deputy county commissioners, assistant county commissioners, chiefs and assistant chiefs. With their past role in land management, there is a possibility of conflict in the discharge of the roles of community land management committees with those of these national government officials. This is especially so when viewed against their past role in land management.

The Constitution lists land lawfully held as trust land by the county governments as constituting community land.[93] It also vests any unregistered community land in the county governments, to be held in trust on behalf of the communities.[94] The Community Land Act gives county governments other functions, including involvement in adjudication of community land and survey functions.[95] They also have a role in relation to approval of development plans for community land.[96]

Apart from the role given directly to the county governments over community land, the County Government Act [97] makes provisions for decentralisation of the functions and provision of services of county governments. One of the decentralisation units is the village.[98] The village units, to be headed by the village council, are to be established on account of *inter alia,* community of interest, historical, economic and cultural ties; and means of communication. This definition of a village unit loosely reflects the definition of a community adopted by the Community Land Act, yet the law does not make any reference to the village units. This might cause confusion and unnecessary tension between communities established under the Act and the village units established under the County Governments Act. There is need for more robust linkages between county governments and the structures under the Act for managing and administering community land.

VI. EXPERIENCE FROM OTHER AFRICAN COUNTRIES

A. Tanzania

In the pre-colonial period in Tanzania land was communally owned. An individual as a member of a family, clan or tribe acquired the right to use arable land if he could clear and manage it profitably. Although the land was used individually, it was owned communally. The remaining communal land was used for grazing, fetching firewood and other societal usage. Colonialism brought some disruptions to these communal arrangements. During the colonial period between 1891 when Germans colonised Tanzania, through to 1922 when the British took over upto the grant of independence in 1961, land was essentially declared public land. While the Land Ordinance of 1923, for example, vested radical title to all land in the public at large, control and management of that land supposedly in the public

92 Act Number 1 of 2013.
93 Article 63(1), Constitution of Kenya.
94 Article 63(3), Constitution of Kenya. See also Section 6, Community Land Act.
95 Community Land Act, No. 27 of 2016 Section 8.
96 ibid Section 19.
97 Republic of Kenya, 2012. County Governments Act, No 17 of 2012.
98 ibid, Sec 48(1)(d).

interest was expressly vested in the Governor (later President), rendering the public virtually powerless to assert their rights and protect their interest in the land.[99]

This position persisted even after independence. However President Julius Nyerere introduced a policy of governance -- *Ujamaa* -- that had implications on customary land and customary land administration. While the essence of Ujamaa is found in the writings and speeches of Mwalimu Nyerere, the key documents that delineate the tenets of this ideology are, *Ujamaa: The Basis of African Socialism* and *The Arusha Declaration of 1967*.[100] The policy focused on "villagisation", whose essence was to have communities move to villages in the rural areas.[101] The Tanzanian Constitution declared all land as state property, with individuals and communities only having rights of occupancy. Allocation by communities continued with the practice that was allowed during colonial period of internal land allocation practices.[102] Under this arrangement, original communities that settled at a place had the rights to claim the land and power to welcome or reject new members. Such members would apply to local chiefs and headmen and request to be allocated an area to build a house, plant crops, and graze their animals.[103] In addition to personal property allotments, there are communal lands open to all community members to hunt, graze their animals, and gather natural resources.[104]

In 1991, the government sought to comprehensively address challenges relating to land ownership and use in Tanzania. It appointed a Commission of Inquiry into Land Matters chaired by Professor Issa Shivji to listen to all complaints relating to land matters and propose policy responses. This culminated in preparation of the country's first-ever National Land Policy of 1995 (Revised 1997).[105] Despite criticism that the policy had several shortcomings,[106] it led to the enactment of new land legislation -- the Land Act of 1999 and the Village Land Act of 1999.[107] The Village Land Act (1999) places all village land

99 HWO Okoth-Ogendo, 'Legislative Approaches to Customary Tenure and Tenure Reform in East Africa' in C Toulmin and Q Julian (eds), *Evolving Land Rights, Policy and Tenure in Africa* (DFID/IIED/NRI: London, 2000) 123-134, 125.

100 For a discussion of Ujamaa, its essence, contribution to Tanzania's governance and critique of its efficacy, See generally: EM Corneli, *A Critical Analysis of Nyerere's Ujamaa: An Investigation of Its Foundation and Values* (PhD Thesis, University of Birmingham, July, 2012). Available at <http://etheses.bham.ac.uk/3793/1/Cornelli_12_PhD.pdf> accessed 25 February 2017 ; J Boesen, BS Madsen and T Moody, *Ujamaa -- Socialism from Above* (Scandinavian Institute of African Studies: Uppsala, 1977), available at <http://nai.diva-portal.org/smash/get/diva2:278969/FULLTEXT01.pdf> accessed 25 February 2017.

101 RS Knight, *Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Lawmaking and Implementation* (FAO Legislative Study 105: Rome, 2010) 153-211. Available at<http://www.fao.org/docrep/013/i1945e/i1945e01.pdf> accessed 25 February 2017.

102 ibid.

103 ibid.

104 ibid.

105 The United Republic of Tanzania, *National Land Policy* <http://www.tzonline.org/pdf/nationallandpolicy.pdf > accessed 27 June 2013.

106 For example, the policy was developed with limited public participation and did not incorporate recommendations including those regarding land decentralisation and democratisation. See World Resources Institute and Landesa, *Focus on Land in Africa: A Brief.* Land and Natural Resource Tenure in Africa Program (Rural Development Institute, 2010). http://www.wri.org/property-rights-africa/wriTest_Tanzania//documents/Tanzania_LessonBrief_2_b.pdf > accessed 27 June 2013.

107 United Republic of Tanzania, The Village Land Act (Number 5 of 1999).

under the management and control of village governments.[108] The main purpose of the Act is to recognise and secure customary rights in land, the main target being rural communities. It strictly regulates transfer of ownership and control over village land in order to protect the interest of local communities from unscrupulous dealers. The Act also addressed the problem that was manifest in the country where customary tenure was disregarded and customary lands dealt with without due protection in law.

This was evident from the fact that even the villagisation programme [109] of the late 1960s to early 1970s did not create a new tenure regime, neither did it legally vest local authorities with the powers to govern land. Villages were often allocated land in public meetings without following any formal procedures. Customary tenure systems were generally ignored, large portions of customary land were alienated and disputes over existing land rights were disregarded. New policies introduced by government in the mid-1980s to liberalise the economy and promote foreign investment further complicated land ownership in Tanzania. Local, national and foreign investors intensified land acquisitions as progressively centralised land administration, increasingly inefficient state bureaucracy and past administrative measures created widespread confusion in land tenure patterns. This led to insecure land tenure and fear that alienation of village land would result in landlessness, especially in the rural areas. Consequently, there was widespread rural discontent with the land tenure policy and administration. These developments led the government to relook into its land tenure regime, and ultimately, in the preparation of the country's National Land Policy of 1995 (Revised 1997).[110] The policy led to enactment of new land legislation - the Land Act of 1999 and the Village Land Act of 1999[111] to provide the overall framework for the exercise and administration of land rights.

These laws represent substantial progress[112] from the prior tenure framework. For example, the laws: grant all Tanzanians above 18 years of age the rights to acquire and own land; recognise and protect all existing property rights, including customary titles; and require land to be used productively and in compliance with the principles of sustainable development.

The laws establish three basic categories of land: general, reserved and village land, with the Land Act governing general land and reserved land, and the Village Land Act governing village land. Village land constitutes 70 per cent of Tanzania's land. In the Village Land Act, village land is defined as:[113] all land within the boundaries of the more than 11,000 registered villages (established by the Local Government (District Authorities) Act of 1982), including land either originally described as the village area or so demarcated

108 See P Veit, 'The Precarious Position of Tanzania's Village Lands' in *Focus on Land in Africa* (WRI and Landesa, 2010). Available at <www.focusonland.com/download/5232e696a2a57/> accessed 25 February 2017.

109 The villagisation programme involved the relocation of about 80 per cent of the rural population to 5,528 villages. The programme aimed to create the structures for the establishment of large collective farms and the modernisation of agriculture.

110 The United Republic of Tanzania, *National Land Policy.* <http://www.tzonline.org/pdf/nationallandpolicy.pdf > accessed 27 June 2013.

111 United Republic of Tanzania, The Village Land Act (Number 5 of 1999).

112

113 Section 7(1), Village Land Act (Number 5 of 1999).

since then; land of a given village according to agreement between that village and its neighbours; and any land which villagers have been using or occupying for the past 12 years.[114] This definition widely reflects what is generally believed to be community land. Indeed, the Act provides that customary rights of occupancy automatically apply to village lands in perpetuity, and that a "customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy."[115] The Village Land Act, read together with the Local Government (District) Authorities Act of 1982, vests the managerial authority of Village Land in the Village Council elected by a Village Assembly.

The Village Council is the body vested with the overall responsibility and authority to manage all village land,[116] including issuing certificates of Customary Right of Occupancy within their area, and establishing and administering local registers of communal land rights. The council is elected by the Village Assembly, which comprises all residents of a village aged 18 years and above. The Commissioner of Lands is required to issue a certificate of village land to every village demarcated in accordance with the Village Land Act.[117] The certificate confers the management functions to the village council and affirms the occupation and use of the land by the villagers.[118] The village council is required to apply local customary law, provided that such laws do not conflict with the prohibition of gender discrimination. In addition, the council is required to apply the principle of sustainable development[119], consult and take into account stakeholders' views and where it is so provided, comply with any decisions or orders of any public officer or public authority with jurisdiction over any matter in areas where village land is.[120] By the Village Land Act, village government has the responsibility and authority to manage land, including issuing certificates of Customary Right of Occupancy within their area, and establishing and administering local registers of communal land rights.[121]

The village council is accountable to the village assembly for land management decisions. For instance, the village assembly must approve any allocation of land by the village council, or grant of a customary right of occupancy.[122]Therefore, the council has to present at every ordinary meeting of the assembly, a report on the management and administration

114 Reserved Land, which constitutes 28 per cent of all lands in Tanzania, refers to all land set aside for special purposes, including forest reserves, game parks, game reserves, land reserved for public utilities and highways, hazardous land and land designated under the Urban Planning Act, and Land Use Planning Act. General Land is defined differently under the two land laws. Under the Village Land Act, General Land is a "residual category", land which is not otherwise defined as Village Land or Reserved Land. In the Land Act, however, General Land is defined as, "all public land which is not reserved land or village land and includes unoccupied or unused village land." The Act does not define "unoccupied or unused village land," but all General Land is under the authority of the Commissioner of Lands. This distinction is of particular importance for communities holding land held under customary tenure arrangements, and has created considerable confusion and conflict. See, World Resources Institute and Landesa n (106) above.

115 Section 18(1), Village Land Act No. 5 of 1999.

116 ibid Section 8(1).

117 ibid Section 7(6).

118 Despite these provisions, the process of issuing certificates has been slow, and some villagers don't even know the boundaries of their land. See, Lawyers' Environmental Action Team (LEAT), *Land Acquisitions for Agribusiness in Tanzania: Prospects and Challenges* (Dar es Salam: LEAT General Publication 2011).

119 Section 3(1) (f) and Section 8(3)(a), Village Land Act No. 5 of 1999.

120 bid Section 8(3)(b).

121 Veit (n108).

122 Section 8(5), Village Land Act, No. 5 of 1999.

of the village land, and get views of the assembly.[123] In addition, the council has to inform the relevant Ward Development Committee and the District Council of the management of the village land. The village council is required to recommend for the village assembly the portions of village land to be set aside as communal village land[124] and purposes thereof.[125] Such recommendation may include advice to the village assembly to formulate a land use plan for the village or part of it, or specific recommendations on specific portions of village land.[126]

As the overall authority over all land in the country, the Commissioner of Lands is empowered by the Village Land Act to offer any advice, either generally to all village councils or to a specific village council on the management of village land which he considers necessary or desirable. All village councils to which that advice is given are expected to heed it.

As stated, the President of Tanzania under the new land laws still retains tremendous authority over all categories of land.[127] The Village Land Act, for example empowers the President to direct the minister responsible to transfer any part of village land to general or reserved land in the interest of the public.[128] Public interest in this context includes investments of national interest.[129] The Act details the conditions that have to be met before such transfer can take effect. *First*, the details of the proposed transfer must be published in the gazette and the same given to the village council in whose jurisdiction the land falls. *Second*, the Commissioner of Lands is required to attend a meeting of the village council or village assembly to explain why the land has to be transferred and to answer any questions that the villagers may have. These questions may include the type, amount, and timing of compensation to be paid to the village.[130] If the Commissioner and the village council cannot agree on the sum to be paid for compensation, then the transfer cannot go ahead until the High Court decides on the amount.

Where any portion of the village land to be transferred has been allocated to a villager or a group of villagers under a customary right of occupancy or a derivative right or a person or a group of persons to use the land, the village council has a duty to inform the villagers of the contents of the notice.[131] Upon transfer of village land by the President, the village council can no longer manage it unless by a special mandate by the Commissioner of Lands. Where people occupy the land, the President may determine whether such people may continue to occupy and use the land subject to any terms and conditions, which he may impose,

123 ibid Section 8(6).

124 Communal village land refers to land that is occupied and used or available for occupation and use on a community and public basis. Such land is available for use by all villagers or by persons with a derivative right under an agreement with the village council. See: Lawyers' Environmental Action Team, *Land Acquisitions for Agribusiness in Tanzania: Prospects and Challenges* (Dar es Salam, Tanzania: LEAT General Publication, 2011).

125 Section 13(1), Village Land Act, No. 5 of 1999.

126 ibid Section 13(2).

127 One of the principles of land policy in Tanzania is the recognition that all land in Tanzania is public Land vested in the President as trustee on behalf of all citizens. See, for example, United Republic of Tanzania, The Village Land Act (Number 5 of 1999), Section 3(1)(b).

128 ibid Section 4(1).

129 ibid Section 4(1).

130 ibid Section 4(3).

131 ibid Section 4(4).

or whether the rights of such people shall be compulsorily acquired, subject to the payment of compensation.[132]The President may also direct that the person or organization pay any compensation payable to whom or which the land has been allocated.[133]

Similarly, the President may direct the transfer of any area of general or reserved land to village land in accordance with the Land Act, 1999. In addition, the President may declare any area of village land to be hazard land,[134] where the proposed hazard land or a part of it is occupied and used by any person under a granted or customary right of occupancy.[135] Other powers of the President in relation to village land include the power to revoke a right of occupancy granted to a non-village organization or a group of persons not being villagers.[136] Apart from the president, the minister responsible for lands and the Commissioner of Lands also have significant roles to play in the management of community land.

Critics of the Tanzanian governance model however argue that the law, while keeping some of the existing customary local administration structures, created many new ones.[137] For example, while village councils were empowered to use local custom to manage customary land, the law created many new procedures and documentation, which moved the local custom away from its traditional practices. Additionally, the powers granted to the Commissioner of Lands and the President denied full land security to villages since the councils could not stop the state from taking village lands. The law allowed this to happen for unused land and through compulsory acquisition.

Key lessons from the Tanzanian experience include the lack of full recognition by government officials of customary rights, technical nature and lack of full appreciation of the import of the Village Land Act hence impacting on its implementation and the fact that government authorities "do not respect the legal authority of village government over village land."[138]

B. South Africa

In South Africa, just like the rest of Africa, the pre-colonial period had a system of rule based on traditional institutions and authorities. With the advent of colonization the most important powers were taken over by the colonial state and later, in South Africa, by the apartheid state, thus weakening the role of traditional leaders and institutions in governing African people.[139] The traditional institutions as opposed to being accountable to the people increasingly became accountable to the apartheid state. They were transformed into

132 ibid Section 4(10).
133 ibid Section 4(11).
134 The Village Land Act (Number 5 of 1999) defines hazard land as land the development of which is likely to pose a danger to life or to lead to the degradation of or environmental destruction on that or contiguous land. See, United Republic of Tanzania, Village Land Act (Number 5 of 1999) for detailed description of what is classified as hazard land. Where such land is not occupied, the minister can declare it hazard land without involving the president, see Section 6(1).
135 ibid Section 6(4).
136 ibid Section 44(1).
137 Night (n 101).
138 Veit (n 108).
139 S Rugege, 'Traditional Leadership and Its Future Role in Local Governance' (2003) 7 Law Democracy & Development 171, 173.

agencies of the alien state and more powers were given to these tribal authorities to control the African population in order to better serve colonial/apartheid interests.[140] The process of qualification to be a chief moved from being purely hereditary to the colonial authority having overriding powers to appoint anybody as a traditional leader at any point in time. In essence, therefore, the traditional institutions of governance were coopted and made more authoritarian in apartheid South Africa.[141]

On 27 April 1994, South Africa inaugurated a new constitutional democracy, which embraced the freedom and equality of all sectors of the South African society.[142] That Constitution addressed both the issues of land rights and role of traditional institutions in the governance of South Africa. Property rights are contained in the Constitution under the Bill of Rights.[143] The Bill of Rights guarantees existing property rights, and simultaneously requires the state to take reasonable steps to enable citizens to gain equitable access to land, promote tenure security and provide redress to those who were dispossessed of property as a result of past discriminatory laws and practices. [144]

The South African Constitution recognizes the institution, status and role of traditional leadership, according to customary law.[145] The roles and functions of the traditional leaders at the local level on matters affecting communities are to be specified by national legislation, which legislation is also constitutionally empowered to establish a council of traditional leaders.[146]

The link between the provisions of land and those on traditional leaders is evident from the place of land in the larger life of communities in South Africa. Discussing this link in the context of the Zulu in South Africa, it has been written that: "Amongst the indigenous people of Southern Africa, the institution of traditional leadership extended far beyond the simplistic notion of political organization and an individual leader. An important feature of the institution was the link between the ruler, the people, the land and the ancestors."[147] In discussing the link between land and traditional institutions in South Africa, one has to keep in mind the triple focus of land reform in that country, being redistribution, restitution and tenure reform.[148]

While the South African Constitution recognizes the place and role of traditional leaders, implementing these constitutional provisions has been the subject of contestation. This has arisen from the lack of clarity on how the institutions of traditional leaders should be dealt with. The state has been grappling with either a toleration approach or an integra-

140 ibid.

141 For a detailed discussion of this, see M Mamdani, *Citizens and Subjects: Contemporary Africa and the Legacy of Late Colonialism* (Fountain Publishers: Kampala, 2004) 218-284.

142 GV Niekerk, 'Manipulation of Traditional Leadership and Traditional Legal Institutions: Zululand during the 1880s' (2009) 15(2) Fundamina 193, 293.

143 Section 25, South African Constitution 1996. See <http://www.govza/documents/constitution/chapter-2-bill-rights#25> accessed 25 February 2017.

144 ibid.

145 South African Constitution, Section 211. See <http://www.govza/documents/constitution-republic-south-africa-1996-chapter-12-traditional-leaders> accessed 25 February 2017.

146 ibid, Section 212.

147 Niekerk (n 142) 195-6.

148 For a discussion of these and their nexus with the constitutional provisions on indigenous land rights law, see A Pope, 'Indigenous-Law Land Rights: Constitutional Imperatives and Proprietary Paradoxes' (2011) Acta Juridica 308.

tion approach, with the latter seeking to have chiefs as part of South Africa's governance system.[149] However, the process has led to conflicts between the powers and functions of traditional leaders overlapping with those of elected local government.[150] Access to land has been at the forefront of the dispute over the future role of traditional leadership.[151] This is a result of the fact that "by far the largest part of the land in the former homelands, which in themselves cover about 13 per cent of the South African territory, is communal property."[152]

The legal framework for the institutional arrangement for the management of communal, customary of customary lands in South Africa is the Traditional Leadership and Governance Framework Act and the Community Land Rights Act. Before the latter was declared unconstitutional by the South African Constitutional Court, the two pieces of legislation would have affected the lives of about one third of the South African population: those who live in the poorest parts of the country.[153]

The Community Land Rights Act (CLRA) was initiated in 1996 and finally came into force in 2004. While it was in force for five years after that, it was never fully implemented.[154] However, its death was signaled by the Constitutional Court in the case of *Tongoane and others v Minister of Agriculture and Land Affairs and others*.[155]The case arose from an application by a group of community members who sought to have the Community Land Rights Act of 2004 to be declared unconstitutional. They argued that the law was enacted without the legislature complying with the requirements of public participation. They had also argued that the legislature had wrongly failed to classify the Bill as one affecting provinces and thus requiring their input in the legislative process. Lastly, they argued that the law, contrary to securing tenure, actually undermined tenure security. While the High Court only declared sections of the law unconstitutional, the Constitutional Court declared the entire law unconstitutional.

During the period that it was in force, the Act provided an institutional mechanism for governing community land. It provided for the state to formally endow communities residing on land according to rules of customary tenure with statutory communal rights to that land.[156] Rights are to be registered in the name of the community, which in turn can allocate and administer land according to its community rules without the need to have these household rights in common formalised.[157] The Act vested the administration and implementation of the land rights and community rules on traditional councils or land ad-

149 See C Himonga and R Manjoo, 'The Challenges of Formalisation, Regulation and Reform of Traditional Courts in South Africa' (2009) 3(2) Malawi Law Journal 157, 159-60.

150 Rugege (n 139) 175.

151 B Oomen, 'Group Rights in Post-Apartheid South Africa: The Case of Traditional Leaders'(1999) 44 Journal of Legal Pluralism 73, 89.

152 ibid.

153 H Mostert, 'South Africa's Communal Land Rights: A Plea for Restraint in Reform' (2010) 54(2) Journal of African Law 298, 299.

154 ibid.

155 (2010) ZACC 10; 2010 (6) SA 214(CC).

156 USAID, 'Integrating Customary Land Tenure into Statutory Land Law: A Review of Experience from Seven Sub-Saharan African Countries and the Kyrgz Republic'. Available at <*http://www.usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_PRRG_Integrating_Customary_Land_Tenure_Into_Statutory_Land_Law.pdf*> accessed 25 February 2017.

157 ibid.

ministration committees.[158] The Act required that the committees were to be democratically elected. Once elected, the committees would also assume dispute resolution responsibilities over land. In cases where traditional councils existed, the law allowed them to take over the functions that the Act had vested in the committees.

As stated earlier, the traditional councils as part of the traditional leadership structure, has constitutional recognition in South Africa. The Constitution allows every provincial legislature to establish a house of traditional leaders, thus giving them an opportunity to participate in governance in South Africa. This has been followed by legislative enactment to provide for their powers and operations. The first comprehensive legislation enacted was the 2003 Traditional Leadership Governance Framework Act. The Act provided clarity on recognition of traditional communities, recognition of traditional councils and a statutory framework for leadership positions within the institution of traditional leadership and also provided for a house for traditional leadership. The law also stated that the traditional leaders complement the role of the state. This Act was amended in 2008 to provide further clarity on the operations of the Act.[159]

The Act thus provides a legal framework for the traditional leaders to be engaged in the governance of South Africa at the local level. Tensions still exist though between the roles of the traditional leaders and municipalities. However, the South African experience demonstrates the importance of recognition of the place of traditional leaders in helping to address local issues, including land.[160] In addition, it points out the intricacies of communal tenure and traditional authority, and the challenges accompanying any attempt to reform the system.[161]

C. Botswana

In 1890s, a few years after Botswana was declared a British Protectorate in 1885, the colonial administration ordered that the chiefs of the five principal Tswana tribes to identify the boundaries of their tribal territories. These were then formally mapped and declared tribal lands. All the other lands were declared as "Crown Lands" and allocated to settlers. For the tribal lands, "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."[162] Consequently, in Botswana before independence, traditional

158 Mostert (n 153) 302.

159 For a highlight of the amendments, see S Heleba, 'Recent Legal Developments: South Africa' (2010) Botswana Law Journal 97,106-7.

160 For a discussion of the role of traditional leaders in South Africa, their nexus with the formal government structures and the challenges that this portends, see generally, S Rugege, 'Traditional Leadership and Its Future Role in Local Governance' Supra, note 139; CT Tlhoaele, 'The Interface Between Traditional Leadership in Shared Rural Local Governance', (Unpublished Masters Dissertation, University of Johannesburg, 2012). Available at <https://ujdigispace.uj.ac.za/bitstream/handle/10210/8144/Tlhoaele.pdf?sequence=1> accessed 25 February 2017.

161 Mostert (n 153) 312.

162 Knight (n 101) 49.

leaders or chiefs controlled land administration in tribal territories.[163] Land belonged to the tribe as a whole and could not be partitioned by anyone for his own purposes.[164] The chief allocated blocks of land designated for residences, arable agriculture or grazing to a village headman.[165] The village headman then allocated land for residences and arable agriculture to married men for the use of their families.[166] Land use was divided into three categories: residential, agriculture and grazing.

Headmen divided the grazing lands into districts managed by overseers.[167] Chiefs initially appointed the overseers but eventually the position became hereditary. Control of grazing was a key focus of pre-colonial institutions. Access to land and surface water was based on membership to the tribe, with outsiders excluded unless with permission by the chief, such permission only possible space permitting. This traditional system was successful because of several factors, including vesting of ultimate authority in the chief, including the power to enforce the rules, decentralization of specific authorities to headmen and overseers who had knowledge of those living within their areas of jurisdiction, making supervision and enforcement of rules easy.[168]

The main change during the colonial period was the disregard of the social arrangements of the tribe and the strengthening of the overall authority of the formal systems. Unlike the case under the pre-colonial period, the flexibility of tribal boundaries was replaced with fixed boundaries. The fixing and enforcement of tribal boundaries under colonial rule meant that tribes lost their ability to expand, constrict or split as they had been able to do in the past.[169] So, although the institution of chieftainship and its associated traditional structures existed from the pre-colonial times, through the colonial period to post-colonial Botswana, its status, powers and functions have changed.[170]

At independence in 1966, tribal lands occupied 48.8 per cent of the total land in Botswana. Since independence, Botswana's stated policy has been to increase the size of tribal lands, and so significant amounts of state land have been converted into tribal land.[171]The country's emphasis on providing land to all citizens has its roots in the customary land tenure systems of Botswana, which allocated land according to the principle of the "right of avail": the chief had an affirmative obligation to provide all members of a particular tribe with access to water and the residential, farming and grazing lands necessary to adequately provide for their welfare.[172]

163 PM Makepe, 'The Evolution of Institutions and Rules Governing Communal Grazing Lands in Botswana' (2006) 21(1) Eastern Africa Social Science Research 39, 43.
164 ibid.
165 ibid.
166 ibid.
167 ibid.
168 ibid.
169 ibid 46.
170 KC Sharma, 'Role of Traditional Structures in Local Governance for Local Development: The Case of Botswana', Paper Prepared for Community Empowerment and Social Inclusion Program, World Bank Institute (Washington, DC: World Bank). Available at <http://info.worldbank.org/etools/docs/library/153055/botswana.pdf> accessed 25 February 2017.
171 Knight (n 101) 50.
172 ibid.

In 1968, the country enacted the Tribal Land Act, which was followed in 1975 by the Tribal Lands Grazing Policy. The Tribal Land Act took custody and control of communal land from the chiefs and vested it in the control of newly instituted land boards.[173] The Act provided for the establishment, composition and functions of tribal land boards. The Tribal Land Act originally set out the composition of each land board to include, generally: the chief of the area administered by the board or his sub chief as an ex officio member, an individual appointed by the chief/tribal authority, two members elected by the district council, and two members appointed by the minister responsible for lands.[174] This original composition ensured that the "Land board members were both upwardly accountable to the central ministries, downwardly accountable to the local people, and horizontally accountable to the chiefs."[175]

However, the composition of the boards has changed significantly since the law was first passed.[176] Chiefs are no longer automatic members of the boards. In the 1990s chiefs, sub chiefs and their nominees were prevented from being on boards on the ground that their membership would provide a conflict of interest since decisions of these boards were appealable to customary courts, over which some of the chiefs presided.[177]As a result, today each land board consists of 12 members: five members elected by the people at the *kola*, two members who are representatives of the Ministry of Agriculture and the Ministry of Commerce and Industry, and five members appointed by the Minister of Lands.[178] With majority of the membership being representative of central government ministries, accountability to community members has been compromised. The structure of the land boards was intended to integrate local participation in land planning and administration.[179]However, the powers and controls established under the Act ensured that the management system remained largely centralized because board members were ultimately answerable to the minister.[180] With no decision-making powers over how land was to be used, the land boards were eventually reduced to advisory boards for the minister, who had the last say over how land was to be allocated.[181]

Other challenges that the new law brought to the traditional management of tribal lands related to the lack of incentive for headmen and overseers to participate in the management process. While the law required headmen to certify that new allocations did not conflict with existing rights,[182] they were not paid for this task. This contrasted with the position under the traditional system where they received economic reward and benefits from the prestige associated with their position as land managers.[183]As a result, headmen failed to

173 Makepe (n 163)49.
174 Knight (n 101) 54.
175 ibid.
176 ibid.
177 ibid.
178 ibid.
179 Makepe (n 163).
180 ibid.
181 ibid.
182 ibid
183 ibid.

cooperate with the agents of the land board.[184]

In the end, while the communal system of land tenure continued, the authority of the overseers to regulate access to grazing land had collapsed.[185]The new system of land boards, meanwhile, lacked the capacity to regulate the use of communal grazing land.[186] While the Act transferred and formalized the functions previously performed by customary authorities to the land boards, their influence has not been positive on land governance in Botswana. Under custom, chiefs and headmen lived in close proximity to the people they governed and interacted with them daily, which strengthened their accountability to the people.[187] However, the land boards are not only appointed centrally but also located far from the communities. On this count, the Tribal Lands Act has strayed far from customary checks on abuses of power; there are no mechanisms to ensure downward accountability to local villagers in either the Tribal Lands Act or its regulation.[188]By shifting customary land management out of village and community structures and locating land boards far away from the communities they govern, the law cut off the local, personal ties and easy accessibility that could have made the boards downwardly accountable to the people whose land they were governing and undoubtedly has helped to undermine the social legitimacy that boards need to ensure that their decisions are respected and their mandates are respected.[189]

The lessons from Botswana are two-fold. First, the institution of chieftainship and the traditional administration structure has been retained as part of the country's decentralized administration, something that provides lessons for the implementation of Kenya's devolved structures and institutions. The second is the need for proper integration between local traditional institutions and formal institutions for the management of communal land. Lack of integration can easily result in failure of the governance arrangement. [190]

VII. CONCLUSION AND RECOMMENDATIONS

Both communal land and traditional institutions share an important history and place in Africa's development. Although disregarded in the past, recent trends have reinstated the importance of both. Management of communal land brings to the fore the link between and importance of both. Relating to institutions, the past approach was to view "traditional" and "modern" institutions as distinctly separate and "development" as the transition from the former to the latter.[191] The reality is, however, different. Success requires that traditional institutions be accommodated in modern governance arrangements. How to effective-

184 ibid.
185 ibid.
186 ibid.
187 Knight (n 101) 70.
188 ibid.
189 ibid.
190 For a detailed analysis of the traditional governance arrangement in Botswana, See KC Sharma (n 170) above; KD Dipholo, et al, 'Traditional Leadership in Botswana: Opportunities and challenges for enhancing good governance and local development' (2014) 3(2)The Journal of African and Asian Legal Studies 17.
191 J Beall and M Ngonyama, 'Indigenous Institutions, Traditional Leaders and Development Coalitions: The Case of Greater Durban, South Africa' Development Leadership Programme, Research Paper Number 5, June 2009, 4. Available at <http://www.dlprog.org/publications/indigenous-institutions-traditional-leaders-and-developmental-coalitions-the-case-of-greater-durban-south-africa.php> accessed 26 February 2017.

ly accommodate aboriginal populations and indigenous institutions in formal democratic governance structures is a question that has vexed successive administrations in countries as different as Australia and India, so Africa is not exceptional in this regard.[192]

While the importance of traditional institutions for successful governance of community lands cannot be understated, it is important that care is taken in implementing the provisions of the Community Land Act. This is to ensure that the institutions are not frustrated through elite capture. One of the greatest criticisms of the institutional arrangements for managing group ranches was the elite capture of the institutions of group representatives.[193] Experiences from Africa demonstrate that customary authorities sometimes take advantage of their roles to reap personal benefits from land allocation.[194] To avoid this, it is important that the institutions are made accountable to the community members. Tanzania's experience is useful, for it gives the village assembly the right to vote over all allocations in the village and to appeal decisions of the village council they are unhappy with to the district council.[195] The extent to which the land management committees will be accountable to the community members and the community assembly will determine their efficacy and success in delivering effective governance of community land.

In rolling out new institutional arrangements, care should be taken not to over glorify traditional institutions. An approach that pits customary institutions against formal state institutions is bound to fail. So is one that ignores traditional arrangements. Success will require that we build synergies between the traditional and local institutions envisaged under the communal land law and the formal land institutions, including land control boards, land registrars and the ministry for lands. As Cotula, et al,[196] have argued, "An 'integration' approach would bridge the gap between the two legal orders, by building on customary institutions to establish 'hybrid' tenure forms in line with constitutional provisions on democracy, human rights and gender equality."[197] The institutions have to balance between the need to keep alive traditions and also adapt to changing times. They have to keep in mind the advice to the institution of chiefs in Africa at a conference in Ghana several years ago, which stipulated that: "Chiefs not only have to be guardians of tradition but they must also be active agents of the present and future by promoting the well-being of the community. This is what really validates chieftaincy, not mere calls for 'self-folklorisation'."[198]

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192 ibid.

193 For a discussion of group ranches see, I Lenaola, et al, 'Land Tenure in Pastoral Lands' in C Juma and JB Ojwang (eds), *In Land We Trust? Environment, Private Property and Constitutional Change* (Initiative Publishers and Zed Books: Nairobi and London, 1996) 231-257; P Kameri-Mbote, 'Land Tenure and Sustainable Environmental Management in Kenya' in CO Okidi, et al, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers: Nairobi, 2008).

194 Knight (n 101) 246.

195 ibid 247.

196 L Cotula, *et al, Land Tenure and Administration in Africa: Lessons of Experience and Emerging Issues* (IIED: London, 2004).

197 ibid 7.

198 DI Ray, *et al,* 'The New Relevance of Traditional Authorities in Africa' (1996) 37 & 38 Special Issue, Journal *of Legal Pluralism* 1. Available at <http://commission-on-legal-pluralism.com/volumes/37-38/ray-vanrouveroy-art.pdf> accessed 25 February 2017.

Tanzania also provides a good best practice in the manner in which the institutions are constituted with the village councils, which are directly elected by the villagers being designated by the Village Land Act as the land managers.[199] Kenya's law provides that the assembly shall elect members of the management committee. This borrows from the good practice in Tanzania. However, for this to be translated into reality will require that the elections are conducted in a democratic manner. There are examples in the country of disputes over leadership of councils of elders either arising from the manner in which the leaders were chosen or influence of politics. Capture by the political elite results in the traditional institutions departing from their core mandate and instead becoming political brokers in the community. This accusation has tarred the Luo Council of Elders and the *Njuri Ncheke* of the Ameru in the recent past.

It is important to also keep in mind that these institutions will start from the scratch in several communities. Due to many years of disregard, their formation will be undertaken against lack of existing structures and influence of modernity with its focus on formal state structures. There is required capacity building and development of rules for the effective operation of these institutions. This approach must, however, seek to draw from community knowledge and experiences and to transplant these with modern rules. To fail to do so would be to convert these new land governance institutions into existing formal institutions and bring with them the disadvantages of such institutions and their unsuitability for managing communal land.

An important issue in the operations of the institutional arrangements created under the community land law is going to be dispute resolution. The Constitution requires that communities should be encouraged to settle disputes that arise from land using their traditional dispute resolution mechanisms.[200] The community land law, recognizing this fact, provides for both traditional and alternative dispute resolution mechanisms as options for resolving disputes over community land, with the only requirement that this will be applied in accordance with the by-laws developed by the community. The traditional governance institutions created by the community law will be instrumental in the implementation of the dispute resolution mechanisms chosen. It is important that this process comply with the rules of natural justice and receive support from the formal court system as envisaged by the Constitution.[201] This will ensure that the country avoids the pitfalls that befell the Land Disputes Tribunal Act of 1990.

The place of women and youth in the traditional governance institutions is going to be critical. Traditionally, most of the governance institutions were male dominated.[202] Despite provisions in law, this was a key challenge too in the operations of group ranches and composition of the group representatives. It is important that the constitutional dictate

199 ibid 12.

200 Article 60(1) (g), Constitution of Kenya, 2010.

201 See Article 159(1) (c), Constitution of Kenya, 2010.

202 For a discussion of the problem of exclusion of women and youth in traditional governance institutions, see UNECA, *Relevance of African Traditional Institutions of Governance* (Addis Ababa, Ethiopia: UNECA, 2007). Available at <http://repository.uneca.org/bitstream/handle/10855/3086/bib.%2025702_I.pdf?sequence=1> accessed 25 February 2017.

of gender equality and the provisions of not more than two-thirds representation of one gender is adhered to in the constitution and operationalization of all the institutions for the management of communal land.

These institutional arrangements are also going to be implemented at a time when there are many institutions being formed and operationalized. Of critical importance are the institutions at the devolved level, including those of ward administrators and the constitutional requirement that county governments create platforms for the participation of communities in governance at the local level. The institution of the chief, too, still exists. This latter one has had a big role in the management of land at the local level, including communal land. The process of ensuring that these institutions do not overlap and conflict with each other is going to be an important implementation challenge that must be taken up in a collaborative manner. Unless this happens, there are likely to be turf wars, which will hamper the success of the governance arrangements necessary to ensure sustainable management of community land in Kenya. The experience from the three case studies in Africa demonstrates that there is a huge gap between legal provisions and implementation reality as far as traditional institutions and their place in land governance is concerned. Kenya has the opportunity of bridging this divide and helping to debunk the myth "that indigenous law does not confer property in land on individuals; and that indigenous social and governance institutions are not capable or suitable agents for allocating land, managing it and for resolving disputes about land."[203] It is only by paying attention to these issues that we can address the conundrum that stares the country in the face through the institutional arrangements created under the Community Land Act.

203 Supra, note 148 at page 328.

PART III: OKOTH'S CONTRIBUTION TO GOVERNANCE DISCOURSES

CHAPTER 11

CONSTITUTIONALISM: AFRICAN PERSPECTIVES

Yash Ghai

I. INTRODUCTION

One of the most interesting articles on constitutionalism was written by Hastings Okoth-Ogendo for a conference celebrating the 200th anniversary of the United State's constitution, with the title, "Constitutions without Constitutionalism: Reflections on an African Political Paradox". Presented in 1988, it was printed in various books and journals. It became one of the most frequently cited articles on the subject of constitutionalism. He managed to inject light, and some heat, into a topic that had generally been regarded as somewhat boring. Partly because of his interesting perspectives, constitutionalism today is perhaps the most popular topic in comparative constitution studies, attracting lawyers as well as social scientists. In a recent publication, *Constitutionalism in Asia in the Early Twenty-First Century* (2014),[1] the distinguished Asian constitutional scholar, Albert Chen opens the book with an introductory essay, "The achievement of constitutionalism in Asia: Moving beyond "constitutions without constitutionalism'". In his first footnote he refers to Okoth-Ogendo's famous article. Chen was not the first author to recognise the relevance of "constitutions without constitutionalism" beyond Africa; Vlad Perju noted the same point in 2012 in an essay on constitutional transplants, in his comment on "constitutional text that lacks political and cultural traction".[2] Having studied a fair sample of articles paying homage to Okoth-Ogendo, I am left with the impression that the authors quoting him have not fully understood him.[3] For this, Okoth-Ogendo might himself be responsible for he did not clarify in which contexts his paradox would apply—a point I will return to soon.

Frequent references to his "paradox" is owed in part to the growing international

1 Albert HY Chen, *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge, UK: Cambridge University Press, 2014).

2 Perju's essay is published in Michel Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1317.

3 Without derogating from Okoth-Ogendo's imagination and ability to marry theory and practice, the great interest shown in the US and Europe in his "constitutions without constitutionalism" thesis is because his article was published in the USA (the first time I came across this expression was in Ben Nwabueze's book, *Constitutionalism in the Emergent States* in 1973). In my experience, US scholars make singularly little effort to study African or Asian scholarship. I discuss Nwabueze's book later.

interest in constitutionalism as a result of the massive ideological re-ordering in numerous countries all over the world, motivated by the end of the Cold War and the decline of communism, particularly in Europe, and resolution of bi-lateral or national conflicts. A large number of constitutions, inclining towards forms of democracy, liberalism and market, have created an unusual interest in the normally tedious subject of constitutions. The international community (for which read the West) have participated in the making of several constitutions; there has been considerable inter-state borrowing, and certain norms drawn from international agreements are now considered essential. The, partial, liberalisation of the Chinese economy and some opening up of the political space, however limited, has stimulated much theorising on the nature and orientation of constitutionalism.[4] International lawyers have also shown some interest in constitution because of the international norms that are deemed to be desirable, if not compulsory, in national constitutions. And the borrowing of judicial precedents from the superior courts of similarly oriented constitutions has aroused the curiosity of both constitutional and international lawyers in comparative "constitutionalism".

A. Constitutions without constitutionalism

Okoth-Ogendo did not specify clearly what he meant by "constitutions without constitutionalism". A constitution can be without "constitutionalism" in at least two ways. The more obvious meaning is when the constitution does not aim for "constitutionalism" (as with military or one party constitutions or, as it is sometimes put, "one leader constitutions"). The second meaning refers to constitutions, which promise human rights, democracy, fair trials, but little is done to implement them—indeed much is done to negate them. Both of these constitutions have been found in abundance in Africa. My understanding is that Okoth-Ogendo had both these instances in mind. He put his thesis more broadly, as follows: "commitment to the idea of the constitution but rejection of the classical notation of constitutionalism".[5] He and some scholars have argued that most African "leaders" have valued constitutions solely for their significance internationally: conferring sovereignty on the state and immunity for its head, not sovereignty of its citizens.

Albert Chen uses the notion in the second sense: "Just as in the daily life of individuals, it is relatively easy to say something or make a promise, but more difficult to translate what is said or promised into action and reality, so in the political and legal life of nations, it is relatively easy to make a constitution, but more difficult to put it into practice, to implement it and be governed by it—which is what "constitutionalism" is about.[6] He also associates constitutionalism with Western ideas, theories and institutions of constitutions—"transplanted in the course of the last two centuries".[7] His study is in the transplan-

4 See for example, Stephanie Balme and Michael (eds), *Building Constitutionalism in China* (New York: Palgrave MacMillan, 2009) and Chen (n 1).

5 HWO Okoth-Ogendo, 'Constitutions without constitutionalism: an African political paradox" in Douglas Greenberg, S.N. Kartz, B. Oliviero and S.C. Wheatley (Eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: OUP, 1993) Chap. 4. p. 67

6 Chen (n 1) p. 1

7 Ibid

tation of constitutions, making a distinction between "pristine constitutions" (western) and "secondary constitutions", and concludes that the former are more likely to succeed. Indeed he says that "even in the early twenty-first century, constitutionalism is still a work in progress in many parts of the world, particularly in Asia, Africa and Latin America.[8]

I now turn to a discussion of what I call the context of the origin and the understanding of the classical concept of constitutionalism. I will then return to contemporary issues, starting with three essays on constitutionalism by East African scholars, Okoth-Ogendo, Issa Shivji and Yash Ghai. This, I hope, will help us to locate the issues nearer home. After that I will return to the nature of the new constitutions of Kenya, its neighbours and South Africa (often described as "transformative constitutions" to consider the utility or otherwise of "constitutionalism" within its classical meaning.

II, CLASSICAL CONCEPT OF CONSTITUTIONALISM

It is best to turn to Charles McIlwain for an understanding of constitutionalism. In the older days (i.e., when I was young) it connoted limitation on powers of the government. In *Constitutionalism: Ancient and Modern,* published in 1940,[9] McIlwain, then a distinguished professor of politics at Harvard, discusses first the origin of the "constitution", drawing on politically advanced ideas of the American rebels. He quotes with approval Thomas Paine's explanation:

> That there is a fundamental difference between a people's government and that people's constitution, whether the government happens to be entrusted to a king or a representative assembly. That this constitution is "antecedent" to the government. That it defines the authority which the people commits to its government, and in so doing thereby limits it. That any exercise of authority beyond these limits by any government is an exercise of "power without right". That in any state in which the distinction is not actually observed between the constitution and the government there is in reality no constitution, because the will of the government has no check upon it, and that state is in fact a despotism.[10]

He emphasises Paine's dictum "that a constitution is not the act of government but of a people constituting a government". [11] He states that the government cannot exercise any powers not granted in the constitution, summarising it as, "All constitutional government is by definition limited government". Its powers are "fundamental", i.e., they cannot be altered by ordinary legal process. McIlwain notes that one element of good governance missing from Paine's account was the "element of judicial review".

McIlwain notes that "in all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its op-

8 Chen (n 1) p.2

9 Charles H McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, NY: Cornell University Press, 1940). The full text seems to be available on the Constitution Society website at<http://www.constitution.org/cmt/mcilw/mcilw.htm >accessed 27 February 2017.

10 Ibid p.9

11 Ibid p.20

posite is despotic government, the government of will instead of law. In modern times the growth of political responsibility has been added...". [12] Constitutionalism is also tied, tentatively, to the mode of the adoption of the constitution (quoting Paine): "a constitution is not the act of a government but of a people constituting a government". [13] McIlwain goes on to say, "And if it be true, the consequence is that the forms and limits followed by this "constituting" become the embodiment of a "a constitution" superior in character to any acts of any "government" it creates".[14] He reiterates, "...the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been always been from the beginning, the limitation of government by law. "Constitutional limitations", if not the most important part of our constitutionalism, are beyond doubt the most ancient". [15]

McIlwain makes clear that his primary interest is in what he calls "our Anglo-Saxon" traditions (and examines the growth of ideas of governance), but in his discussion of other European nations, he makes clear that similar developments were taking place elsewhere. He notes that "the medieval constitutionalism disclosed by the English historical materials was no monopoly of England or of Englishmen, but a datum with which the historian must reckon no matter with what particular European constitutional system he is immediately concerned with".[16] The French Declaration of the Rights of Man and of the Citizen in 1789 endorses constitutionalism in the sense outlined by McIlwain, with the rights of man and restrictions on what the state can do. Article 16 even says, "Any society in which the guarantee of rights is not assured nor the separation of powers defined, has no constitution at all".

McIlwain makes a few observations that make sense of the contemporary discussions of constitutionalism, or at least why the notions of constitutionalism seem to be changing, expanding, or modified.[17] The first point, already noted above, is that the notion of constitutionalism is not restricted to Anglo/US values or traditions (though it has been fairly influential, as in France after the revolution). Secondly, circumstances keep on changing and with them priorities, values or context (e.g., whether the principal concern is with freedom or with security). Writing when Hitler's army was taking over Europe and, at home, killing Jews, gypsies and gays, McIlwain's book/lectures were a plea for preserving liberties in Europe and America. He was very conscious of the dangers of sacrificing liberties when the government stirs the public with danger of threats from abroad (of terrorism, for example). He cautioned his audience as follows. "Constitutional history is usually the record of a series of oscillations. At one time private right is the chief concern of the citizens; at another the prevention of disorder that threatens to become anarchy. ... When the rights of government are unduly stressed, the rights of individuals are threatened; when the latter are overemphasised, government becomes too weak to keep order" (p. 136). Okoth-Ogendo showed well how soon after independence African governments talked of the threats to the integrity of

12 Ibid p.21-22
13 Ibid p. 20
14 Ibid p. 21-22
15 Ibid p.22
16 Ibid p. 91
17 Ibid pp. 137-139

their states as well as their plans for development as justification for authoritarianism, when not long previously they had demanded independence and human rights for the people from the colonists.

Over time, the somewhat limited elements of constitutionalism as outlined by McIlwain expanded to include a clear notion of democracy and, something that McIlwain did not consider part of constitutionalism -- the separation of powers. In fact he considered it antagonistic to constitutionalism. MacIlwain wrote (worried about excessive power of judicial review), "But to insist thus on the indispensability of legal limits to governmental power and the safeguarding of these limits by an independent court is not to advocate the enfeebling of what government itself. Among all the modern fallacies that have obscured the true teachings of constitutional history, few are worse than the extreme doctrine of the separation of powers and the indiscriminate use of the phrase 'checks and balances'. In this regard, he was among the US scholars who have denigrated judicial review, on the basis that it undermines democracy. [18] Judicial review has also been attacked as against the separation of powers. There is clearly a dilemma here ("solved" by the US Supreme Court in *Marbury v. Madison*[19] early in the history of the US Constitution). Today this dilemma is resolved by the constitution itself in the definition of the functions and responsibilities of the judiciary.[20]

A. Separation of powers and judicial review

Twenty-four years after McIwain's book, the requirements of constitutionalism had expanded somewhat, as stated by the distinguished British scholar, Stanley de Smith. He offered the following account of constitutionalism,

> A contemporary liberal democrat, if asked to lay down a set of minimum standards, may be very willing to concede that constitutionalism is practised in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organise in opposition to the government in office and where there are effective legal guarantees of fundamental liberties enforced by an independent judiciary; and he may not easily be persuaded to identify constitutionalism in a country where any of these conditions is lacking.[21]

A non-English academic might add to de Smith's list a written constitution, with special entrenchment of provisions dealing with the invalidity of laws that violate the constitution, the entrenchment of the constitution itself, and the duty of courts to declare invalid laws that are inconsistent with the constitution.

Though McIlwain has a historical account of constitutionalism, it is more about chronology or sequences than explanation of the circumstances 'or ideology' (in the style of Karl Marx or Max Weber) that led to the adoption of the specific characteristics of constitutionalism. There is little account of the changes in social relations or in the economy

18 For his fuller critique of judicial review see McIlwain (n 5) 141-143.

19 5 U.S. 137 (1803).

20 See Yash Ghai for a discussion of Kenya's 2010 Constitution on judicial review ("Dilemmas for the Judiciary" in The Nairobi Law Monthly 46—51, December 2015).

21 Stanley de Smith, *The New Commonwealth and its Constitutions* (London: Stevens and Sons,1964) 106.

or political alliances that might explain the relative importance of constitutionalism or its form. Moreover constitutions at this time after constitutions were rather brief, and dealt principally with institutions of the state and their power. The underlying circumstances, values and the role of the state have changed greatly since the birth of constitutionalism. Their implications for constitutionalism are considered after the review of the essays by Okoth-Ogendo, Shivji and Ghai.

III. THREE ESSAYS

The three essays are closely connected. They were written as part of celebrations of the 200th anniversary of the US constitution organised by the American Council of Learned Societies. The essay by Okoth-Ogendo appeared twice, once in a book edited by the American Council, *Constitutionalism and Democracy: Transitions in the Contemporary World*[22] and, earlier, in a book edited by Issa Shivji.[23] Shivji's essay appeared in the African volume, and mine in the American Council book. The title of Okoth-Ogendo's essay is, "Constitutions Without Constitutionalism: Reflections on an African Paradox", Shivji's, "State and Constitutionalism: A New Democratic Perspective", and mine, "The Theory of the State in the Third World and the Problematic of Constitutionalism".

The juxtaposition of these essays was of particular interest for me: both Okoth-Ogendo and Shivji were my students at Dar es Salaam in the late 1960s; both extremely bright and imaginative, but holding diverse, indeed conflicting, views on the role of law in society and development. And Okoth-Ogendo's opening lines in his famous essay is a reference to Patrick McAuslan and my book *Public Law and Political Change in Kenya* (1970).[24] Both Okoth-Ogendo and Shivji made copious references to my other writings (pupils' homage to their teacher—though, I am happy to say, not always in agreement with me). On ideology, I was somewhat between Okoth-Ogendo (liberal theory) and Issa (marxist theory), though tending towards marxist theory the more I reflected on what was happening in Africa—and reading Issa's writings. My vacillation between liberalism and Marxism was well captured in my chapter, "Legal Radicalism, Professionalism and Social Action: Reflections on Teaching Law in Dar es Salaam" in a book edited by Shivji,[25] (Issa's own contribution was titled "Within and Beyond Legal Radicalism"). Since those exciting times, I have taught

22 Douglas Greenberg et al, *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993)

23 Issa Shivji, *State and Constitutionalism: An African Debate on Democracy* (Harare: Southern African Research and Documentation Centre, 1991))

24 Yash P Ghai & Patrick WB McAuslan, *Public Law and Political Change in Kenya* (Nairobi: Oxford University Press, 1970). Okoth-Ogendo cites our critique of narrow legal studies, eschewing "politics...and concentrating instead on a broad survey of the text of the constitution, other relevant laws and the few cases that [had] arisen in the courts on the constitution". Consequently, "not merely the books themselves, but constitutional law and lawyers [tended to be] almost irrelevant in much academic discussion of political and economic development in Africa". In a footnote, Okoth-Ogendo adds, "Much of the political science literature coming out of Africa in the 1960s and 1970s was concerned mainly with leadership styles and roles, elections and electoral behaviour, political parties and political mobilisation etc without relating these to the structural parameters within which these processes operated".

25 Issa G Shivji, *Limits of Legal Radicalism : reflections on teaching law at the University of Dar es Salaam* (Dar es Salaam: Faculty of Law, University of Dar es Salaam,1986)

in numerous universities, some among the most distinguished in the world, but I have met few students as bright, sharp and of inquiring minds as Okoth-Ogendo and Shivji. It was my good fortune to be tutored by them, operating from opposite ends of ideological debates on development and justice.[26]

A. Okoth- Ogendo : Constitutions without Constitutionalism: Reflections on an African Political Paradox

Okoth-Ogendo's main thesis is set out in the form of a paradox: "the commitment of African governments to the idea of the constitution and an equally emphatic rejection of the classical notion of constitutionalism". In order to explain the paradox, he examines the theory of the constitution as organised power; constitution as power map and the making of it as pre-eminently a political process—which points have been ignored by scholars. States accept and establish constitutions for particular purposes, not just "a simple reproduction of some basic principles which particular societies may have found operational".[27] The motives which have compelled African elites to adopt constitutions are the realisation that without the constitution "the polity can have no legitimate or sovereign existence". The second concept is of the constitution as a basic law, not as something sacrosanct, but "does entail ...minimum and perhaps popular observance of the rules contained in the constitution". One might say it is opportunistic; choosing those bits that serve political elite but rejecting what does not suit it. The justification of what constitutionalists might say is expediency, is presented by the elite as more in tune with the realities of African states. Okoth-Ogendo cites Nyerere (the more intellectual, and one can say, more honest, of African leaders) as follows, "We refuse to adopt the institutions of other countries even where they have served those countries well because it is our conditions that have to be served by our institutions. We refuse to put ourselves in a strait-jacket of constitutional devices—even of our own making. The constitution of Tanzania must serve the people of Tanzania. We do not intend that the people of Tanzania should serve the constitution". [28]

Okoth-Ogendo concludes, "A purely instrumental view of what constitutions are for, and one which is evident in Nyerere's position has, therefore, been one in which the state elites have found themselves searching for the formal means by which to preserve the integrity of the "constituted polity" without being embroiled in a maze of constitutional law whose function, in classical theory, is to control and supervise constitutionality".[29] Okoth-Ogendo argued that the strength of the colonial state lay not in constitutional mandates but the structure and powers of the bureaucracy. "...[C]ontrol and coercion rather than management and persuasion were the hallmarks of colonial legal order".[30] The traditions of the

26 Neither Okoth-Ogendo nor Shivji was necessarily dogmatic. The latter found much that was acceptable in Nyerere's socialist policies despite eschewing marxism, while the former made his peace with President Moi, despite his strong attack on the kind of policies associated with Moi, to the extent that some thought he almost became his admirer.

27 Shivji n. 23 p. 5

28 Nyerere in a speech to Parliament in 1965 (as Tanzania moved to a one party constitution), reproduced in R Martin, *Personal Freedom and the Law in Tanzania* (Nairobi: Oxford, 1974) 47. Nyerere put a similar idea in another statement that Africa needed a constitution that acts as an accelerator rather than as a break.

29 Shivji n. 23 p. 7

30 Shivji n. 23 p. 8

judiciary were more resonant of this colonial approach than those of the rule of law. He also argued that independence constitutions were more geared towards conflict (among political parties and communities) than peace. The bureaucracy acquired a stronger status and powers than in the colonial period, and operated without the rule of law or impartiality practised by the British bureaucracy in the UK. Over the course of time it established a relationship with the political class to plunder the resources of the state. Okoth-Ogendo makes another important point that the bureaucracy more than acceded to colonial administrative power; its role was expanded, particularly as regards the management of the economy.

Independent constitutions were for the most part in the mould of British or Western constitutions, whose hallmark was "a remarkable distrust of centralized power" and "where laws or state acts in violation of the constitution were unconstitutional".[31] Post-independence amendments or replacements approximated to the colonial model (in spirit, if not in structure or detail). Okoth-Ogendo discusses in considerable detail some key elements of the new constitutional orders—familiar I am sure to Kenyans and members of other African states. He summarises the "actual process of subverting" the constitutional order as follows, "The most notorious was the *coup d'etat* which did not merely involve 'opting' out of the basic law but often its total abrogation. The other was simply a cavalier disregard of constitutional niceties and processes such as the postponement of election... the declaration of no contest against certain election candidates.... The more interesting for our purposes was the move by state elites in a number of African countries to *politicise* the constitution; initially, by declaring it a liability, and subsequently by converting it into an instrument of political warfare".

Among the devices for politicization, Okoth-Ogendo lists the extension of the powers of the chief executive to appoint and dismiss holders of all public offices, even to 'constitutional' offices like judges and the attorneys-general; restrict public appointments to members of the ruling party (this tendency led in a number of countries to formal one party states); expand the coercive power of the state to derogate from the Bill of Rights; and to ensure that the constitution conforms to rest of the legal order (as for example our present president Uhuru Kenyatta tried to do in respect of security officers and their powers)[32]. He concludes, "A run to amend the constitution whenever a political crisis emerged or was apprehended, therefore, became increasingly attractive as a method of re-establishing equilibrium with the body politic … Thus the coercive orientation of the legal order continued to be enhanced even as the essence of constitutionalism was being drained from the reconstituted power map". The consequences are imperial presidency, the immunity of the holder of that office, removal of restrictions on the number of terms a person may hold the office, and the high degree of paranoia which tends to surround the exercise of executive power. These developments result in the 'shrinking' of the political arena.[33]

Okoth-Ogendo did not set out his understanding of constitutionalism as such,

31 Shivji n. 23 p. 9

32 In the Security Laws (Amendment) Act of 2014, several provisions of which were declared unconstitutional in Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another [2015] eKLR Petitions 628 and 630 of 2014 http://kenyalaw.org/caselaw/cases/view/104799/

33 The reference here is perhaps to Nelson Kasfir, *The Shrinking Political Arena* (Berkeley: University of California, 1976).

though one can infer from his critique of post-colonial constitutional arrangements what he meant by it. For example he preferred the "constitutional order" to be an arbiter in the power process, and regretted that the order became instead "a most crucial element of and for the appropriation of power; the Constitution lost most of its claims to being the basic law of the land".[34] It is also clear that he regarded administrative law as protecting the rights of the people against unfair or unlawful acts or decisions of state officials and regretted restrictions on civil rights like processions and marches.[35] He noted that the "coercive orientation of the legal order continued to be enhanced even as the essence of constitutionalism was being drained from the reconstituted power map".[36] His detailed critique of "imperial presidency" as undermining the separation of powers, and the legal immunity of the president as negating the rule of law, provides further guidance on his conception of constitutionalism. His commitment to democracy is implicit in his discussion of the centrality of the role of political parties to public participation and the broadening of policy options. He writes, "In Africa, however, the reconstitution of the independence power maps has recast political parties into very different instruments. Instead of expanding the arena of politics…political parties have been used to shrink it". Okoth-Ogendo's position is undoubtedly liberal in the older sense of the term—a believer in human rights above all. His constitutionalism is based on both rights and democracy. But he was not an activist when some academics (among others) struggled for constitutional reforms nor did he contribute to any of the several books and booklets arguing for reform (such as by his contemporaries, Willy Mutunga, Kivutha Kibwana, Peter Anyang'Nyong'o, Gibson Kamau, Pheroze Nowrojee, and Gitobu Imanyara).

Okoth-Ogendo explains the lack of constitutionalism in Africa by reference to its poor socio-economic conditions—and the consequent greed of the elite for accumulation of wealth, in dubious ways. I would perhaps put the point across somewhat differently—the poverty of Africans is the result of the greed and selfishness of its "leaders"—of which few countries provide more convincing evidence than Kenya. Looking to the future, he said that constitutionalism would be feasible only when there is prosperity in the country. "Constitutionalism being the end product of social, economic, cultural and political progress can only become a tradition if it forms part of the shared history of the people". The fact is that corruption flourishes just as much (if not more) in the more economically developed countries.

Okoth-Ogendo's conclusion is not very comforting to those who struggled for constitutional reform and pushed through, despite some damage in the process, the CKRC draft constitution as the 2010 Constitution—a constitution replete with values of constitutionalism, but not only that, since major themes of the constitution are social justice for the present and future generations and redressing past injustices in matters pertaining to land. It has also to be said that Okoth-Ogendo worked hard for the achievement of the CKRC and Bomas draft constitutions, despite his failing health. It would be imprudent to dismiss

34 Shivji n. 23 p. 13
35 Ibid
36 Ibid

the Okoth-Ogendo thesis regarding the emergence of constitutionalism out of hand—the fortunes of the 2010 Constitution will be a good test. Unfortunately, Okoth-Ogendo will not be with us to share the outcome.

B. Issa Shivji: State and Constitutionalism: A New Democratic Perspective

Shivji's engagement with constitutionalism is informed by a different hypothesis from that of Okoth-Ogendo. Nor does he subscribe to Okoth-Ogendo's view that corruption would cease and constitutionalism prevail once a country achieves a level of affluence. His interest is not in liberalism, but in neo-colonialism and imperialism. Shivji says (as the foundation of his approach), "It is clear that endemic underdevelopment is integrally related to the role that these economies play in the international economic order dominated by imperialist countries".[37] Another difference is that Okoth-Ogendo's framework of analysis is the nation (dominated by state sovereignty) while Shivji's concern is with the state or "statism" as he calls it (in the context of domination by global forces). Shivji says that social scientists question the relevance of the liberal democratic model, preferring a different democratic model from that of Western liberalism. The basis of his discussion of constitutionalism is significantly different from that of Okoth-Ogendo. He aims to "recast constitutional issues and concerns within a different conceptual framework of constitutionalism guided by a new democratic perspective".[38]

Shivji begins by categorising the colonial state as despotic, its legal order inconsistent with constitutionalism, a statement with which Okoth-Ogendo would have had no problem, as he would not with Shivji's account of the resurgence of the colonial order through "amendments, modifications or overthrow" of the constitution. Shivji's analysis of reasons given by the new political elite for the erosion of constitutionalism (e.g., individual human rights and the separation of powers) are similar to Okoth-Ogendo's—principally about the imperative of "developmentalism". Like Okoth-Ogendo he concludes that the result was "an authoritarian neo-colonial state". So far both seem to agree on the meaning of constitutionalism, though neither defines it as such, just making passing references. Shivji has a more detailed analysis of the characteristics and methods of the colonial/neo-colonial state than Okoth-Ogendo; however they agree that it rules by coercion rather than consent. But unlike Okoth-Ogendo, who is satisfied with the liberal or "bourgeois" definition of constitutionalism, Shivji sets out to re-define it, consistent with his notions of fair and just political order.

So what is this constitutional order? To start with, Shivji does not accept Okoth-Ogendo's explanation that constitutionalism will only be respected once Africa achieves development, which Shivji understands as bourgeois development or constitutionalism. The constitutionalism that Shivji is looking for would deal with the present socio-economic conditions. As he explains, "The process of 'underdevelopment and poverty' are in this view, not an earlier condition of a society moving toward development but rather an integral condition produced by the same single process in the development of the dominant countries on the one hand, and imperialist domination of the third world on the other".[39] He

37 Shivji n. 23 p. 33
38 Shivji n. 23.
39 Shivji n. 23 p. 31

attributes the authoritarian state in Africa to the integration of the African political economy in the world capitalist system, and the way it is articulated with social and political forces. [40]

Shivji sets out at considerable length how Africa gets out of this bind, based on national independence and anti-imperialist struggles. An important element of independence is the liberation of minorities from their oppression by the state, reflected in the "intense uneven and unequal development" of their regions.[41] He advocates national integration not through assimilation but through the recognition of diversity. [42] The second element is democratic governance: he argues that the western democratic forms, including the parliamentary Westminster system, have failed in Africa because they involve rule from the top. What Africa needs is direct democracy, with initiatives coming from below, and constant accountability to the people organised in different groups. [43] The third element is a vibrant role for autonomous civil organisations. He says, "The crucial structure or medium through which the society 'confronts' the state is precisely its autonomous organisations which may express varied vertical and horizontal interests within itself cutting across class and cultural boundaries". [44] The fourth element is the right "to the integrity of the person", including through respect for human rights now well acknowledged internationally, as ways of influencing policies through, for example, the right of petition. These four elements (suitably developed) provide "us with some pointers and guidelines to attempt a new conceptual framework for the concept of constitutionalism" [45] which he attempts to draw in the rest of the chapter--certainly much broader than, as he notes, "twin pillars of limited *government* and individual fundamental freedoms/rights".

Okoth-Ogendo sees liberal constitutionalism as covering a critical but limited area; but Shivji's constitutionalism is broader and covers most of the constitution.

In the book which includes these and other articles, Shivji, as editor, tries to weave the threads (spun by several distinguished African scholars and activists) together, and notes frankly that the traditional notion of constitutionalism implied, and to some extent explained, by Okoth-Ogendo had greater support from the contributors to his book than his own four- fold elements. I will return to his reflections after the next section, which is on my chapter.

C. Yash Ghai: The Theory of the State in the Third World and the Problematic of Constitutionalism

My chapter focuses on the nature of the state, principally in Africa, and tries to demonstrate how its dynamics makes it improbable that constitutionalism (à la McIlwain) would be observed by the government. I state that my analysis is based on Marxism though I use the terminology of Max Weber to explain the reasons for the development of constitutionalism in Europe, tying it to relations between the growth of the market economy and the pre-emi-

40 Shivji n. 23 p. 32
41 Shivji n. 23 p. 33
42 Shivji n. 23 p. 35
43 Shivji n. 23 p. 37
44 Shivji n. 23 p. 39
45 Ibid

nence of constitutionalism or the rule of law. I argue that the relations between the state and economy/markets that led in Europe to constitutionalism ("legal-rational") were completely the reverse of the relations between the state and economy in Africa ("patrimonial")—and thus, far from constitutionalism being critical to the kind of economy that African governments preferred (based on a key role for state, politicians and bureaucrats), what was critical were/are the discretionary powers of the state over the economy. The "entrepreneurs" in Europe were in the private sector, who wanted a reliable legal framework for their plans and contracts, while in Africa the "entrepreneurs" were those who used the state mechanisms which they did not want fettered or questioned, and preferably not accountable to a legal regime.

This is what I said in my chapter,

> It is well known that the notion of the rule of law is associated with a mode of nomination and legitimation, the legal-rational, that Weber regarded as central to the development and functioning of the modern state. The authority of state actions is founded in the law, which also provides the basic framework for institutions and the operation of the state. No one is above the law, which is itself purposive and rational, the product of human deliberation. ...The constitutions of most Third World countries promulgated on independence conformed to this pattern, establishing the supremacy of the constitution, the neutrality of the public service, and independence of the judiciary.
>
> Patrimonalism is a different form of domination. It is a form of personal rule, which does not tolerate opposition. Administration is based on the total power and discretion of the ruler. The bureaucracy is an extension of his household, and to which he delegates its powers. There is no clear separation between the private and public spheres of the ruler. He is above the law, as are his officials, and dispenses justice; petitions to him for clemency and generosity substitute for legal writs. The ideological superstructure of such domination is the goodness, generosity, and concern of the ruler for his people. He is the "father of his people", "the father of his nation".
>
> I clarify that the legal-rational model (as well as the accompanying ideology) is not completely superseded but co-exists with the patrimonial. The trend has fundamental implications for constitutionalism and the status and role of rules.

As regards the rule of law, I wrote,

> If the rule of law as an ideology is unimportant, it will come as no surprise that is it also unimportant in its substantive aspect. In most developing countries, whether the economic system is a species of capitalism or socialism, general norms play a secondary role. Both kinds of economy are essentially administered economies, where license is the king and discretion is the norm. Capitalists seek the embrace of the governments, and concentration of state with capital is extensive and complex. Markets themselves are the creation of governments, whose leaders, not having a secure base of their own in production or distribution process, are fearful of the

> free play of economic forces. Multinationals accept that bargains have to be struck with the government and concessions negotiated. Key prices are regulated and controlled. The administered economy is incompatible with generalised norms operating autonomously. But more fundamentally, it is the character of the state and the nature of the process of accumulation in most Third World countries that undermine constitutionalism.
>
> I did not necessarily see this state of affairs as permanent:
>
> Perhaps there is no straight route from colonial legality to constitutionalism; perhaps it must pass through a new process of state building. ...In certain situations it may well be that the costs of suppression outweigh the gains from it. Circumstances may so change that the vested rights of the dominant class (and the interests of foreign states and capital) are better served through a democratic rather than an authoritarian polity. The forms of development generated through authoritarianism frequently give rise to their own contradictions, for instance, the development of a propertied and professional middle class that values democracy and human rights for pragmatic and ideological reasons. [46]

After all, Weber, although reluctant to commit himself to an evolutionary scheme, had envisaged the progression from patrimonialism to the rational-legal state, with the growing purposiveness and rationality of the law and state institutions. "What we have been examining is the rapid emergence of a patrimonialism state on the legal foundations of constitutionalist state, some transformations secured through the manipulation, trivialisation, and disregard of the law"[47]. To understand the dynamics and functions of constitutionalism, one has to uncover its social and economic bases, and thus transcend the formal boundaries of the law.

IV. COMPARING THE THREE ESSAYS

I have already given some indication of the differences in the approach of the writers to constitutionalism. The biggest difference was between Okoth-Ogendo and Shivji. My approach and analysis were not significantly different from that of Okoth-Ogendo and had some resonances with Shivji (though of course his framework was global rather than national, as mine was). All three essays are more sociological and political than purely "legal". There is considerable agreement on some important issues, particularly on the nature of the colonial state, without a trace of constitutionalism (extensively illustrated in Ghai and McAuslan[48]), and the predatory nature of its descendent, the independent state.

While Okoth-Ogendo and I conduct our discussion largely within the McIlwainian concept of constitutionalism, we introduce elements of its socio-economic background, and say a great deal more than him on the nature and dialectics of the state. Shivji has little time for McIlwain or his framework. For him, constitutionalism in that sense is merely an obsta-

46 Shivji n. 23 p. 196
47 Shivji n. 23 p. 106
48 *Ghai & McAuslan, Public Law and Political Change* (n 13 above).

cle to the fundamental changes in the state and globally, necessary for justice to all. Shivji as such does not consider the virtues or drawbacks of the components of constitutionalism—but attacks the system associated with it (liberalism) without examining the working of the system and the precise role of constitutionalism—maybe they too were marginalised in the capitalist economies. Capitalism after all changed over time, and the original understanding of constitutionalism (once favourable) may no longer be so functional for current capitalism (as hinted by Okoth-Ogendo and me). And in Marxist societies also, the components of constitutionalism may not be without benefit to the people. In fact looking at the record of communist states in Europe, one can see the advantages of a measure of restrictions on the executive.

A. The Spring of "Constitutionalisms"

The McIlwain model seems to have dominated the approach of most authors who participated in the 200th anniversary of the US constitution. Editors of the Council of Learned Societies reached this conclusion after surveying the papers and discussions in the programme, stating in the Introduction to the primary book: "The distillation of these varied and energetic discussions suggests an approximate definition of constitutionalism: it is a commitment to limitations on ordinary political power; it revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights; it draws on particular cultural and historical contexts from which it emanates; and it resides in public consciousness".

Instead, Shivji sets up his own version of constitutionalism, more directed to values, communities and institutions, freeing them from old McIlwainian constraints. This is indeed a clever device, moving the debate to what he considers are key social issues. By attaching the concept constitutionalism to totally different social, economic and political system, not only does he challenge McIlwainian concepts and policies, but opens up a new framework labelled "constitutionalism"—of his own making. In this respect too, Shivji was quite innovative (though he did not attach a prefix to it, such as "socialist constitutionalism").

Interestingly, Professor Jackton Ojwang, a leading constitutional scholar (now a member of Kenya's Supreme Court), at about the same time, coming from different political perspectives from those of Shivji, had argued that there could be no one understanding of constitutionalism, when he compared the very different positions in Europe between the constitutions of market oriented states and those of socialist oriented states. Noting the firm conviction with which scholars from each camp spoke of their "constitutionalism", he concluded that,

> To claim, therefore, that the notion of constitutionalism demands the same approach to government practice, always and everywhere, would not be consistent with reality. The one inference, which might be made, is that constitutionalism entails a spirit of 'good' government. Such government must inevitably take into account the circumstances of each society. Subject to that condition, constitutionalism requires as objective an assessment as possible of the social, economic and cultural characteristics of any given society and their incorporation into the practice of government.

His definition of "constitutionalism" would therefore imply "a sensitivity to the basic orientation of the people; it requires reasonable consultation between government and people; it calls for fair procedures of government designation; it would demand a reasonable degree of accountability of government to the governed; it requires that the law-making process be responsive to the public needs; it calls for fair and effective adjudicatory procedures; it demands effective adjudicatory procedures; it demands effective management of public policy and administration, in the general interest of the people". [49]

Today, there is a proliferation of different kinds of constitutionalism—each with its own prefixes. In a short space of time I came across the following (the list is not complete by any means): democratic constitutionalism, political constitutionalism, judicial constitutionalism, illiberal constitutionalism (oxymoron no more?), new constitutionalism, contemporary constitutionalism, popular constitutionalism, corporatist constitutionalism, negative constitutionalism, Russian constitutionalism, Confucian constitutionalism, African constitutionalism, transformative constitutionalism, plurinational constitutionalism, feminist constitutionalism, secular constitutionalism, modern constitutionalism, aggregative constitutionalism, Sinicized Marxist constitutionalism - and to crown it all, world constitutionalism. We have not yet seen the end of it.

We owe this multiplicity of "isms" to the great renewal of interest in constitutions after the end of the cold war—and to some extent to the convergence of the interests of some constitutional and political science scholars. Large parts of the world were released from the bondage of the west or the east (meaning Russia). But they could not have the constitutions they pleased—many might have preferred to continue with their "dictatorial constitutionalism" were it not for two of world's great "democrats"—Regan and Thatcher. States with "dependent constitutionalism" had to shift to "democratic constitutionalism". Many citizens living under "dependent constitutionalism" began or intensified their demand for "constitutionalism" in its prescient form. They wanted constitutions that were based on democracy and accountability, ("participatory constitutionalism"?), human rights, dignity and gender equity, sharing of power, and social justice. Interest in constitutions increased when international lawyers began to take interest in constitutions (under the mistaken idea that constitutional bills of rights were owed to international law, forgetting that numerous constitutions innovated with human rights centuries ago). But it is true that the international community (for which read mostly western states/NGOs) played a not unimportant role in the making of constitutions in a number of states ("imposed constitutionalism")—which inevitably drew in US, Canadian and European academics, often prolific writers, into offering their advice. Often foreign academics had better access to giving advice than local academics—and they were also more given to "theory" than local academics. One knows what happens if US scholars get into the act. Perhaps for this reason, in the west the term "constitutionalism" is used freely, to express the author's preference or the dominating orientation of the constitution ("political constitutionalism", "pluriconstutionalism", "feminist constitutionalism", "judicial constitutionalism" etc.). But in Asia, Latin America and Africa, the academics are also (sometimes more) interested in the mechanisms of decision-making and enforcement

49 J.B.Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Nairobi: Acts Press, 1990) 215. I discuss later a possible change in his position.

of the constitution). In the west, which developed the concept of constitutionalism as a system to curb the power of the state and to increase the liberty of the people, that sense is increasingly giving way to a somewhat meaningless use of "constitutionalism". There is a real danger that scholars from developing countries might lose sight of "constitutionalism" and its significance in their own study of western disquisitions.

One is reminded of Alice in Wonderland's conversation with Humpty Dumpty,[50] asking him anxiously, *"The question is whether you can make words mean so many different* things", in reply to his statement ("in rather a scornful tone"), "When I use a word, it means just what *I choose* it to mean — neither more nor less", and eliciting the response "'The question is, which is to be master — that's all**...**". The difficulty here is that often what the "ism means" is not explained. Consequently, it is not surprising that there is such an explosion of literature on constitutionalism, nor that there is now no common understanding of what constitutionalism means. I return later, briefly, to this issue.

B. Back to Africa

For the most part, when African and Asian scholars use the word "constitutionalism", they mean its classical or McIlwainian sense. I believe the reason for this is that for a long time they have lived under authoritarian regimes (colonial as well as indigenous). I intend in conclusion to try to locate "constitutionalism" within contemporary African context and constitutions. A number of leading African scholars have devoted their energies to elucidating the significance of constitutionalism — Ben Nwabueze, Mahmood Mamdani, Kwesi Prempeh, Abdullahi Ahmed An-Nai'm, Charles Fombad, Jackton Ojwang, Oloka-Onyango, and others. Unfortunately space allows only brief references to the work of Nwabueze, Ojwang, and An-Nai'm.

1. Ben Nwabueze

African scholars have strongly supported constitutionalism in the traditional sense, as far back as 1973 when the distinguished Nigerian scholar Ben Nwabueze published his book *Constitutionalism in the Emergent States*.[51] By that time the euphoria of independence and with it rights, freedom and justice had worn off and the colonial type of state had re-established itself. Constitutionalism, he said, "recognises the necessity of government but insists upon a limitation being put placed upon its powers".[52] He went on to say; "There are indeed many countries in the world with written constitutions but without constitutionalism".[53] He reminded us of constitutions which "consist to a large extent of nothing but lofty declarations of objectives and a description of the organs of government in terms that impose no enforceable legal restraints".[54] Hence the need for constitutionalism. Nwabueze, a disciple of Stanley de Smith, endorsed forcefully all its ingredients: a written constitution which is supreme law, government of limited powers, separation of powers, and judicial review—de-

50 Lewis Carroll (Charles L. Dodgson), *Through the Looking-Glass, and What Alice Found There* (London: Macmillan & Co., 1871) chapter 6 .

51 Ben Nwabueze, *Constitutionalism in the Emergent States* (London: Hurst, 1973).

52 Ibid. p. 1.

53 Ibid. p. 2.

54 Ibid.

mocracy underlying such a regime ("the democratic control of mechanisms popular representation and the responsibility of the government to the governed unquestionably increase the efficacy of any system of restraints upon government", p. 11). He sets out meticulously the ways in which some governments in Africa and Asia had managed to subvert constitutionalism despite the above elements (through incitement of racial conflicts, various forms of political coercion, declarations of emergencies, coups d'état, and secessions—working his way through a substantial part of the Commonwealth).

He wrote of constitutionalism with greater passion than any scholar I know. He was very ardent, even evangelical, about constitutionalism. He wrote with great passion about the need for freedom, and how that should be secured. Thirty-one years later, he was still deeply engaged with and committed to constitutionalism, the underlying theme of his monumental study in 7 volumes of *Constitutional Democracy in Africa* (of which I have to confess I have only read the first five).

2. Jackton Ojwang

Jackton Ojwang's earlier views were not supportive of "western constitutionalism". One of the most controversial themes of his work was the legitimacy of political parties in Africa. His general thesis was that the Western type of multi-party system had failed to establish either unity or stability. He argued that African states needed a one party system to maintain law and order. A clear statement of his views as to the appropriateness of western conception of constitutionalism appears in his chapter, "Constitutionalism –in Classical Terms and in African Nationhood", in a book edited by Nasile Rembe and Evance Kalula (1991).[55] He argued that the western notion of constitutionalism could not be adopted as such in Africa; instead, it must incorporate Africa's conditions of social, economic and political and cultural dimensions which present valid dimensions, which must be incorporated in national schemes of constitutionalism. The same, he argued, necessitated the adjustment of the theory and practices of human rights. Apart from economic constraints, he considered cultural differences as of major consequences. More than once in his writings[56] he summarised the views of the then president, Daniel Arap Moi as follows:

> President Moi underlines the cultural base of intellectualism, suggesting in effect that the concept of a footloose intellectual would be either a rarity or of a contradiction in terms. He considers that the intellectual riches of the mind are a growth from the "rich cultural and philosophical heritage of [one's] own country". Thus, one claiming to be an intellectual without caring to understand one's genesis, without benefiting from the lesson of history, without appreciating the social, cultural and political conjuncture in which one finds oneself, without the haziest picture of one's bearings and one's interplay with the milieu obtaining, would not be a true intellectual and ought not to pass for an exemplar in Kenya [in Africa].

55 Nasile Rembe & Evance Kalula, *Constitutional government and human rights in Africa : proceedings of a workshop on constitutional government and human rights in Africa, Maseru, Lesotho, 4-8 October, 1989* (Roma, Lesotho : Lesotho Law Journal with the assistance of the International Third World Legal Studies Association, 1991).

56 Constitutional Development in Kenya: Institutional Adaptation and Social Change (Nairobi: African Centre for Technology Studies, 1990) p.217 citing Ojwang, "Authochthony, Nationhood and Development: A Review Article" (1987) 2 African Urban Quarterly 454 at 456.

In the same vein, Professor Ojwang justified, in a number of papers, the establishment of the one party political system in Africa. He argued that Africa did not have diversity in economy, which justified a multi-party system in liberal societies. Furthermore, he argued that in African states, people did not have primary loyalty to the nation but to the tribe, and therefore a multi party system would divide the people. He continued, "It is unfortunate that lawyers and political scientists have not taken full note of the relatively long period during which the institutional basis of Western liberalism has been falling apart in Africa. Instead many of them have passed censorious judgments on the non-practice of these values, in this way placing themselves in a complacent and unconstructive intellectual posture and becoming unhelpful for any solution to the problems they see".[57] In a sense his position was not dissimilar to Okoth-Ogendo's position, except that at that time Ojwang was trying to explain, not justify, the African approach.

However, Ojwang gradually moved away from this position to one more liberal oriented, accepting many features of "western constitutionalism". This features very strongly in his latest published book, *Ascendant Judiciary in East Africa*.[58] He does not offer a detailed explanation of the change of his views, but did hint in one or two articles that the economic and social circumstances—constituting the underlying basis of society in Kenya and Africa— have changed. The change in his own views appears most clearly in his recent book.[59] He seems to have reconciled himself to the constitution most driven by "constitutionalism" of any African constitution.

3. Abdullahi Ahmed An-Na'im

Thirty-three years after Nwabueze's first major study of constitutionalism, another distinguished African scholar, Abdullahi Ahmed An-Na'im, addresses the same issues (though with slightly different perspectives), bemoaning deficiencies in the realisation of constitutionalism, but with somewhat different approach to a solution.[60] An-Na'im has a particular interest and great knowledge of Islam, which he discusses at length in the context of constitutionalism, including adjustments in religious practices. Contextually: of constitutionalism, he asks, "The question is how can people of different religious/cultural traditions, even if they all live in the same country, agree to accept the same normative system? In other words, tensions in the relationship between Islam and constitutionalism in Islam and constitutionalism in Islamic societies are simply specific manifestations of the broader problem of cultural legitimacy and contextual sustainability of constitutionalism in these countries".

While Ojwang, in his powerful defence of one party rule and deviations from constitutionalism, concluded that culture must override constitutionalism, An-Na'aim explores, optimistically, the prospects for constitutionalism. He himself is committed to traditional

57 Liberal Values in African Constitutional Development" African Society of International and Comparative Law, Proceedings of the Third Annual Conference Arusha 2-5 April 1991, p. 19 at p.27.

58 JB Ojwang', *Ascendant judiciary in East Africa : reconfiguring the balance of power in a democratizing constitutional order* (Nairobi: Strathmore University Press, 2013).

59 Some of the judgments of which he was part include: *Speaker of the Senate and Another v. The Attorney General & 4 Others,* In the Advisory Opinion No. 2 of 2013. http://kenyalaw.org/caselaw/cases/view/91815/ after 203

60 My discussion of An-Na'im is based on his book, Abdullahi An-Na'im, *African Constitutionalism and the Role of Islam* (Philadelphia: University of Philadelphia Press, 2006).

constitutionalism, but realises that that conditions in Africa may not be fully suitable. His concern is with creating conditions for the realisation of complete constitutionalism rather than ideological debate about it. He talks of an "incremental process of constitutionalism in Africa", realising the difficulties facing its complete implementation immediately.[61] Among the hurdles he outlines is dependence on outside assistance and the resulting " western neo-colonial hegemony". He says, "The only way forward is through the practice of constitutionalism in order to empower civil society actors to hold governments legally and politically accountability to their own populations...The main question for the book is how to make that happen in a sustainable way manner throughout the continent."

He examines how that approach would that work in African Islamic states, given the tension between the understandings of Shari'a and modern principles of constitutionalism and suggests that it might principally be through the reinterpretation of Shari'ia to reformulate its relevance particularly in multi-cultural societies. He argues that tensions within African countries (due to for example multiplicity of ethnic groups) should not be taken as a reason why constitutionalism cannot function; on the contrary, it is the reason why it should be promoted. He justifies different conceptions of constitutionalism, seeing them as complementary approaches to an ideal "to be adapted to different conditions of time and place, rather than as representing sharp dichotomies or categories"—and that should be harmonised over time. He attempts to relate "constitutionalism" to the country's circumstances, rather like Ojwang, but unlike Ojwang he is committed to traditional constitutionalism values: " uphold the rule of law, enforce effective limitations on government powers, and the protection of fundamental rights".[62] But my primary interest here is his analysis of what he calls 'the contingent role of Islam" which he claims can help to mediate between traditional understandings of Islam, on the one hand, and modern principles of constitutionalism on the other.[63]

He demonstrates the variability of Shari'a, dependent on the history/circumstances of the Muslim country, "product of the history of their own societies" .[64] Shari'a is, he says, a matter of interpretation of the Qur'an and Sunna, so it is neither divine nor immutable. Certain principles may be incompatible with constitutionalism but perhaps some accommodation may be possible. He points to the inadequacy of the Shari'a[65]—it makes it difficult for the state to fulfil its essential domestic and international functions in the present increasingly global context. [66] Referring to inequalities under Shar'ia of women and non-Muslims, he says, "While such aspects of Shar'ia represented significant improvements on political and legal systems that prevailed throughout the pre-modern world, they are totally unacceptable from a constitutional point of view today". But in practice there is a great push for the inequalities, presented as an essential aspect of Islam. However, if there were the

61 Ibid. p. viii
62 Ibid. p. 3
63 Ibid. p. 99
64 Ibid. p. 100
65 Ibid. p. 105
66 Ibid.

will for constitutionalism, then the problem could be solved by re-interpretation (can one say that this is An-Na'im's weak point?). He considers that what is needed is a commitment to reform (which many custodians of Islam are not interested in). He says "issues must be framed in terms of historically conditioned forms of the relationship between Islam and the state, rather than a sharp dichotomy between total unity or categorical separation of religion and the state".[67]

He then explains the contingency of Islam to mean: ".... the kinds of social, political and cultural changes and transformations associated with Islam cannot be reduced *solely* to either an "African" or "Islamic" agency or motivation. Moreover, to view the spread of Islam in a given context primarily in terms of its appeal as a religious ideology may draw on certain assumptions regarding the role of "religion" for the society in question. .... The concept of contingency means that a particular outcome can be simultaneously viewed as, on the one hand, local African, and Islamic, and on the other hand, religious, ideological, social, cultural, and/or political." [68] An Na'im gives various instance of this, particularly from West Africa, but discusses also the special case of East Africa, quoting Pouwel's study (*Horn and Crescent: Cultural Change and Traditional Islam on the East African Coast*).[69] Pouwel wrote, "In coastal East Africa, with its long tradition of welcoming immigrants from great distances, cultural change was an inescapable fact of life" going on to say that the local understanding and practice of Islam was not only influenced by African culture, but also exhibited elements of Asian influence that created a culture distinct from coastal East African culture. Others have commented that as Muslim traders went inland for trade purposes, they built good relations with communities there and adopted local customs, while some of the people there converted to Islam without losing much of their cultural heritage.[70]

V. CONCLUSION: REFLECTIONS ON CONSTITUTIONALISM IN OUR AGE[71]

An-Na'im principal concern in his book was to explore the consistency of Islam with constitutionalism—and the answer was positive provided certain interpretations were adopted. Ojwang acknowledges that circumstances can change, making constitutionalism acceptable, indeed imperative. As others and I have argued, constitutionalism emerged in the West in certain economic circumstances, with the rise of capitalism. Recent writings on constitutionalism have taken a new turn, when everything is "constitutionalism" but the question is, what kind? The proliferation of the concept has made it somewhat meaningless.

In my own feeble way, I tried to distinguish "constitutionalism" from "constitution"

67 Ibid. p. 107

68 Ibid. p. 109

69 Randall L. Pouwels, *Horn and Crescent : cultural change and traditional Islam on the East African coast, 800-1900* (Cambridge: Cambridge University Press, 1987).

70 An-Na'im pp. 208-9.

71 This section draws on my three articles: "Creating a New Constitutional Order: Kenya's Predicament" in Elizabeth Gachenga, Luis Franceschi, Migai Akech and David Lutz (eds), *Governance, Institutions and the Human Conditions* (Nairobi: Strathmore University, 2009)—this book was dedicated to Okoth-Ogendo; "Constitutions and constitutionalism: the fate of the 2010 constitution" in Godwin Murunga, Duncan Okello and Anders Sjogren (eds), *Kenya: The Struggle for a New Constitutional Order* (London: Zed Books, 2014); Yash Ghai and Jill Cottrell, "State and Constitutionalism in Post-Colonial African" in Abdul Paliwala, Christopher McCrudden and Upen Baxi (eds), *Law's Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining* (Cambridgew: Cambridge University Press, 2015).

thus:

> The constitution is a set of rules and institutions that regulate the governing of the country. Constitutionalism is an ideology based on certain values, procedures and practices. At one level the concept of constitution is very simple: it is a text that is the supreme law of the land. Constitutions have been a way of consolidating power—as is well illustrated by colonial constitutions, but they have the same tendency, indeed purpose, in other contexts. The necessity of constitutionalism was to balance this state power, often enormous, armed with the police and the army, by granting rights to citizens and obliging the state not to transgress these rights—an act of restraint. In contemporary period, while some rights still relate to restraint by the state, other rights (socio-economic rights as well those on equality) require the state to undertake positive action in favour of citizens. Thus the concept of constitutionalism at first focused on the supremacy of the constitution, as a means to control the people. Later it was used to limit the power of the state but in due course some powers had to be returned to the state. In a paradoxical way, constitutionalism now requires an activist rather than a passive state. But the "activism" is not unregulated; the state is no longer distanced from the people—instead the people are the state.[72]

Several contemporary constitutions illustrate this point. The new constitutions are based on different values, procedures and institutions, with the emphasis on nation building, participatory democracy, sharing of state power and resources, a strong regime of rights, particularly social and economic rights with a view to eliminating poverty, and preventing corruption. Some have called this new type of constitution (of which South Africa and Kenya are examples) transformative constitutions. Klare describes transformative constitutionalism as "a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[73] This depicts the constitution has having the desired effect of social justice. However to restore social justice a creative jurisprudence of equality coupled with substantive interpretation of the content of socio-economic rights should be considered.

It is uncontested that constitutionalism as we use it in this chapter is of western derivation. Its fundamental principles have not changed, though safeguards against abuse of power have increased. Since the state in contemporary Africa owes so much to its creation by the west (making it more powerful than any "state" before colonialism), it is not unreasonable to look to it for safeguards against the abuse of that power. Questions like the following

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72 This paragraph is partially based on "Constitutions and constitutionalism: the fate of the 2010 constitution" in Godwin Murunga et al above, at pp. 119-20.

73 Klare, K.E, "Legal Culture and Transformative Constitutionalism" (1998) 14(1) *South African Journal on Human Rights* 146 150. *S v Makwanyane* 1995 (6) BCLR 665 (CC), para 262 (per Mahomed J); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC); *Minister of Finance and Another v Van Heerden* 2004 (11) BCLR 1125 (CC); *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C), para 100.

are pertinent: does the state in the West and in Africa serve similar functions and have similar responsibilities? If so, do we need different structures and authority from that in the west? For example, the relationship between the state and society may be quite different in the two regimes. In the West much social control emanates from civil society; this is unlikely to be the case in Africa where the state occupies space which in the West is occupied by society.

More broadly, what is the relationship between the state, economy and society? Do they differ significantly in Africa from that in the west? In Europe the idea of the state and nation coincided a long time ago, but the colonial state was, almost deliberately, designed as multi-ethnic? The idea of constitutionalism as we understand it is based on the experience of western states. Central to that is an agreement under which the people have delegated power to the government—in most cases; the agreement takes the form of a constitution. The constitution represents the form of government, the structure of civil society, and the relations between the state and citizens that have developed over a long historical experience that are broadly acceptable to the people (the elite and masses) of the country. The constitution does not so much create public power or the relations between citizens among themselves, or between them and the state, as reflected in historical compromises, which have ensured a substantial measure of stability and predictability. In Africa the constitution has been regarded as the means for creating structures and powers of the state, and the limitations on them. They seldom represent any continuity in the development of public power. They may not, indeed do not, have much connection with the reality of the depository of power or its accountability to society. But we continue to repose faith, or pretend to, in the document called the constitution, in the face of overwhelming evidence that it is a piece of paper (or rather, pieces of paper—constitutions have become very long!). The constitution is not a self-operating or self-executing instrument. The real task of establishing constitutionalism lies in other spheres: politics, the judiciary, the rise of professionalism, civic associations, and enlightened leadership. Perhaps the emphasis on constitutions (to the point that a new constitution is called for not only in cases of regime change, but also government change) has in that sense done Africa a disservice, distracting attention from the real task of building constitutionalism.

CHAPTER 12

THE ROLE OF CIVIL SOCIETY IN LAND REFORMS IN KENYA: THE KENYA LAND ALLIANCE

Odenda Lumumba

I. INTRODUCTION

On the cusp of the 21st Century, research in 1980s and 1990s drew attention to the effects of past land policies on the poor, especially those resulting from land registrations and titling programmes in sub-Saharan Africa.[1] The emerging evidence challenged the Western-legal viewpoint of land as fundamentally being about rules of holding physical things without the attendant social and political relationships.[2] Taking advantage of the shifting approach[3] by governments and donors, buffeted by both internal and external pressures to address issues of access to and control of land and land use, civil society representatives embarked on advocacy around the issues of land rights, tenure and land policy reforms.

A workshop on land rights and sustainable development in sub-Saharan Africa held at Sunningdale, United Kingdom (UK), in February 1999[4] provided a platform for policy makers, researchers and civil society representatives from Africa to review issues of land rights, tenure and land policy reforms. The meeting, under the auspices of the UK Department for International Development (DfID), gave civil society an opportunity to debate the market-oriented land reforms that took place in the 1990s.[5] The thrust of these reforms was recognition of property rights, adoption of mechanisms regulating privatization of public land and development of procedures to regulate the transfer of property rights.[6]

The Kenya Land Alliance (KLA) was formed in 1999, the same year that the two

1 HWO Okoth-Ogendo, 'Legislative Approaches to Customary Tenure and Tenure Reforms in East Africa' in C Toulmin and JF Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa* (DfID/IIED/NRI: London, 2000).

2 Elizabeth Daley and Mary Hobley, *Land: Changing Contexts, Changing Relationships, Changing Rights*. (DFID: London, 2005).

3 The international cooperation discourse, since at least the early 1990s, put at the centre functioning participatory democracy as a prerequisite for sustainable development. This participatory democracy is seen as only possible with a vibrant civil society, which is viewed as having the capacity to overcome undemocratic leaders and elites. Notably, the World Bank has stepped up its engagement with civil society organisations.

4 C Toulmin and JF Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa* (DfID/IIED/NRI: London, 2000).

5 Elizabeth Daley and Mary Hobley, *Land: Changing Contexts, Changing Relationships, Changing Rights* (DfID: London, 2005).

6 Klaus Deininger, 'Agrarian Reforms in Eastern European Countries: Lessons from International Experience' (2002) 14 (7) Journal of International Development987.

important commissions that would lay the foundation for land reforms in the country - the Commission of Inquiry into the Land Law System of Kenya[7] (the Njonjo Commission, named after its chairman, Charles Njonjo) and the Constitution of Kenya Review Commission (CKRC) - were established.[8] Prof Okoth-Ogendo played a pivotal role in moderating the land reform initiative at the time as a consultant to the Njonjo Commission[9] and a member to the CKRC. The nascent KLA seized this opportunity to offer a route out of the broken promises of land reforms, breakdown in the rule of land related laws, lack of a national land policy to pressure for land reform enactments and eventual implementation.[10]

A. Formation of the Kenya Land Alliance

In the 1990s, civil society involvement in land reforms revolved around the initiatives of individual organization - with each civil society focusing on a specific sector.[11] The Green Belt Movement, the East African Wildlife Society, Oxfam GB, Mazingira Institute and the Kenya Human Rights Commission[12] were some of the organisations involved in land reforms, but as Odhiambo[13] points out, such efforts were sporadic and remained unlikely to trigger long-term changes.[14] Initiatives focused on land reform existed in the context of a globalized world where the government was expected to 'promote, enforce and implement' various ideas had to between various ideas and priorities, with no guarantee that those policy choices would serve the interests of the majority. Under those circumstances, only the best-organized groups were most likely to have their interests served or protected.

KLA was launched, therefore, to coordinate civil society efforts and rally their energies in the land sector. Oxfam convened a consultation workshop leading to the formation of the KLA held in Nairobi in May 1999 with funding from the Department for International Development (DfID). Oxfam GB provided support for the alliance at the formative stages based on its experience in Uganda. In fact, KLA was modeled on the Uganda Land Alliance.[15]

The alliance was founded as a membership, not-for-profit and non-partisan network and registered in November 2000 as a Trust. Later, to comply with the Public Benefit Organisations Act, 2013 provisions, KLA was re-registered as a non-governmental organization (NGO) in July 2013.

The Kenya Land Alliance served two strategic purposes. *First,* it legitimized the land reform agenda and *second,* it led to the empowerment of civil society organizations that

7 Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer: Nairobi, 2002).

8 Republic of Kenya, *The Constitution of Kenya* (Government Printer: Nairobi, 2010).

9 Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer: Nairobi, 2002).

10 Republic of Kenya, *Sessional Paper No.3 of 2009 on National Land Policy* (The Government Printer: Nairobi, 2009).

11 Michael O Odhiambo, 'Advocating for Land Policy Reforms in Kenya, Uganda and Tanzania: NGO Lessons and Prospects' (2002) Paper prepared for the Second Workshop of the Pan-African Programme on Land and Resource Rights, to be held in Lagos, Nigeria 15-16 July 2002, 10.

12 ibid.

13 ibid.

14 ibid.

15 <http://mokoro.co.uk/land-rights-article/?fwp_land_rights_countries_filter=kenya>accessed 25 February 2017.

would later become part of the overall democratization agenda. Experiences and lessons learnt from Mozambique and South Africa had convinced DfID that mobilized civil society organisations could pursue a democratization agenda.[16] Professionals such as Prof Okoth-Ogendo linked KLA to the East African Land Network and the African Union (AU) Land Policy Initiative, which spearheaded the drafting of the Framework and Guidelines on Land Policy in Africa.[17] The framework and guidelines flagged the shared vision, objectives and principles on land policy.

The 1990s heralded a wave of land policy reforms following the failure of efforts to convert customary tenure governing community lands to individualized freehold rights in Africa.[18] According to Ambreena Manji,[19] both bilateral and multilateral donors during the same period embarked on the promotion of land law reform instead of substantive redistributive and transformative land reforms.

II. THE ROLE OF CIVIL SOCIETY IN LAND REFORM PROCESSES

In Kenya, like in Tanzania and Uganda, Oxfam country representatives undertook to facilitate land reform processes by establishing land alliances, whose programmatic agenda was land reform.[20] Civil support for poor people's capacity to pursue land claims and gain access to and use of land through donor support for the formulation of pro-poor land policies legitimized its own role.[21] Thus, the civil society role in land reform processes of 1990s was actualised by taking advantage of the era of market-oriented land reforms that aimed at promoting and encouraging land markets with minimum direct intervention of government or public authorities.[22] McAuslan posits that the World Bank had won by propagating the view that land markets were the preferred official national approach to land management.[23] According to Elizabeth Daley and Mary Hobley, the land reform processes that combined long drawn out constitutional reform and land policy-making processes required credible relationships and alliances that included civil society so as to build a pro-poor consensus and seize the historical momentum to push for change.[24] In a nutshell, the market-oriented reforms were about the recognition of property rights, the adoption of mechanisms regulating the privatization of public land, and the development of procedures to regulate the transferability of property rights.[25]

16 P McAuslan, *Land Reforms in Eastern Africa: Traditional or Transformative? A Critical Review of 50 years of Land Reform In Eastern Africa 1961-2011* (Routledge: London, 2013).

17 AUC, ECA, AfDB Consortium, *Framework and Guidelines on Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods*. (Addis Ababa, Ethiopia: UNECA, 2010).

18 C Toulmin and JF Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa* (DFID/IIED/NRI: London, 2000).

19 Ambreena Manji, 'Whose Land is it Anyway? The Failure of Land Law Reform in Kenya' (Africa Rsearch Institute: London, 2015).

20 <http://mokoro.co.uk/land-rights-article/?fwp_land_rights_countries_filter=kenya> accessed 25 February 2017.

21 P McAuslan, *Land Law Reform in Eastern Africa: Traditional or Transformative? A critical Review of 50 Years of Land Law Reform in Eastern Africa 1961-2011 (*Abingdon and New York, NY: Routledge, 2013).

22 D Acemoglu and AJ Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Crown Publishers: New York, 2012).

23 P McAuslan, *Land Law Reform in Eastern Africa: Traditional or Transformative? A Critical Review of 50 Years of Land Law Reform in Eastern Africa 1961-2011 (*Abingdon and New York, NY: Routledge, 2013) 219.

24 Elizabeth Daley and Mary Hobley, *Land: Changing Contexts, Changing Relationships, Changing Rights* Unpublished Paper commissioned by the Urban-Rural Team, DfID, 2005.

25 Klaus Deininger, 'Agrarian Reforms in Eastern European Countries: Lessons from international experience' (2002) 14 (7) Journal of International Development987.

Consequently, the role of civil society in land reform processes was strengthened by the intellectual backing of influential academics, notably Prof Issa Shivji and Prof Okoth-Ogendo, who realized that something needed to be done urgently in response to the World Bank position of promoting the privatisation of land, in the form of individual titling, throughout the world, citing alleged huge successes in Thailand and Kenya. The World Bank had the Peruvian economist Hernando de Soto, who offered very simple solutions to extremely complex questions as its spokesperson, and his ideas had captivated donor organizations and developing country governments. [26] The input of Prof Okoth-Ogendo, which is reflected in the philosophy behind the Kenya National Land Policy principles supported the civil society position that: Land is not just a commodity that can be traded in the marketplace, since it represents multiple values which require that it is managed productively, equitably, and sustainably for the present and future generations.[27]

Before turning to the numerous land reform processes that civil society played varied roles in, it is important to point out that while many donors facilitated these civil society roles, the United States Agency for International Development (USAid) was mainly concerned with agrarian political economy conceptualization of land reforms and tried to effect changes to the 2007 draft National Land Policy.[28]

A. The KLA Contribution to the Njonjo Commission

The Njonjo Commission was formed through Gazette Notice No. 6593 of 26 November 1999 to inquire into land issues, which were fundamental to the development of the country. The commission's terms of reference were to undertake a broad review of land issues and recommend the main principles of a land policy framework; analyse the legal and institutional framework of land tenure and land use; recommend guidelines for basic land law and complimentary legislation; address land tenure and administrative system issues; look at all customary laws relating to land; and prepare drafts of new or amending legislation deemed necessary. The commission collected views from the public, visited the provinces and districts in the country to receive complaints from members of the public and also visited countries outside Kenya.

Local and marginalised communities whose land rights were compromised by past failures and approaches to land reform that placed emphasis on a market-based model, with the goal of converting customary tenure to individualized freehold rights, were mobilised by KLA to make oral and written submissions as well as complaints on their land issues to the commission. KLA benefited from the influence of Prof Okoth-Ogendo who was the commission's consultant on the principles of a national land policy framework to push for

26 <http://mokoro.co.uk/land-rights-article/?fwp_land_rights_countries_filter=tanzania> And also Hernando de Soto, 'Listening to the Barking Dogs: Property Law against Poverty in the Non-West' (2003) 41 Focaal- European Journal of Anthropology179.

27 Republic of Kenya, *The Constitution of Kenya and the Sessional Paper No.3 of 2009 on National Land Policy* (Government Printer: Nairobi, 2010; 2009).

28 USAid, *Kenya Land Policy: Analysis and Recommendations* (USAid: Nairobi, 2009). This publication was produced for review by USAid. It was prepared by ARD, Inc. The principal author being John Bruce, an ex-Senior Counsel in the Environmentally and Socially Sustainable Development and International Law Unit of the Legal Vice-Presidency of the World Bank.

the need for a national land policy.[29] Despite the existence of many land laws, some of which were obsolete, Kenya had not had an overall land policy framework to guide the land sector resulting in a complex land management and administration system.[30] This is how the land policy principles that were presented to the commission formed the basis for the debate on revising the existing land law system to redress Kenya's skewed structure of land ownership and management, which promoted predatory land practices by the state.

KLA members identified the lack of a land policy as the cause of inept and corrupt land administration. The solution to the problem required the formulation of a National Land Policy to guide not only the land reform agenda, but also the establishment of an independent National Land Authority under the Constitution. KLA was at the forefront of the forceful civil society argument for the democratization of land administration and Kenyans say on the institution that should be responsible for land administration. This proposal formed the basis for the call to jettison the presidency and the provincial administration from land matters as a way of avoiding centralized land administration and providing for a decentralized and devolved system of land management that would involve local communities.[31]

Indeed, the Njonjo Commission provided KLA with a platform to make the argument for new land ownership categories, including community land, to replace the trust land regime; the establishment of a national land administration institution under the Constitution;[32] reform of land tenure for sustainable management of natural resources; alternative land dispute resolution mechanisms devoid of corruption and delays associated with court litigation; and an efficient and equitable land delivery system not controlled by the presidency and the provincial administration.[33] KLA, with the support of Okoth-Ogendo, pressurised the Njonjo Commission, which was largely composed of pro-establishment commissioners, to accept to deal with the identified issues such as: principles of a national land policy framework; the land question; principles of sovereignty over land; classification of land, tenure of land-based resources; settlement of disputes; mechanism of a new land administrative structure; and a new constitutional position on land. This formed Part II of the Njonjo Commission Report.[34] Some of the outstanding issues KLA proposed are the location of radical title; classification of land to include community land, public land and private land; limitation of lease periods to a maximum of 99 years; and provision for addressing historical land claims by communities, especially in the Coast and Rift Valley provinces.

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29 Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer: Nairobi, 2002).

30 Republic of Kenya, 2009: ix. *Sessional Paper No. 3 of 2009 on National Land Policy* (Government Printer: Nairobi, 2009).

31 Republic of Kenya, Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration (Government Printer: Nairobi, 2009) 108.

32 Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration (*Government Printer: Nairobi, 2002) 44.

33 Kenya Land Alliance, 'Technical Paper of Public Land Administration' (2002).

34 Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer: Nairobi, 2002) 13-86.

KLA was aware that the terms of reference of the Njonjo Commission were meant to address the structural framework of the land law system in Kenya, which was only possible within a new constitutional dispensation that was being crafted by another commission chaired by Prof Yash Pal Ghai, with Prof Okoth-Ogendo as his deputy. Thus, KLA prepared to engage the Constitution of Kenya Review Commission to ensure that fundamental land issues it had advocated for included in the Njonjo Commission report were eventually anchored in the Constitution.

One of the most significant challenges faced was mobilising efforts to ensure that Kenya got a progressive National Land Policy, with its fundamental principles anchored in the Constitution. Beyond being the main consultant on the principles of a national land policy framework for the Njonjo Commission, Prof Okoth-Ogendo was one of the three technical advisors to the National Land Policy formulation process. KLA's contribution to the formulation of the comprehensive National Land Policy endorsed by Parliament as Sessional Paper No. 3 of 2009 follows.

B. KLA and the National Land Policy Formulation Process: 2004-2009

The National Land Policy formulation process commenced in February 2004[35] with the objective of developing an administrative and legal framework that would ensure equitable, efficient and sustainable access to, and use of the land resources in Kenya, through a participatory process. The process was initially anticipated to take one and a half years but was completed five years later in December 2009.[36] Throughout the period, KLA reached out and mobilized civil society to ensure the policy vision "to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity" was reflected in the final document.

Indeed, the National Land Policy provisions aim to reform administration and management of land by providing for devolution of power, computerisation of land records and creation of national spatial data infrastructure. The policy provides a basis for reforming land use planning and land administration and management; improving productive use of land; addressing land tenure issues; reforming institutions responsible for land administration; addressing inequalities in land ownership; redress for historical injustices related to land; and dealing with land issues requiring special intervention -- including the peculiar land issues related to the coast region. The National Land Policy is anchored in the Constitution of Kenya, 2010.

The post-election violence (PEV) witnessed in Kenya in early 2008 underscored the need for urgent implementation of land reforms. The resulting displacement demonstrated the theoretical nature of security of tenure in the absence of effective land policies. The reality that a title document viewed as any piece of paper with the property owner and titleholder living in a tent was a turning point for reform of land administration and management practices.[37]

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35 Republic of Kenya, *Sessional Paper No.3 of 2009 on National Land Policy* (Government Printer: Nairobi, 2009).

36 Republic of Kenya, *Sessional Paper No.3 of 2009 on National Land Policy* (Government Printer: Nairobi, 2009).

37 P Kameri-Mbote, The Land Question in Kenya: Legal and Ethical Dimensions (2009) in EW Gachenga, LG Fraceschi, M Akech and DW Lutz (eds) *Governance: Institutions and the Human Condition*, Strathmore University and Law Africa pp. 219-246

PEV further reinforced the knowledge that for national cohesion to be realized, processes had to be initiated to resolve the land issue, which is a deep social-cultural issue.[38] The National Land Policy captures the manifestations and impacts of the land question, which provided the context for implementing Agenda IV of the 2008 post-election mediation process.[39]

Previously, policymaking was the preserve of the state, with little participation by the citizens, and so KLA's lead position and participation in policy formulation was significant. The land policy issues were grouped into six broad themes, each of which was reviewed and analysed by a thematic group. KLA members were incorporated into the thematic groups, with its nominated representatives holding the position of chairperson and the Ministry of Lands acting as the secretariat. Each thematic group was made up of state officials, academics and representatives of civil society organisations.[40] The civil society representatives in the six groups were: Rural Land Use (Centre for Land Economy and Empowerment of Women (CLEAR)); Environment and Informal Sector (Institute for Law and Environmental Governance (ILEG)); Urban Land Use (Shelter Forum); Land Tenure and Social Cultural Equity (Resource Conflict Institute (Reconcile)); the Legal Framework (Kituo Cha Sheria, Haki Jamii); the Land Information Management System (Pamoja Trust); and the Institutional and Financing Framework for Implementation (KLA Secretariat).

KLA's stewardship, with support from donors, kept up the pressure for land reforms when the policy formulation process began to stall between 2007 and 2008. The National Dialogue and Reconciliation Accord signed in February 2008 and featuring land reform under Agenda IV, created new urgency to finalise the policy.

In 2008, UN-Habitat and the Swedish International Development Agency (Sida), through the Embassy of Sweden in Nairobi, spearheaded discussions on the engagement of civil society organizations (CSOs) – non-state actors in land reforms, which culminated in the formation of a Land Sector Non-State Actors (LSNSA) network in October 2008. The Paris Declaration on Aid Effectiveness (2005), which advocates state, non-state actors and donors working together on the basis of the principles of ownership, alignment, harmonization, results and mutual accountability, provided the impetus for the network.

In Kenya, non-state actors have been active in the land sector since the 1990s, with support primarily from DfID, which had a country strategy on land reform. This support was halted in 2007 following a change in strategy, and KLA was compelled to seek alternative support. The Swedish government, through its Embassy in Nairobi, supported Kenya's poverty reduction efforts as presented in Vision 2030, and in the Kenya Joint Assistance Strategy. It is through this initiative that it complemented ongoing government programmes in the land sector, supported by Development Partners Group in the Land Sector (DPGL). The programme was in line with the Swedish Country Strategy, 2008, for Kenya through its programme on natural resources and the environment sector.

In recognition of KLA's efforts to build a joint platform for concerted action on land reforms, it was selected as the LSNSA secretariat. The LSNSA was a consortium of pro-poor

38 P Kameri-Mbote & Kithure Kindiki, Trouble in Eden: How and Why Unresolved Land Issues Landed "Peaceful Kenya" in Trouble in 2008' (2009) 1 Forum for Development Studies, Oslo, Norway.

39 ibid.

40 Republic of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy* (Government Printer: Nairobi, 2009).

civil society organisations already working in the land sector. Working through the consortium was conceived in an effort to harness technical capacities and expertise among members and the engineer a ripple effect by using networks that were part of the consortium. KLA and the Institution of Surveyors of Kenya (ISK) were lead implementing partners for the network's activities. They worked jointly with eight other network partners, namely; Economic Social Rights Centre (Haki Jamii), Shelter Forum, Pamoja Trust, Kenya Human Rights Commission, Federation of Women Lawyers in Kenya (Fida-Kenya), Groots-Kenya, Legal Advice Centre (Kituo Cha Sheria) and Resource Conflict Institute (Reconcile).

After a lull of two years from April 2007 when stakeholders, through a national symposium, adopted the Draft National Land Policy, the government had taken no steps to have it endorsed as a Sessional Paper. KLA organized meetings for the network partners to forge synergies and provide leadership in the finalisation and implementation of the National Land Policy for comprehensive land sector reforms through the Land Reform Support Programme. KLA was, therefore, a key contributor to Parliament's endorsement of the National Land Policy in 2009.[41]

KLA drew lessons from the setbacks in the formulation of the National Land Policy, realizing early that the final document would not lead to the envisaged land reforms. National and global attempts to derail efforts in favour of working to support local and foreign elite agenda did not take pro-poor land reform agenda into consideration. KLA drew on the support of Prof Okoth-Ogendo and the commitment of pro-poor civil society organisations to ensure the eventual implementation of substantive land reforms for redistributive and transformative change, guided by the land policy framework. Prof Okoth-Ogendo's constant support ended abruptly when he passed on in April 2009 during a ministerial meeting to approve the AU Land Policy Framework and Guidelines as a lead member of the African Task Force of Experts.

We now turn to KLA's role in the process of constitution review that took place at the same period as the National Land Policy formulation, and which resulted in Chapter V of the Constitution of Kenya, 2010.

III. LAND AND THE CONSTITUTION OF KENYA REVIEW PROCESS ('GHAI COMMISSION', 1999-2005 AND THE COMMITTEE OF EXPERTS -- 2008-2010)

From inception, KLA understood the importance of land as a central asset and an emotive issue in the lives of Kenyans requiring debate in the constitutional review process. KLA indeed framed land as a critical element to the economic, social and cultural development of Kenya. This is because land provides a means of livelihood to farmers, traditional herders, fishing communities, hunters and gatherers, miners, loggers and wildlife conservationists. Under KLA's advocacy efforts, land is further considered a cultural inheritance from previous generations and communities that are highly protective of their spatial jurisdictions from intruders. This is in tandem with the argument that land was the primary reason why the fight for independence was waged after the introduction of a formal land tenure regime by the colonial administration in Kenya, which ushered in principles, laws, procedures and

41 Republic of Kenya, The National Land Policy, *Sessional Paper No. 3 of 2009* (Government Printer: Nairobi, 2009).

institutional arrangements that were designed to serve the executive and political class of the day and not the general citizenry. Consequently, KLA pointed out that the land institutions in place were highly bureaucratic, centralized and inaccessible and prone to corruption.[42]

The pertinent land issues KLA advocated that required special attention and which appear in the Constitution of Kenya, 2010, are: providing for a landholding ceiling in respect of private land; redress of historical land claims; and provision of new mechanisms for allocation of public land, coupled with a review of all grants and dispositions of public land. These three pertinent issues, KLA argued, would provide room to transform the agrarian sector in terms of modes of production and regimes of land tenure. KLA's viewpoint on the new constitutional dispensation was that Kenya needed to establish a landholding cap, and focus on redistribution of private and public land, and restitution of unjustly acquired ancestral lands.

This was the narrative KLA required an intellectual of the stature of Prof Okoth-Ogendo, among others, to assist civil society to articulate as necessary constitutional parameters of land reform. The emotive issues that needed to be addressed included: sovereignty over land; land tenure; natural resource tenure; land management; use and administration; and the resolution of land disputes. KLA drew from the wisdom of Prof Okoth-Ogendo to debate the issue of radical title, eminent domain, and police power in regulating land matters. KLA requested Prof Okoth-Ogendo to write a technical paper on the 'Efficacy of Establishing a National Land Commission for Land Administration in Kenya'.[43] Prof Okoth-Ogendo's main argument in this paper was that like many African jurisdictions, the land administration system in Kenya lacked transparent and effective institutions to deal with public land and customary land, the administration of which is perceived to be corrupt, over-centralised and remote from resource users.

Prof Okoth-Ogendo further argued that land administration in Kenya is often considered a part of routine public (Civil Service) administration. For this reason, land administration is rarely regarded as a skill-based or professional function. Consequently, land administration personnel are often sourced from other government departments. Unfortunately, due to the fact that land administration is a means through which land accumulation occurs, its capture and control by state elites in a predominantly land-based economy is the norm rather than the exception in Africa. For this reason, there has been general reluctance to reform, privatize or re-engineer land administration structures and infrastructures.

After extensive public enquiry into a wide range of issues, including the land question, the CKRC also noted that the main weaknesses of the land administration system in the country were: legal overlaps and ambiguity; institutional rivalries; and operational overloads.

Prof Okoth-Ogendo helped KLA to conceptualise the need for the establishment of a new institutional framework for land administration in the country. This was necessary to ensure independence of the new institution from political interference and manipulation by

42 Republic of Kenya, *Report of the Commission of Inquiry into Illegal and/or Irregular Allocations of Public Land* (Government Printer: Nairobi, 2004).

43 Kenya Land Alliance, *Efficacy of Establishing a National Land Commission for Land Administration in Kenya* (Nakuru: KLA, 2005).

entrenching it in the Constitution. Indeed, this is what led KLA to pursue the establishment of the National Land Commission under Article 67 of the Constitution of Kenya as one of the independent commissions under Article 249.[44] KLA's participation in the National Constitutional Conference (2003-2004) highlighted its proposals on land at a time when Prof Okoth-Ogendo was a member of the technical committee focusing on these issues. Equally important, the discourse at the National Constitutional Conference provided fodder for articulation of the principles of National Land Policy.

KLA spearheaded the civil society engagement with Prof Okoth-Ogendo in the constitutional review process at the national delegates conference[45] that ensured the following long outstanding land issues were addressed: any property in land that was to be found to have been unlawfully acquired --Article 40 (6) -- did not enjoy protection under the protection of right to property clause; community land vested in and held under trusteeship was to enjoy equal recognition and protection like private and public land -- Article 61 (2) read together with Article 63(1), all leases exceeding 99 years limited to a period not exceeding 99 years at Article 65 (1), regulation of land use and property to ensure that investments therein benefit local communities and their economies at Article 66(2), public land administration under the presidency taken to the National Land Commission established under Article 67, historical land injustices to be investigated for appropriate redress at Article 67(2)(e), legislation to prescribe minimum and maximum land holding in respect of private land at Article 68(c) (i), recognition and protection of matrimonial property at Article 68 (c)(iii) and review of all grants or dispositions of public land to establish their propriety or legality at Article 68 (c)(v). All these constitutional provisions were not easily accepted and up to the very last moment they needed the solid backing of scholars of Okoth-Ogendo's standing.[46]

Despite arguments by vested interests that the chapter on land, property, environment and natural resources was contentious[47] because it provided for provisions on historical land injustice, which would plunge the country into chaos, the provisions were still adopted. There were also arguments against capping landholding, which was labeled as traditional reform thinking that did not have a place in modern Kenya. Interestingly, the same vested interests opposed the establishment of the National Land Commission.[48] KLA's position, supported by the CKRC and later by the Committee of Experts, carried the day as the country ended up with a chapter on land and environment in the Constitution, as opposed to limited provisions on land. However, despite Article 68 providing for Parliament to create new land laws in addition to revising, consolidating and rationalizing the existing ones in line with the Constitution, the effort has largely failed.[49]

In the absence of Prof Okoth-Ogendo, other legal scholars have tried to support KLA in pointing out contradictions and inconsistencies without much success. Instead, the parliamentary committee on Land and Natural Resources is pushing for the review of the

44 Republic of Kenya, *The Constitution of Kenya* (Government Printer: Nairobi, 2010) 160.
45 CKRC, *Technical Committee Report on Land Chapter* (Government Printer: Nairobi, 2010) 160.
46 CKRC draft reports, 2004, and the Proposed New Constitution (PNC) of 2005.
47 Committee of Experts on Constitutional Review: *Katiba Mpya, Kenya Moja*, 8 January 2010.
48 Committee of Experts Constitutional Review report on the parliamentary retreat in Naivasha of 2010.
49 Ambreena Manji, *Whose Land Is It Anyway: The failure of Land Law Reform in Kenya* (Africa Research Institute: London, 2015).

National Land Policy and amendment of the new laws instead of ensuring the constitutional principles are not negated.[50] Some of the controversial provisions that the National Assembly pushed into the Land Laws (Amendment) Bill, 2015, which was assented to on 31 August 2016 are: provisions that failed to give effect to Article 68 (c) (i), requiring Parliament to enact legislation prescribing minimum and maximum landholding acreage in respect of private land. The other was provision for evictions from land, which contravene Article 40 (4) of the Constitution that recognises and protects occupants in good faith.[51]

IV. KLA AND THE GLOBAL AND REGIONAL LAND POLICY REGULATORY FRAMEWORK PROCESS (2003-2009)

Since 2003, a number of land policy regulatory frameworks have been developed by global, regional and national institutions to standardize land acquisitions generally and specifically to guide land investments. Most of those in Africa were largely influenced by international and regional agencies, starting with the World Bank Land Policy Framework for Growth and Poverty Reduction in 2003.[52] In 2004, the European Union released the Land Policy Guidelines, which were designed to guide land policy reforms in developing countries.[53] In the period 2006 to 2009, the African Union Commission (AUC), in collaboration with the African Development Bank (AfDB) and the United Nations Economic Commission for Africa (UNECA) came up with a Framework and Guidelines on Land Policy in Africa to strengthen land rights, enhance productivity and secure livelihoods.[54] Prof Okoth-Ogendo was a pivotal expert peer group member who contributed a great deal in conceptualizing the centrality of land policy issues in Africa. He was a key facilitator in all regional economic communities' deliberations and greatly influenced the debates and their resolution.

Coincidentally and influenced by these initiatives, between 2004 and 2009, Kenya developed a National Land Policy whose principles are anchored in the 2010 Constitution that established the National Land Commission as a land governance institutional framework.[55] The guidance of Prof Okoth-Ogendo to KLA throughout this period enabled it to articulate land issues that generated a lot of debate about attempts to impose policy guidelines on Kenya's intricate land question. This enabled KLA to advocate against regulatory frameworks that attempted to legitimize land grabbing at the national level and a new land scramble for Africa at the regional level.

The global land policy regulatory framework was marked by fundamental assumptions derived from the 'Western-legal' view, which looks at land rights as anchored on the rules for holding physical things, without consideration of attendant social and political relationships. The 'Western-legal' view further advocates land titling based on hypothetical

50 The Land Laws (Amendment) Bill, 2015 now an Act of Parliament.

51 The Land Laws (Amendment) Act 2016.

52 Klaus Deininger, *Land Policies for Growth and Poverty Reduction* (Washington, DC: World Bank & Oxford University Press, 2003).

53 See, EU Taskforce on Land Tenure, *EU Land Policy Guidelines: Guidelines for support to land policy design and land policy reform processes in developing countries* (EU, 2004). <https://ec.europa.eu/europeaid/sites/devco/files/methodology-eu-land-policy-guidelines-200411_en_2.pdf > accessed 25 February 2017.

54 AUC, ECA, AfDB Consortium, *Framework and Guidelines on Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods* (Addis Ababa, Ethiopia: UNECA, 2010).

55 (Republic of Kenya, National Land Policy 2009 and the Constitution of Kenya 2010).

ideas of Hernando de Soto who, in his book, *"The Mystery of Capital*[56] argues that titling is the solution to formalizing informal rights to property in land. Prof Okoth-Ogendo, on the other hand, argued that despite lack of legal title, community relations to land remained resilient.[57] This position is what guided KLA in articulating with conceptual coherence and clarity the constitutional provisions found in Article 63 of the Constitution of Kenya, 2010, on community land.

A. KLA and the Regional Land Regulatory Framework

The Framework and Guidelines on Land Policy in Africa was led by the Land Policy Initiative (LPI), which was formed in 2006 as a joint effort of the African Union Commission (AUC), United Nations Economic Commission for Africa (UNECA) and the African Development Bank (AfDB). The consortium's aim was to initiate a process for the development of a framework and guidelines for land policy and reforms in Africa, with a view to strengthening land rights, enhancing productivity and securing livelihoods. KLA joined the process through the East African sub-regional effort in which Okoth-Ogendo, among others, was a key facilitator.

The Framework and Guidelines[58] were developed through continent-wide and regional multi-stakeholder consultations, refined by national experts and finalized by the Joint Conference of Ministers of Agriculture, Lands and Livestock in April 2009. Finally, the Assembly of African Heads of State and Government at the African Union Summit in July 2009 endorsed them.[59] Through a declaration, the Framework and Guidelines on Land Policy in Africa were established as a regional reference to guide the land policy process in African countries at the national level. This framework gave impetus to the finalisation of the Kenya National Land Policy document that was endorsed by Parliament on 3 December 2009.

The highlights of the Framework and Guidelines for Land Policy in Africa include: security of tenure for all categories of land rights; review of land laws and regulations to strengthen land rights; enhanced productivity and secure livelihoods; guidance on the process of policy development; the process of implementation; and the tracking of progress. With Prof Okoth-Ogendo at the centre of the crafting of the framework and guidelines and Kenya's National Land Policy, the country's land policy formulation process benefited from an espousal of the same land policy principles and vision from an able land expert.

Indeed Prof Okoth-Ogendo spearheaded the adoption and endorsement of a Framework and Guidelines on Land Policy in Africa by a Joint Conference of African Union Ministers of Agriculture, Land and Livestock before his passing. KLA benefited greatly from Prof Okoth-Ogendo as the chairperson of the taskforce for this continental land policy

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

57 HWO Okoth-Ogendo, 'The Nature of Land Rights under Indigenous Law in Africa' in Claassens, A. & Cousins, B. (eds.), *Land, Power & Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town: UCT Press and Legal Resources Centre, 2008).

58 AUC, ECA, AfDB Consortium, *Framework and Guidelines on Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods* (Addis Ababa, Ethiopia: UNECA, 2010).

59 AUC, ECA, AfDB Consortium, *Framework and Guidelines on Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods* (Addis Ababa, Ethiopia: UNECA, 2010) xii.

initiative as he intervened from time to time to offer expert advice to many governments, including Kenya, and international agencies on land reform. This enabled KLA to contribute both to the national and regional comprehensive policy frameworks and guidelines for land reforms for sustainable livelihoods.[60]

Thus, whereas the reform of land governance in Africa was necessitated by the felt need 'to foster good governance of land, natural resources and processes of land use change',[61] expert advice ensured the documentation of the same for posterity. Prof Okoth-Ogendo ensured this was done to redress the predominantly colonial and post-independence dualist system[62] and the unequal enjoyment of land rights that limited equal opportunities for all land users in Africa because of patronage, nepotism and corruption that characterised many countries on the continent.[63] For the first time, governments from across Africa endorsed key goals and best practices for reforming land governance in the region. Indeed, since his demise in 2009 land reforms across Africa seem to have slowed somewhat.

The Framework and Guidelines on Land Policy in Africa seek to provide a basis for understanding land issues in Africa by putting the land policy development process in context. Additionally, the framework and guidelines discuss the ecological, political, economic, social, cultural and demographic parameters within which the land question must be addressed, as well as examining the upsurge in large-scale land acquisitions as the "new scramble for African land resources".[64] Further, the framework and guidelines discuss the implications of land policy for different sustainable development issues, including agriculture and other economic uses such as mining, energy, tourism and the need to protect ecosystems. Lastly, they focus on guidelines in terms of the process of policy development, the process of implementation, and the tracking of progress. Thus, the framework and guidelines broadly address questions about why and how member states must tackle land policy, and resolve challenges that have been encountered within Africa.

The Framework and Guidelines on Land Policy in Africa came into force at a time of an upsurge in large-scale land acquisitions by foreign and domestic investments in Africa, yet the continent's economic growth depended largely on the way land and land-based resources were regulated, used and managed to ensure that all categories of land users enjoy comparable protection.[65] As a civil society expert, I participated in the process of developing the African Union Land Policy Framework and Guidelines, which contributed to the restructuring of three components of the land system in terms of its property structure, use

60 KLA's Executive Director is acknowledged for his contribution in AUC, ECA, AfDB Consortium, *Framework and Guidelines on Land Policy in Africa: A Framework to Strengthen land Rights, Enhance Productivity and Secure Livelihoods* (Addis Ababa, Ethiopia: UNECA, 2010).

61 AUC et al., *Framework and Guidelines on Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods* (Addis Ababa: UNECA, 2010) 20.

62 The historical overview of the national land governance system in Kenya is a continuity of the colonial dual legal approach. The dualist system secured acquired land rights for settlers, while ignoring African customary property laws under which native communities acquired, used and controlled land (Okoth-Ogendo, Tenants of the Crown 1991).

63 AUC et al., '*Framework and Guidelines on Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods* (Addis Ababa: UNECA, 2010) 20.

64 AUC et al., 2010: 10. 'Framework and Guidelines on Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods', Addis Ababa

65 AUC et al., 2010. 'Framework and Guidelines on Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods, Addis Ababa

and production structure and the provision of the support services' infrastructure. This was with the aim of redressing the weak and poor land governance across the continent that gave the impression that Africa had abundant, unused and under-utilised land available to foreign investors. This is consistent with Alden Wily's[66] argument that the land that was being acquired in Africa belonged *de facto* to rural communities under a customary tenure system. Contrary to the 'wasteland' theory that guided the colonial acquisitions of much of the community land all over Africa as uncultivated and unsettled lands, according to John Locke's 17th century treatise that argued that real property only comes into being through labour.[67] Locke's treatise is flawed in its assumption around there being 'wasteland' available to outsiders' labour across the globe because what may appear available is land used for a varied range of livelihood activities for local communities who use it in season.

V. CONCLUDING REMARKS

In contributing to land reform in Kenya, KLA used Prof Okoth-Ogendo's conceptual schematic to lead civil society efforts. Prof Okoth-Ogendo inspired KLA to explore and address issues about land, poverty and power, especially in making a case for pro-poor access to and control of land as well as its use. KLA's story of land reform in Kenya examined the relationships between land, poverty and livelihoods from Prof Okoth-Ogendo's ontological viewpoint, which perceives land rights as social contracts focusing on the links between those land rights, social processes and the structures of political and economic organization. This is a departure from the Western-legal view, which emphasises land administration systems that are pro-market, freehold individualised land rights, without much regard to social and political relationships around land.

KLA's story of the civil society role in land reforms in Kenya presents empirical evidence that adoption of well-intentioned land reforms without continued intellectual guidance of citizens' struggles is bound to be blocked by ruling elites who have great contempt towards pro-poor land reforms.

Prof Hastings Okoth-Ogendo was a pillar of the land reform movement in Kenya, and while one does not have to agree with everything that he wrote, said, or did, it is indisputable that his guidance was a great service to land and agrarian minds in the country and on the continent. Prof Okoth-Ogendo was a role model on constructive engagement in the land sector for civil society and the academia. His lasting legacy to all of us is his written word on land concepts and deeper insights on the land question.

Upon reflection, it is clear that Prof Okoth-Ogendo played a fundamental and far reaching role through his work on the Kenya National Land Policy, the Constitution of Kenya and the Land Policy Initiative. His indelible footprint in national, regional and international land policy frameworks, which we celebrate and reference today, evidences this.

66 L Alden Wily, 'The Law is to Blame: The Vulnerable Status of Common Property Rights in sub-Saharan Africa' in Development and Change, 42 (3): 733-757. International Institute of Social Studies (Oxford: Blackwell Publishing USA: Malden, 2011).

67 ibid.

CHAPTER 13

DEMYSTIFYING THE POLITICS OF LAND TENURE: OKOTH-OGENDO AND THE CONCEPT OF LAND IN AFRICA

Karuti Kanyinga

I. INTRODUCTION

In 1994, I set out to undertake my doctoral degree studies at Roskilde University, Denmark. The mystery and complexity of Africa's land question was not among the key research problems that nagged me at the time. I was interested in the role of civil society in governance and development. But as I exposed myself to readings, my supervisor, the eminent Africanist, Peter Gibbon, pointed me to the literature on the land question in Africa and the fact that it had both governance and development aspects that Africa was yet to resolve. In the course of general reading on this subject, I unexpectedly bumped into an argument that stuck in my mind. It read: 'the doctrine of ownership of land' is about man-man relations: ownership 'creates and determines power in land-based societies'. The author proceeded to point out that property in land 'consists in value equivalents of the status differentia which a particular category of membership in a production unit carries.' This argument was by HWO Okoth-Ogendo in his writing on 'Some Issues of Theory in the Study of Tenure Relations in African Agriculture' in 1989.[1]

My interest in land continued to grow in the course of my interaction with my supervisor, Peter Gibbon, and senior researcher, Phil Rikes, at the then Centre for Development Research (CDR) in Copenhagen, Denmark.[2] The literature generally urged me to think about land beyond its implications for agricultural production. This was quite clear from my encounter with Prof Okoth-Ogendo's argument in the above article. His observations gave more insights into this dimension of the land question, particularly with the emphasis that land ownership reflects man-man relations in the society. This meant that land is not just the soil on which people grow crops or on which they put up properties. It is a social institution, which defines relations between and among people as individuals and groups. From then on, I continued to undertake more readings on the 'land question' in Africa, with particular reference to Kenya.

1 HWO Okoth-Ogendo, 'Some Issues of Theory in the Study of Tenure Relations in African Agriculture' (1989) 59 (1) Africa 6. He elaborated on this argument further in 1991 in *Tenants of the Crown (*Nairobi: Acts Press, 1991).

2 For the first time since 1924, the Social Democrats lost power to the conservatives in 2001. The conservatives, comprising the right wing faction, dismantled this centre by merging several research institutions in 2002.

Admittedly, my generation of political scientists at the University of Nairobi had limited interactions with positivists at the then Faculty of Law. Many at the Faculty of Law pursued law as a career and, worse, from a positivist perspective. Very few could reflect on the social basis of the discipline. Many at the Faculty of Law concerned themselves with the law as an outcome of certain legal events and did not bother to connect law to the society. A few of us -- young political scientists in our early thirties -- on the other hand, often argued that the boundaries between disciplinary blocs were irrelevant in our quest for societal transformation. We advocated for the forcible dismantling of these boundaries so as to advance academic thinking and scholarship on Africa's development challenges and proffer relevant solutions. From this argument, some of us decided to interact with the discipline of law and legal scholars who did not think about law from a positivist perspective.

My reading of Prof Okoth-Ogendo's piece showed that he was indeed among the few lawyers who were not positivist on matters 'land' or, as I came to find out, on many other issues on state-society relations. Thus, when I came to collect data for my study, I went straight to him for a discussion that did not take place. I bumped into him in the Senior Common Room, the place that lecturers used for serious academic discussions but which over the years has turned into a pub with little, if any, serious interdisciplinary debates. I requested an appointment to 'discuss my proposal on the land question in Kenya'. As was usual with Prof Okoth-Ogendo, his reply was: 'What about land? And what do you mean by land?' I will not reveal what I mumbled. But he simply directed me to the library at the Faculty of Law and specifically to a brown 'box' containing his writings on property rights, land, and land law. The writings broadened my thoughts on the politics of land.[3] It was not long before I met Prof Okoth-Ogendo at the 'Palacina Place'.[4] I went straight to him and said: 'Prof! In your writings, you have not answered the question on why the land question remains 'unanswered today'. He took that as a good challenge – and I enjoyed it. From then on, I continued to read more of his works, particularly because he was seeing land beyond law and agricultural productivity. I must concede, however, that while on matters land Prof Okoth-Ogendo did not adopt a positivist interpretation, in matters politics, he leaned to the centre of the right in a cautious manner. He was not part of the lawyers who connected law to the society and the politics of deconstructing the authoritarian Moi state.[5] This is a subject for another essay all together.

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3 This box contained articles such as HWO Okoth-Ogendo, 'African Land Tenure Reform' in J Heyer, J Maitha and W Senga (eds)., *Agricultural Development in Kenya* (Nairobi: Oxford University Press, 1976); HWO Okoth-Ogendo, 'Imposition of Property Law in Kenya' in B Harrell-Bond and S. Burman (eds), *The Imposition of Law* (New York: Academic Press, 1979); HWO Okoth-Ogendo, 'The Legal Organisation of Colonial Agriculture, 1900-1960: An Essay in the History of Dependence, Autonomy and Co-optation' (1976), Staff Seminar Paper No. 18, University of Nairobi; HWO Okoth-Ogendo, 'Land Ownership and Land Distribution in Kenya's Large Farm Areas' in T Killick (ed) *Papers on the Kenyan Economy: Performance, Problems and Policies* (London: Heinemann, 1979); HWO Okoth-Ogendo, 'The Perils of Land Reform: The case of Kenya' in J Arntzen, L Ngcongco, and S Turner (eds), *Land Policy and Agriculture in Eastern and Southern Africa* (Tokyo: United Nations University, 1986); HWO Okoth-Ogendo, 'Some Issues of Theory in the Study of Tenure Relations in African Agriculture' (1989) 59 (1) *Africa* 6.

4 A restaurant off Denis Pritt Road in Nairobi where influential elites would stop, especially after work on Fridays.

5 Kivutha Kibwana, Ooki Ooko-Ombaka, Smokin Wanjala, Chris Mulei, and Okech Owiti were some of the non-positivists who linked law to other disciplines and the society. In academic discussions, Okoth-Ogendo remained non-positivist but leaned to the right when it came to matters politics.

This chapter examines Prof Okoth-Ogendo's contributions to the debate on Africa's land question and specifically the politics of land tenure in Kenya and Africa in general. The discussion shows how Prof Okoth-Ogendo re-oriented studies on land towards a dimension that Western European studies had ignored: the political economy of land. Prof Okoth-Ogendo opened the debate to a new dimension that continues to influence studies on the land question in a manner that was rare at the time of his writing.

The first part of the chapter discusses the problem of the land question and the failure of past studies to fully understand its complexity. The second part of the chapter discusses the politics of tenure security and why policies fail to address it. The last part of the chapter shows how evolution of land tenure has influenced the major political developments in Kenya. The discussion generally notes that policies fail to resolve the land question because they view land as an economic resource yet land ownership in agrarian societies is equivalent to distribution of political power.

II. THE THEORY OF THE LAND QUESTION IN AFRICA

The challenges of land tenure and particularly the issue of access to and control of land rights remains an issue of concern throughout much of agrarian Africa. These are important issues in the economic, social and political organisation of agrarian societies such as Kenya and much of Africa throughout history. The significance of these issues continues to grow even today because of demographic, political, and social-economic changes. Thus land, and specifically property rights in land, is now relevant to not only agricultural productivity but also to other spheres of society. Land is strictly the basis upon which political power is built and, therefore, as Okoth-Ogendo argued in several of his writings, property rights are about social and political relations in the society.[6] This means then that property in land is a social institution. It defines relations between individuals and even between communities. At the same time, as argued by many scholars on this subject, it confers certain rights, powers, and privileges to groups that have effective access and control rights over land.[7] Similarly, ownership of land itself is the means by which state rule takes shape at the base of the society.[8]

The issue of ownership of land brings to the fore an important dimension of what constitutes land tenure, a subject which takes a central place in Prof Okoth-Ogendo's writings since the 1970s.[9] Land tenure is about relationships among people with respect to land. It is rules and regulations that regulate people's behaviour and interaction with usage of land. This means that 'tenure' is an institution; it constitutes rules defining property rights to land and how these are allocated; access granted; how use is controlled; and how transfer

6 See in particular, HWO Okoth-Ogendo, 'Land Ownership and Land Distribution in Kenya's Large Farm Areas' in T Killick (ed), *Papers on the Kenyan Economy: Performance, Problems and Policies* (London: Heinemann, 1981); and HWO Okoth-Ogendo, *Tenants of the Crown* (Nairobi: ACTS Press, 1991).

7 S Berry, *No Condition is Permanent: The Social dynamics of agrarian change in sub-Sahara Africa* (Madison: University of Wisconsin Press, 1993).

8 M Neocosmos, 'Homogeneity and Differences on Swazi Land' in M Neocosmos (ed), Social Relations in Rural Swaziland: critical analyses (SSRU: UNISWA, 1987) 105-116.

9 The most influential in this regard is HWO Okoth-Ogendo, 'African Land Tenure Reform' in J Heyer, J Maitha and W Senga (eds)., *Agricultural Development in Kenya* (Nairobi: Oxford University Press, 1976).

is restricted, and so on. These rules define who can use land, how, how long, and under what conditions. Tenure rules limit control and transfer of land and set restrictions or conditions under which people can use the land.[10] This means that land is significant in social relations; it is embedded in a dynamic and a broad political and social economic context. It has a bearing on patterns of social relations in the society.

Prof Okoth-Ogendo[11] was among the first group of scholars to argue that land meant more than the soil on which property is imposed and anchored. To him, the meaning of land stretched beyond this and concerned broader organisation of economics and politics in agrarian societies. He observed that the systems of land tenure are not just sets of rules concerning rights in land but also involved allocation of power in agrarian societies. For this reason, issues of land touched on virtually all structures of the society and did not concern only agricultural production. This would mean that the nature of property rights in land is the central basis upon which political power is built because property rights are about social and political relations in the society. This way, Prof Okoth-Ogendo persuaded those interested in finding solutions to the land question to think beyond land as a 'physical and social asset'. Prof Okoth-Ogendo, among others such as Mafeje and Sara Berry, persuaded studies to anchor analysis of land issues on the broader socio-economic and political contexts arguing that land is about social relations.[12]

This thinking is persuasive on two important counts. The significance of land as a source of political power, more than its basis for economic productivity, has meant continued resurgence of land conflicts everywhere in Africa. It accounts for resurgence of the land question in the social and political discourses of many countries in Africa today. Secondly, this suggests that the structure of land ownership is equivalent to the structure of political power in these societies. It is for this reason that issues of land rights remain high on the agenda of political discourses all over Africa. Furthermore, it is for this reason that land topped the agenda of discussions in the decolonisation struggle throughout the 1950s and 1960s in Africa.[13] The focus at the time was on the radically skewed ownership of land because this structure of ownership, especially in the British colonies where colonial settler economy prevailed, was coterminous with skewed distribution of power in favour of the landed minorities who included the colonial administration and loyalists. They reproduced their power through the state. The structure of land ownership in the post-colonial period in agrarian Africa continues to reflect this anomaly in the distribution of political power. Kenya, Zimbabwe and South Africa remain important examples of this form of inequality in post-colonial Africa. The amount of land that people own largely reflects how much political

10 See, AUC-ECA-AfDB Consortium, Framework and Guidelines on Land Policy in Africa (UNECA: Addis Ababa, 2010).

11 See, Okoth-Ogendo, 'African Land Tenure Reform' (n 3); Okoth-Ogendo, 'Some Issues of Theory' (n 1).

12 A Mafeje, 'Agrarian Revolution and the Land Question in Buganda' in A Arens (ed), *A Century of Change in Eastern Africa* (The Hague: Mouton Publishers, 1976); S Berry, *No Condition is Permanent: The Social dynamics of agrarian change in sub-Sahara Africa* (Madison: University of Wisconsin Press, 1993).

13 WO Maloba, *Mau Mau and Kenya: An Analysis of a Peasant Revolt* (Bloomington: Indiana University Press, 1998); M Mamdani, 'The Agrarian Question and the Democratic Struggle (With Specific Reference to Uganda)' (1986) 2 (1) in Eastern Africa Social Science Research Review26; M Mamdani, 'Peasants and Democracy in Africa' (1987) New Left Review 37.

power is in their hands. The landed minorities are in control of both the economic structures and the political institutions. The landless majority is also powerless in this respect.

This thinking is also responsible for different types of reforms that are somehow opposed to each other: the radical and the liberal. Radical land reforms focus on redistribution as an integral strategy to weaken and destroy the landed elites and their organic relationship with state power. These types of reforms generally originate from social upheavals or revolutions and have the object of transforming relations of production and the nature of state power itself. They generally seek to eliminate socio-economic and political differentiations in the society. Arguably, this kind of transformation is only possible where the landed minority and their counterparts at the centre of state power are weakened or forced to acquiesce to demands of the landless majority particularly if the landless majority overwhelm them with demands for a new constitutional order. Historically, these instances have been rare.

On the other hand is the liberal type of reforms whose main focus is on land titling based on the argument that this would foster economic growth through enhanced capitalist relations. This type of reform is pursued in opposition to the redistribution reform on argument that redistribution is inimical to growth or that redistribution is an impediment to national economic growth. Liberal reforms, therefore, have the aim of modernising 'inequalities in land ownership' and often result in enhancing differentiations between the landed and the landless groups in the society. Liberal reforms, viewed this way, moralise inequalities and prefabricate the status quo. They blind the society of the urgent need to restructure land ownership and prevent everyone from paying attention to the political dimensions of land ownership. When pursued, liberal reforms leave power relations intact; they do not offend political power because they ride on it to give the titles to those who hold land.[14]

The liberal ideology has dominated land reforms throughout Africa, including Kenya, in spite of its inability to appreciate that land is more than a physical asset.[15] Because of this, land reform in Africa has come to mean freehold tenure rather than redistribution from the rich to the landless. On this account, land reforms have taken place without reform of state power on which land ownership is anchored. The import of this is that land reforms are taking place without the democratisation of property relations yet, as argued above, land ownership and control of political power are organically related.

Societies are oblivious of these relationships between political power and land ownership. Because of this, many countries pursue land reforms only to entrench the institution of private ownership in the constitutions and to mesh it with other institutions of property rights. This is in spite of the fact that land ownership carries multiple meanings in the African agrarian context. These countries do not pursue land reform to alter distribution of political power. All the same, these two positions offer the foundation for the main theoretical discourses historically used to formulate the land question.

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14 See for instance, M Neocosmos, 'The Agrarian Question in Southern Africa' and 'Accumulation from Below: Economics and Politics in the Struggle for Democracy' (1993), Research Report No. 93 Uppsala, Nordic African Institute.

15 HWO Okoth-Ogendo, 'The Perils of Land Reform: The Case of Kenya' in J Arntzen, L Ngcngco, and S Turner (eds), *Land Policy and Agriculture in Eastern and Southern Africa* (Tokyo: United Nations University, 1986).

The liberal theoretical thinking focuses on land tenure systems and property rights. The main argument here is that indigenous land tenure systems are a constraint to agricultural productivity and economic development in general. The argument gives import to individual private property rights and critiques the communal or customary rights as an impediment to production. It tends to tie poor growth to customary land tenure, arguing that the indigenous tenure system is static and incapable of accommodating modern methods of agricultural production. This is an argument that even the World Bank often reinforced in the 1970s and had influence from Hardin's 'Tragedy of the Commons'.[16] The argument was emphatic that fully developed property rights had an effect on resource allocation and capital accumulation because such rights would reduce uncertainties in land ownership. This would in turn lead to land being increasingly used as collateral for credit to invest in land and improve agricultural production. A perfect market for land would evolve and occasion transfers to more dynamic farmers from the less efficient ones.

From the mid-1980s, there was evidence that land titling did not have a strong effect on productivity. This evidence came from studies by the World Bank itself.[17] Land productivity did not have any strong relationship with land privatisation. Further, not all title-holders use their land holding as collateral for loans in banks.[18] Secondly, it was observed that transformation of tenure itself created insecurity for the politically and economically weak groups. The ensuing conflicts over individualisation tended to disadvantage the weak groups because they are displaced or fail to get all their considerations. Furthermore, individualisation does not entail extinction of all land rights. A title cannot exhaust all the tenure arrangements; a title in the agrarian context does not mean exclusive control over land. Okoth-Ogendo[19] indeed brought evidence to bear on the argument that changes in rules of land tenure tended to promote multiplication of claims over ownership. There was a clash over ownership between new and emerging rights and those already enjoying customary tenure. Furthermore, the ensuing changes tended to reduce security in tenure and also aroused new forms of inequalities in land ownership – and therefore new forms of political inequalities.

The second theoretical discourse concerns the relationship between the agrarian question and democracy. The concern here is on historical processes through which capitalist social relations of production are established in the agricultural sector and their role in economic development as well as transformation of the society. Much of the literature here focuses on the Leninist tradition. It is about the need for radical reforms and/or revolution to promote agrarian development and democratic revolution.[20] The Leninist argument was developed where inequalities in land ownership were based on the survival of semi-feudal

16 See, World Bank, *Land Reform.* World Bank Development Series (World Bank: Washington, D.C., 1974); P Dorner, *Land Reform and Economic Development* (Harmondsworth, England: Penguin, 1972); P Harrison, *The Greening of Africa* (London: Paladin Grafton Books, 1987).

17 S Migot-Adholla; Peter B Hazell; B Benoît & Frank Place, 'Indigenous land rights systems in Sub-Saharan Africa, A constraint on productivity?' in Hoff, K.; A. Braverman & J. Stiglitz (eds) *The Economics of Rural Organization*, (Oxford: Oxford University Press/World Bank, 1993) 269-91.

18 S Migot-Adholla & John Bruce, 'Are indigenous African tenure systems insecure?' in Bruce, J.W. & S.E. Migot-Adholla (eds), *Searching for Land Tenure Security in Africa* (Dubuque: Kendall/Hunt Publishers, 1994) 1-14.

19 Okoth-Ogendo, 'African Land Tenure Reform' (n 3).

20 Neocosmos (n 14).

production relations and where inequalities were created by a history of land grabbing by the nobility. Studies here emphasise that transformation can only occur either through a change of a class of pre-capitalist landed property into agrarian capital or through an overthrow of the landed capitalist class. This would be followed by subsequent distribution of land to the peasantry.

The Leninist theory appreciates that land ownership is linked to the structure of political power and therefore proposes radical land redistribution as a means of addressing inequalities in political power in non-democratic agrarian societies. The discourse equates addressing inequalities in land ownership to forms of democratisation. It argues that the democratic question arising from the agrarian inequalities can be resolved in two ways, both of which are democratic. These are the bourgeoisie route from above, and the popular route from below.

The bourgeoisie approach is equated with revolution from above. It is seen as leading to the modification of the landlord economy. Landlords lose their rights to social domination of the landless and it alters extra-economic coercion that characterised relations in land between the landlord and their subjects. Nonetheless, this development does not alter the economic and political conditions of the landless. It is in the interests of the landlord. By giving them a role in controlling the process, this approach saves the basis of the rule by landlords and therefore leaves behind some traces of their regime. This is therefore a less democratic form of social-economic and political change.

The approach from below, or the popular route, is carried out in the interests of the peasants. It results in abolishing all the glaring inequalities in land concentration because it leads to radical redistribution to the landless. It wipes away any traces of a feudal regime. It leads to a break with the past and peasants begin developing on their own. They take a capitalist path to development without any landlord economy. With access to land on their own, they begin competing among themselves. This revolution also entails leadership by popular groups with the objective of consolidating democracy to protect their own rights and to abolish the rights of the landlords and all forms of extra-economic coercion on which landlords thrive.

The Africanists in this Leninist tradition interpret the land question within the framework of the state acting as the landlord.[21] They claim that the state is the landlord and is the agency that exercises extra-economic coercion, which takes the form of political repression -- including on matters to do with control of land rights. They concede that the agrarian question on which the land question is appended has roots in the oppressive conditions and can only be resolved by confronting the power of the landlord, in this case the state, from below through popular groups.[22] In their view, the prevailing form of the state in Africa has roots in the agrarian question. Any analysis of the land question must be linked to the political conditions on which many live. They underline the fact that the state as the main landlord in the agrarian fields restricts access to land and permits only those organically related to the ruling elites. On account of this, the state inhibits political development because it politically regulates conditions of access to land and therefore those of agrarian accumulation.

21 M Mamdani, 'Peasants and Democracy in Africa' (1987) New Left Review 37.

22 See details especially in Neocosmos (n 14); and M Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996) 87.

III. OKOTH-OGENDO ON THE POLITICS OF LAND TENURE IN KENYA

Prof Okoth-Ogendo's main entry point in this theoretical debate on the land question was through his interpretation of land and in particular his argument that land in Africa is not necessarily a physical asset. As noted above, he insisted that land meant more than 'soil' because it encompassed economic and political relations. These relations shaped the organisation of the society and determined how groups related with one another. This thinking has in turn influenced perspectives on land rights in Africa in many ways. To Prof Okoth-Ogendo, the land question in Kenya has roots in the colonial situation when the colonial administration changed the rules upon which various communities held, controlled or even administered access to land rights. The rules for accessing, controlling and transferring land radically changed with the entry of the colonial administration. The change also affected relations between and among people because land encompassed many dynamics that changed with the entry of a new agency, the state, and disruption of the way people held land.

Prof Okoth-Ogendo observes that the land question stemmed from three inter-related processes. Each of these created a new set of land problems that interlinked with each other, thereby making the land question in Kenya a complex phenomenon. The discussion addresses these shortly but an overview of the pre-colonial situation that these developments interrupted is worth revealing.

Pre-colonial Kenya comprised different land tenure systems. The rules for holding and regulating land rights varied from one community to another. Factors such as demography, climatic conditions, and socio-political organisation of a particular community determined the nature of land tenure obtaining in a particular community. The tenure regimes obtaining at the time were also predicated on the abundance of the amount of land available in the frontiers and the absence of population pressure in any given community.[23] A common feature of these regimes of tenure was kinship or the political authority for regulating access to land controlled conditions under which land was held. Access rights were also open to each and every member of a social group and were equitably distributed on the basis of individual needs and responsibilities to members of a social formation that was in control of a particular territory.

Land tenure, as already argued, denotes relationships among people with respect to land. It is an institution; it has rules for regulating access and behaviour. Because different social formations have different internal interests, every tenure, as an institution, has overriding, overlapping and even complementary interests. In some instances one can even find competing interests. Prof Okoth-Ogendo enhanced this discussion way back in 1976 when he pointed out that a piece of land carried with it multiple rights for different uses and by different people when he pointed out that all evolving relations to land were predicated on functions such that several people could hold different rights to land for different purposes. Indeed, this is the most important contribution to studies on land at the time. He specifically noted that:

> a village could claim grazing rights over a parcel of land subject to the hunting rights of another, transit rights of a third and the cultivation rights of a fourth.

23 Okoth-Ogendo (n 3).

> Each one of these categories carried with it varying degrees of control exercised at different levels of the social organisation. For example, while cultivation rights were generally allocated and controlled at the extended family level, grazing rights were a matter of concern for a much wider segment of the society.[24]

This view points to complementarity of land rights in the customary regime. This on its own helped in maintaining stability and social order in the society. The customary tenure played another important role. Okoth-Ogendo[25] observed that this arrangement enforced equitable distribution of rights to land. He noted that:

> the *raison d'etre* of control was to guarantee these rights and to ensure their equitable distribution among all members of the community. This control, although exercised by family, clan, or in some cases territorial sovereigns, did not ... entail (*de jure*) ownership ...[26]

Additionally, it is often pointed out that customary tenure provided insurance against landlessness and was a guarantee for equitable rights of access. The manner in which land was held and used enabled all members of the respective society to have access rights but not rights to alienate or transfer rights to outsiders or 'strangers'. Absolute rights of proprietorship and transfer were vested, not in a single person, but in a 'collective authority'. This acted as a check and balance to the internal process of land appropriation and alienation among the members of that particular social formation. Such a check and balance to the processes of access to land laid the foundations for internal social stability that most groups found themselves in. As argued by Berry in regard to most pre-colonial African societies, such a security of tenure was linked to the overall security of social and political life.[27]

This is not to suggest that customary land tenure did not provide for individual rights. Individuals could have their rights but these were secondary to communal rights. Prof Okoth-Ogendo indeed argued that in many communities in Kenya, initial rights to land were established by first occupation and continued investment of labour in bush clearing and cultivation.[28] For instance, among the Meru of Kenya, land obtained through first settlement became the property of the pioneer occupier (individual or clan) who/which then assumed rights of control over it. Such rights were analogous to individual title (of the pioneer and the descendants) and assumed a communal form of ownership only after the death of the 'pioneer' occupier. The land holding, though initially the 'individual property' of the pioneer, subsequently became a common property of his descendants. Even if an individual owner left land acquired through first settlement idle, no other individual would cultivate it without the permission of the pioneer cultivators. The council of elders (*njuri*

24 ibid. 53.

25 Okoth-Ogendo, *Tenants of the Crown* (n 6).

26 ibid. 11.

27 S Berry, *No Condition is Permanent* (n 12) 105.

28 It is a matter of debate whether one could establish such rights through redeemable purchases from a group that did not have exceedingly high pressure on land. Although Sorrenson observes that the Kikuyu in Kiambu purchased and obtained irredeemable ownership rights from the Dorobo by exchanging stocks with them, this remained a subject of controversy throughout the colonial period. See, MPG Sorrenson, *Land Reform in the Kikuyu Country: A Case in Government Policy* (Nairobi: Oxford University Press, 1967).

ncheke) would come in and summon the clans to arbitrate in case of any dispute.[29]This is to suggest that the ideology about land in the 'customary tenure system' in Kenya underlines the system as having had both elements of individual usufructuary and appropriation rights coexisting with different forms of communal ownership and control of land. How these tenure arrangements were mediated provided the bases of not only tenure security but also social security and political stability of the various African communities. The colonial situation, however, restructured this system of tenure and introduced a complex land question. Prof Okoth-Ogendo's arguments on the evolution of the land question from the colonial to the post-colonial period are the issue discussed below.

IV. OKOTH-OGENDO AND THE EVOLUTION OF THE LAND QUESTION IN KENYA BEFORE INDEPENDENCE

A. The First Question: The Arabs on Mwambao Strip and Evictions by Colonial Government

Prof Okoth-Ogendo[30] points out that the ascent of land to pre-eminence in the political processes -- and the creation of a people without rights to land -- the squatters -- coincided with the integration of Kenya into the British colonial empire and subsequent establishment of a capitalist development economy. This is the basis upon which the first land problem arose. But the development of the land problem did not take place in a uniform manner throughout the country. There were significant differences on how this evolved. First, at the coast, the influence of the Sultan of Zanzibar prevented the British for penetrating into the interior and especially into Uganda, which they wanted to reach for economic purposes. The Germans had their challenges in the region, too. Both entered into an agreement to defeat the interests of the Sultan by delimiting his geographical and political authority in a manner that would allow them into the interior. They created *Mwambao*, a ten-mile strip of coastal land, for the Sultan. This cleared the way for the British into the interior.[31]

The creation of *Mwambao* meant that the Sultan had control of land rights therein. The possession of the Sultan's subjects, however, amounted to individual title under Islamic law. They were recognised as such by those Islamic laws and Arabs' customary practice.[32] This applied, therefore, only to Arabs and those who had converted to the Muslim faith. A majority of the Mijikenda indigenous groups were excluded from land rights from the outset as the Sultan's authority over Mwambao was consolidated. This thus constituted the first land question in the country: exclusion of the Mijikenda groups from the land rights along the Mwambao strip.

In tandem with this exclusion, a second land question emerged in the interior: eviction and exclusion of more Africans through expropriation of land to give room to the colo-

29 K Kanyinga, 'The land question in Kenya: Struggles, accumulation and changing politics. (Unpublished PhD dissertation, Roskilde University, 1998).

30 See, Okoth-Ogendo (n 3) (n 1) (n 6) above.

31 YP Ghai and JWB McAuslan, *Public Law and Political Change in Kenya* (Nairobi: Oxford University Press, 1970).

32 Okoth-Ogendo n 6).

nial settlers. Prof Okoth-Ogendo[33] argues that the administration had to look for various legal devices to expropriate the upcountry land. They had to use the Indian Land Acquisition Act of 1894. Through use of administrative and quasi-legislative devices, the administration set the stage for the imposition of laws and institutions that had fundamental consequences for the later structure of the land question.[34] The administration expropriated land on which communities had settled or laid territorial claims to. The expropriation extinguished their claims and led to the imposition of the 'Crown' as the new owner. Again, the legal devices used here facilitated the perception that much of the land was not owned because it was not occupied. To the administration, all the land that was not occupied reverted to the British Crown and any one coming to occupy it later would be a '*Tenant of the Crown*', a fact embedded in law under the Crown Lands Ordinance, 1915. The settlers were indeed given the land at very attractive conditions: 999-year leases.

It is evident that land was an instrument of the conquest of Kenya from the early days of the Arab control of the coastal region, and later the establishment of the colonial state. Both the Arabs and the British established their presence in Kenya by alienating Africans from their land and establishing the institution of property rights in a manner that neglected the rights of the African groups. This formed the basis of the first forms of inequalities in land ownership and, relatedly, inequalities in access to and control of political power. Land became the instrument of control and the basis for accumulation of political power. This disenfranchised the indigenous Africans and laid the basis for disaffection.

B. The Second Question: Eviction of Africans and Creation of Native Reserves

The second problem arose out of the process that followed creation of space for the settlers. The colonial administration had to evict Africans and put them in native reserves to please the settlers and to particularly create a distance between them and Africans. The administration did this because the settlers were initially unhappy with a number of regulations. Prof Okoth-Ogendo indeed remarks that one of the settlers was so unhappy with the regulations that he termed them 'idiotic land laws that were ever seen and that no man in his right senses would ever think of taking up land on such conditions'.[35]

New legal devices were sought to please the settlers. The Crown Lands Ordinance of 1915 was utilised to pronounce as 'waste and unoccupied' land in the British Protectorate. The 1915 Ordinance redefined Crown Lands to include land occupied by the natives and all that had been 'reserved' by the governor for their use. It created the reserves for 'natives' and located them away from areas scheduled for European settlement. The Ordinances took away all the subjects' rights and vested them in the Crown. The result was that occupants became tenants at the pleasure of the Crown in the land they actually occupied or as Okoth-Ogendo[36] puts it, the occupants became '*Tenants of the Crown*'.

33 ibid.

34 ibid.

35 Quoted in Okoth-Ogendo (n 3)154) Sorrenson provides details of the settlers' reaction to the regulations, see MPG Sorrenson, *Origin of European Settlement in Kenya* (Nairobi: Oxford University Press, 1968).

36 Okoth-Ogendo (n 6).

The state also located the reserves in areas deemed unsuitable for settlers, drew their boundaries along ethnic lines and ensured that subjects, by law, could not reside in any reserve other than the one allocated to their ethnic groups. This redefinition of land provided room for accumulation of more land for settlers and further expansion of settler interests territories traditionally identified with different ethnic groups. The creation of reserves set the stage for sharpening of ethnic identities. A clear process, which linked both 'ethnicisation' and 'politicisation' of the mechanisms for control of land began during the period. This laid the basis of inequalities in land ownership (exemplified by how much land the settlers acquired; and politicisation of access to land, again exemplified by how the settlers manipulated the colonial state and use of state power to get land they deemed important and specifically potential in terms of commercial value).

C. The Third Question: Imposition of Private Rights through Land Tenure Reform

Expropriation of land for settlers meant limited frontiers for African communities. They were also put in native reserves, which proved unviable because of high population pressure and poor productivity. Thus, contradictions in the colonial settler economy and the mode of state domination eventually engendered reform of land tenure. The administration neglected African agriculture in favour of the settlers'. This gradually resulted in political unrest and an economic crisis, both of which could only be addressed by paying attention to the Africans' demands for more suitable land and for greater integration as producers in the expanding cash economy. The government decided to introduce a reform programme in 1954 to arrest both the political and economic crisis. Much of this was arising from land alienation, creation of native reserves, and imposition of laws to govern agricultural development and specifically to promote the settler agricultural economy.

Establishment of native reserves had an additional profound consequence. The reserves 'eroded the virtues of customary structure of access to land, for in the reserves individual families rather than clan or kinship evolved as an important medium of acquiring land'.[37] Relatedly, boundaries designed for the reserves made it impossible for people to acquire land rights elsewhere because they 'halted migrations into frontier lands thereby piling pressure onto the land carrying capacity which the African customary tenure practice of out-migration easily addressed whenever there was a population increase or shortage of land'.[38]

Concerns over surplus population and the need to increase production (provided none of these measures reduced the steady supply of labour to the settler farms) finally resulted in the establishment of settlement schemes. But these were not successful at all. Many of the schemes had to be abandoned fairly early:

> nearly all of them were highly unsuitable for human occupation, being riddled, for example with dangerous game, tsetse fly ... Little attempt was made to render such land habitable prior to the settlement of human populations. Many of the original settlers moved out soon after being brought there, while others were eject-

37 Okoth-Ogendo (n 3); S Migot-Adhola & Bruce (n 18).

38 Okoth-Ogendo (n 3).

> ed, allegedly for failure to comply with the rules of proper management ... Little attempt was also made to deal with any claim to land earmarked for settlement that neighbouring residents might have had before people were moved into them.[39]

The re-settlement schemes failed to address problems of access to land. They were not a solution to the congestion in the reserves and the declining land carrying capacity both of which were central to the growing unrest. The unrest grew rapidly and resulted in the consolidation of the Mau Mau uprising and the peasant resistance against the colonial rule. The uprising centred on the land question as the main demand and grew rapidly, gaining a violent character against the colonial settlers. Ironically, the Mau became a stimulant to thinking on land tenure reform in the native reserves because the administration wanted a reform programme that would keep Africans very busy on their holdings in order to prevent them from participating in the Mau Mau resistance movement.

This resulted in the colonial agricultural officer, one Mr Swynnerton, developing a *Plan to Intensify the Development of African Agriculture in Kenya.* The plan proceeded to point out that the reform required for such development was one that would provide the African farmer with security of tenure through indefeasible title so as to encourage him to invest his labour and profits into the development of his farm.[40]

The reforms did not solve the land question. The Swynnerton Plan of 1954 did not attempt to address the issue of land alienation, the need for redistribution or those of inequalities in ownership between the settlers and Africans, and inequalities between and within the various African communities. Where the plan applied in central Kenya, it created more problems by extinguishing rights of families and clans. It created more familial and clan conflicts, which were not much evident under the customary tenure. Moreover, some of those arrested for participating in Mau Mau lost their land to loyalists and others who claimed their rights while they were in detention.

D. The Fourth Question: Land as a Political Instrument

The various land questions were not resolved at independence. At the time of transition to *uhuru (Independence)*, the land question directly influenced the debate on the constitutional and economic arrangements that Kenya would assume. On the one hand, the constitutional debate revolved around whether Kenya should adopt a unitary or federal form of government. On the other hand, the economic one centred on issues of whether markets or political processes should determine allocation of basic resources. Central to these issues was the question of the status of colonial settlers and what was to become of landed property on the coast and other parts of the country.[41]

Contestations over some of these issues ensued between, basically, two groups founded largely along ethnic identities rather than political ideology. Two main political parties

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39 ibid 160.

40 RJM Swynnerton, 'A plan to intensify the development of African agriculturein Kenya' (Nairobi: Department of Agriculture, Government Printer, 1954) 9.

41 R Bates, *Beyond the Miracle of the Market: The Political Economy of Agrarian Development in Kenya* (Cambridge: Cambridge University Press, 1989); JW Harbeson, *Nation Building in Kenya: The Role of Land Reform* (Evanston: North-Western European Press, 1973).

also formed along these lines. The first, the Kenya African National Union, comprised an alliance of numerically large groups -- the Kikuyu and the Luo whose bonds of solidarity had antecedents in the colonial labour economy. The second, Kenya African Democratic Union, comprised smaller communities notably the Kalenjin, Maasai and related Turkana and Samburu pastoralists group (Kamatusa) and other smaller groups such as the Mijikenda whose fear of domination by the larger groups brought them together.

Divisions around the land issue became the foundation for different projects of 'national independence'. On the one hand, KANU preferred a unitary form of government and a stay on further land reforms until political independence was obtained and pending the release of Jomo Kenyatta -- their leader -- from detention. On the other hand, KADU, because of the fear of domination by the Kikuyu and the Luo, preferred a federal system of government *(Majimbo)* with regional assemblies whose most significant duty would be administration of land matters.[42]

Internally, both parties were also deeply divided over the land reforms. In KANU, a radical faction rooted in a nationalist position on land championed *nyakua* (Kiswahili for seizure -- referring to wholesale seizure of expropriated land) in the White Highlands to settle the landless and squatters who had lived in the Rift Valley for decades. To them, the resettlement schemes did not make sense since squatters and other landless were required to pay deposits and acquire loans to buy the farms. Opposed to the radical wing were groups of liberals and proto-capitalists who sought to promote a free market in land -- from a liberal viewpoint to promote more rapid economic growth and from the proto-capitalist one to provide a basis for greater security for accumulation. Those in the radical wing included Oginga Odinga (a Luo), who later became the country's Vice President, and Bildad Kaggia (a Kikuyu), among others.

The country attained *uhuru* (independence) in 1963 without a resolution of the land question although national level disputes had subsided. The divisions between KANU and KADU were resolved by the evolution of contradictions internal to each of the parties and especially those, which revolved around the settlement schemes and the land purchase programme in the White Highlands. All the same, after KANU won the elections, the liberals triumphed and began to privilege privatisation of land rights.

The triumph of the liberals and the defeat of the radicals through instrumentalisation of the land question is one subject that Prof Okoth-Ogendo did not write much about. It is indeed difficult to find radical thoughts in his arguments. Liberal views also are not dominant in his writings. He cautiously straddles the two divides. And, indeed, this reflected in him as a person: he was cautious to be neither of the two.

The sections that follow, therefore, discuss the development of the land question in the post-colonial period with insights by Prof Okoth-Ogendo. The sections are drafted on the basis of the framework that land is central to the organisation of economies and politics in any agrarian formation.

42 ibid.

V. OKOTH-OGENDO AND THE EVOLUTION OF THE LAND QUESTION IN KENYA AFTER INDEPENDENCE

A. The Kenyatta Regime and the Freezing of the Land Question

The Kenyatta regime began by taking a liberal approach to the land question. It pursued a market-based solution in which the landless were expected to pay for rights, including in the White Highlands that initially belonged to Africans. The radical groups in KADU were defeated at the time of independence and grew even weaker thereafter. The liberals under Kenyatta re-organised and took over from the white settlers; they took over the colonial behaviour and mentality as well as the mode of governance. They did this because, arguably, they did not want to disrupt the structure of land ownership since, to them, it constituted the economic foundation of the country. They introduced settlement schemes also so that they could settle the landless; those able to pay; and a new group of black elites who would learn from the departing white farmers. They also encouraged formation of land buying companies to incorporate the land hungry peasants from areas whose land had been expropriated by the colonial settlers.

The manner in which the Kenyatta administration and liberals around him approached the land question left many issues unresolved. Many of the leaders articulating interests around the land question were only keen to advance their political careers. For instance, leaders in the land buying companies found their way into national political positions, which they used to weaken the support of their rivals. They used these positions to undermine the organisation of the land buying companies if they did not further their interests. Mismanagement and embezzlement of funds featured in most of the land buying companies such that by early 1980s, some had still not subdivided the farms to shareholders or were faced with liquidity problems.

The resettlement schemes provided grounds for further inter-ethnic conflict which had its origins in the amount of land apportioned to the Kikuyu in the eastern part of the Rift Valley Province and elsewhere because they (Kikuyu) had been identified by the administration as the most land hungry and the most threatening group. On the other hand, as argued by Bates,[43] violent conflict was averted because of the mixture of motives surrounding KADU's approach to the land issue and because the structure of political institutions governing land resettlement programmes enabled Kenyatta and other national politicians to exploit them to disorganise regional political opposition.[44] Due to their wealth and numbers, in addition to the support they enjoyed from the Kenyatta state, the Kikuyu found their way into schemes meant for other ethnic groups: they could be found as far away as in the Lamu and Kilifi Settlement schemes at the coast, in Trans Nzoia and in Uasin Gishu in the Rift Valley.

It bears mention that the transfer of rights to land from Europeans to Africans in the former White Highlands was not based on conflicting historical claims of ownership either by virtue of first settlement and occupation, expansion of frontiers for cultivation and graz-

43 ibid.
44 ibid 60-61.

ing or what constituted ownership and property in land under the traditional tenure system. Land was sold as private property financed by loans from the government. The Swynnerton Plan addressed neither the potential of reactivation of historical territorial claims by the different ethnic groups nor the multiple claims on the same holding by different individuals. Instead, both the resettlement schemes and the changes in land tenure intensified disputes over land. The land question remained unresolved.

B. Moi Regime and Disinterring and Thawing of the Land Question

Daniel arap Moi ascended to presidency after the death of Kenyatta in 1978. Having led KADU and the radical wing of the land question in the 1960s, Moi came to office with a focus on the land question as he was in the 1960s. Most of his public pronouncements underscored this; they touched on controls over land acquisition 'in order to protect popular interests'. These pronouncements had an important consequence: they led to the closure of frontiers in Rift Valley where land hungry groups used to migrate to acquire land. From as early as 1980 and in the process of constructing his independent bases of political support, Moi began to order rapid individualisation of farms owned by land buying groups (cooperatives and companies and partnerships) and registration of titles for the individual shareholders. Again, this closed avenues for further entry into the heartland of Rift Valley by land hungry groups, and the Kikuyu in particular.

From the early 1990s and with pressures for political liberalisation, appropriation of government land by political elites took on an even faster pace as Moi struggled to retain a clientele of loyalists, one that was otherwise rapidly disintegrating. Meanwhile, the group around Moi began to appropriate the land question for a different but related political purpose. They saw demands and pressure for multi-partyism as implying the end of Moi's leadership and therefore resurrected the *Majimbo* demand with the hope that it would deflect the debate and give them room to halt the political tide. It did not.

Moi and group locally reactivated demands for territory in Rift Valley and in the Coast as they had done in the 1960s. This resulted in ethnic land clashes between members of former KADU groups and immigrant populations in the Rift Valley and, much later, at the coast between the Mijikenda and upcountry Kikuyu and Luo immigrants. Large groups of Kikuyu families were evicted from the Rift Valley, their titles to land notwithstanding. Significant, however, is that these clashes took place again in 2008 following a dispute over the December 2007 election results. The violence pitted members of the Kikuyu community against a new alliance of Kalenjin and the Luo. In other words, land ownership was the instrument of politics under the Moi regime. He used the land question to construct political opposition against the democratisation reforms and once again concretised the ethnic identities formed during the colonial regime. This made the land question more intractable.

C. The Kibaki Regime: Old Liberals and New Constitution Rub out the Land Question

President Mwai Kibaki won the December 2002 General Election. His triumph marked the end of KANU's leadership under Moi. His coming to power did not coincide with the re-articulation of the land question. The main issue on the agenda at the time was consti-

tutional reform. The issues of land rights were conjoined to this debate but from a 'historical injustices' point of view. Various groups whose land had been expropriated during the colonial period and those who lost land rights to political elites wanted the constitution to incorporate provisions on how historical injustices would be resolved. In this regard, upon assuming office in 2003, the new government established a Commission of Inquiry into the Illegal/Irregular Allocation of Public Land to review past allocations.[45] This gave impetus to new demands to address historical grievances over land.

The attention of the Kibaki government therefore shifted towards administrative aspects of land rather than the ideology of land ownership. The government took a liberal position: land titling was an important reform that the administration would pursue. Secondly, the development of a national land policy would enable the government to pursue administrative reforms that would enable people to acquire title deeds. In other words, the Kibaki government reinforced the arguments in the Swynnerton Plan with emphasis on land titling but did not introduce any ideology of equity and restitution.

The government also finalised the draft National Land Policy, whose thrust was generally administrative rather than political. The policy emphasised the making of laws to address problems around historical injustices (dating back to 1895 when Kenya became a British Protectorate); restitution; redistribution; and resettlement. The position of each of these policy issues, however, required a radical departure from past approaches. Each of these would require a political position because they were at the core of the political divisions that happened in the 1960s and which continued to shape the major events in Kenya throughout the post-colonial period. To avoid addressing these issues, therefore, Kibaki procrastinated yet they constituted the core of the land question. The government often prevaricated on the land question and in particular matters around historical injustice.

This notwithstanding, a dispute over the presidential election results in December 2007 unleashed a violent conflict that engulfed the country in an unprecedented manner. The conflict threatened the very existence of Kenya as a nation-state. The violence was more intense where the land question has been at the core of local politics since the colonial period: the Rift Valley and the coast. In the Rift Valley, discourses over land ownership emerged to fuel the grievances over elections. Central in these discourses was the question of the resettlement efforts and the distribution of land by the Kenyatta regime in the 1960s. In Rift Valley, the Kalenjin began to evict the Kikuyu on the basis of these arguments; this formed a repeat of previous patterns under the Moi regime when the Kikuyu would be evicted on the basis of the argument that they did not have territorial claims in the area.

The international mediation that followed to end the violence identified the land question as one of the grievances that had fueled the conflict and noted that land indeed was a historical factor that had remained unresolved.[46] The mediation efforts identified a number of ways, mainly administrative, through which the land issue would be addressed. The

45 Referred to as the Ndung'u Commission and named so after its chairman, Paul Ndung'u.

46 The African Union Panel of Eminent African Personalities under the chairmanship of the former UN Secretary General, Kofi Annan, headed the mediation. The mediation under the Kenya National Dialogue and Reconciliation identified a number of long standing issues that had contributed to the crisis. The panel identified grievances over land ownership as one longstanding issues in this regard.

agreement underlined the need to establish constitutional reforms to address the problem of land tenure and land use. It also recommended harmonisation of land laws and introduction of a modern information management system for land.

The liberal approach once again triumphed over the radical approach to land reforms. The liberal approach, with its emphasis on registration and titling, influenced the drafting of provisions in the Constitution of Kenya, 2010. The provisions in the Constitution concern addressing issues around access rights but shy away from addressing control and ownership claims that revolve around the four land questions, including those around loss of land under Arabs, expropriation by the colonial state, restructuring of customary tenure from the early 1950s, and those around titling in the 1960s. The Constitution emphasises the importance of private property rights and at the same time recognises the rights established during the colonial period but underlines also the importance of community in regulating rights to community land. The Constitution, when viewed this way, promotes a liberal agenda as a solution to the land question. The provisions of the National Land Policy are well integrated in the Constitution, too. Individual title as a form of absolute ownership is privileged in the Constitution, in spite of the challenges attending the notion of absolute title. Furthermore, the Constitution provides for the National Land Commission to oversee the rapid implementation of this liberal agenda. The commission is responsible for managing public land, advising on national policy and registration of title, and investigating historical claims. It is also charged with the responsibility of assessing tax on land and monitoring land use.

The issue of landlessness and specifically giving security of tenure to those who squat without secure land rights is not addressed under the provisions on land. This was not by accident. Provisions on land were negotiated because vested interests, including the landed elites, were keen to prevent the incorporation of radical proposals. They were worried the Constitution would provide for giving land to the landless, which would have meant getting the landed to give up certain amounts of land for the purpose. Without giving room for radical proposals, the Constitution, like previous efforts, failed to provide a radical direction on how to address the land question. President Uhuru Kenyatta ascended to power, after Kibaki, following the 2013 General Election. His regime has continued to further the liberal agenda.

D. The Uhuru Kenyatta Regime: Continuity with Liberal Reforms

President Kibaki prevaricated on issues of land until the post-2007 election violence brought it the fore. The government was unambiguous about what land reforms entailed but titling appeared to be the main agenda. President Uhuru Kenyatta has followed the titling agenda as the main meaning of land reforms. The government began by making commitments to fast-track the land titling process. Government efforts have been tagged to this thinking.

Land reforms, in the view of the government, largely comprise the titling programme or registration of individual rights and acquiring a title deed. Budget allocations to the line ministry have land registration and information management systems as the main component. For example, in the 2015/16 financial year, the budget for the national bulk-titling centre was slightly over 50 per cent of the total for the Ministry of Lands, Housing and Urban Development. The budget allocation for the centre increased to about 60 per cent of

the ministry's budget in the 2016/17 financial year. The problem of landlessness, historical claims that the NLC was meant to pursue, and loss of land rights through allocations that the government made on political considerations receive scant, if any, mention in official policy documents. To the government, titling is the main challenge concerning land. The appetite to award title to land prevails so much that even areas unsuitable to parcelisation and individual titling such as the pastoral areas where large communal holdings are suited for pastoral economic activities are falling under the titling programme. The government has a narrow interpretation of the meaning of land – a physical asset. The programme does not appreciate land as a social asset that is anchored on an economically and politically dynamic context.

VI. CONCLUSION

Prof Okoth-Ogendo gave an important meaning and interpretation of 'land' and the land question in particular. He added voice to new thinking on how land should be viewed in agrarian societies. He was clear that the structure of land ownership was equivalent to the socio-political organisation of the society and therefore any interpretation on land matters needed to use different lenses from what the law provided. On this issue, one may argue that Prof Okoth-Ogendo was not a positivist *per se*; he thought beyond the law to understand the complexities of the land question.

Prof Okoth-Ogendo's theoretical thinking helps one understand why Africa, and Kenya for that matter, has failed to resolve the issue of land. There is no solution to the land question because Africa is yet to democratise its society. That is, the structure of land ownership is equivalent to the structure of distribution of political power. And because Africa is undemocratic, there exist vast inequalities in land ownership. In Kenya, the structure of land ownership in which a few people hold onto thousands of hectares of land and millions of people hold on to less than a hectare and millions others are landless is a reflection of the state of our democratisation. Our land tenure regime is yet to be democratised and therefore many people continue to languish under poor land rights. This failure to have comprehensive reforms and in particular reforms to address landlessness, and failure to give secure tenure rights to many ordinary citizens, is a reflection of how poor Kenya is in terms of democratic endowment. This is one contribution to theories of land tenure that Prof Okoth-Ogendo left behind as an important legacy.

CHAPTER 14

OKOTH THE DREAM KEEPER: BREAKING DOWN THE BOUNDARIES OF LAW

Wanjiku Mukabi Kabira and Nkatha Kabira

I. INTRODUCTION

Bring me all your dreams,
You dreamers
Bring me all of your
Heart melodies
That I may wrap them
In a blue- cloud- cloth
Away from the too- rough fingers
Of the world

~Langston Hughes~[1]

This poem in many ways embodies the role Prof Okoth-Ogendo played in the constitution-making process in Kenya between 2000 and 2005.[2] During this period, Okoth, together with the rest of the commissioners, traversed the country listening to the views of thousands of Kenyans from all walks of life. Men and women turned up in their thousands to share their *heart melodies*, their hopes and dreams for a new constitutional dispensation. After years and years of hoping to see the proverbial promised land, a ray of hope glimmered when the Constitution of Kenya Review Commission commenced the work of listening to the people's views with the aim of coming up with a new constitution.[3] The time had finally arrived for all dreamers to share their dreams with other Kenyans. Those with big dreams and those whose dreams appeared to be not so big. Okoth, in his various roles, as the vice-chair of the Constitution of Kenya Review Commission (CKRC), and as the chair of the Research and Drafting Committee, facilitated the *"wrapping of their dreams"* in a

1 L Hughes, *The Dream Keeper and Other Poems* (New York: Knopf, 1994) 2.

2 Prof Okoth-Ogendo was the Vice Chair of the Constitution of Kenya Review Commission as well as the Head of the Research and Drafting Committee.

3 For background information, see the Constitution of Kenya Review Commission, *Final Report of the Constitution of Kenya Approved for Issue at the 95th Plenary Meeting of the Constitution of Kenya Review Commission* (2005) 2-7.

"blue-cloud-cloth away from the *"too-rough fingers of the world".* Okoth *"the dream keeper"* helped in wrapping women's dreams in a *"blue-cloud-cloth",* away from all those who would kill them. This wrapping of women's dreams by Okoth is the subject of this paper, but who was Prof Okoth Ogendo, the dream keeper?

Okoth was a broadminded scholar who did not confine himself to the boundaries of traditional law. He challenged formalist thinking about law, which broadly speaking entailed distinctions between law and politics, law and morality, law and fact as well as the public-private distinctions embedded in classical legal thought.[4] As is evident from his famous paper, '*Constitutions without Constitutionalism*',[5] for him, law and politics were inextricably linked and thus the legal discipline entailed intricate connections between it and other disciplines such as political science, economics, anthropology, literature, philosophy and even sociology. He believed in the expansive nature of knowledge. His experience as a professor of law, a teacher, a poet, a researcher, an international scholar and traveller had made him a man who could recognise both local and global perspectives while bringing contextual relevance to these perspectives. His critical and philosophical approach to issues enabled him to see in every man and woman the potential to learn and contribute to knowledge and to the negotiations for co-existence. Okoth inspired trust, respect and admiration. You felt that your dreams and your secrets were safe with him. That is why this paper honours him by reflecting on how the space for which he was a critical guardian made it possible for women to bring to the negotiation table their dreams, their secret hopes and aspirations – their *heart melodies* as well as their public and private struggles. This *dream keeper* created a safe and open environment where women could bring their dreams and aspirations for him to wrap and safeguard.

This chapter also looks at how in the process of bringing their dreams, women challenged the traditional knowledge about them, knowledge that had been created by patriarchal institutions for centuries. What they had been saying in low tones in their interactions flowed out through the women's-only sessions; presentations by women leaders and women's organisations, as well as women academics among other processes. Women named their problems and collectively created new knowledge about themselves and about law. This chapter argues that in the process of sharing their dreams, women broke down traditional boundaries of law while redefining concepts such as democracy, fairness, inclusion and public participation. Women brought new meanings to law and governance in Kenya.

This chapter is divided into two main sections. The first describes the *dream* and outlines the journey towards realisation of this *dream*. The second describes the impact of this process on law and governance in Kenya. It analyses some examples of how Okoth, together with other commissioners, wrapped this dream in the Constitution of Kenya, 2010. The chapter concludes with some reflections on Okoth, the dream keeper.

4 See DM Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in David Trubek & Alvaro Santos (eds), *The New Law and Economic Development,* (Cambridge University Press, 2006) 19.

5 HWO Okoth-Ogendo, 'Constitutions without constitutionalism: an African political paradox" in Douglas Greenberg, SN Kartz, B Oliviero and SC Wheatley (Eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: OUP, 1993) Chap. 4.

II. THE DREAM

A. Defining the Dream

At the onset of the constitution making process in Kenya, through their representatives organisations and groups, women shared their hopes and dreams with other Kenyans. These dreams included "gender equity in all areas of governance, equal citizenship, equality and redress of the discrimination or hardships suffered in the past; respect of women's rights and fundamental freedoms; equitable access to national resources; full and inclusive participation in public affairs; and the provision of basic needs to all Kenyans through the establishment of an equitable framework for economic growth."[6] Ultimately, the women, like all other Kenyans, brought these dreams to the CKRC with the hope that they would ultimately become their lived realities. According to the CKRC Report, for far too long, women had felt marginalised as a result of their lack of participation in governance processes; discriminatory customary, religious and cultural practices; violence on their bodies and those of girls; general oppression; and lack of resources and opportunities to enhance their full potential.[7]By sharing their struggles against institutional and other forms of discrimination, the ultimate dream was that their hopes and aspirations would be *wrapped in blue cloud cloth*, as Langston Hughes would say, *away from the too- rough fingers of the world*. This "*blue cloud cloth"* was a new constitution – a renegotiated social contract that would reflect the will of both men and women in Kenya. It was only through the enactment and promulgation of a new constitution that their dreams would be actualised and become a reality. The journey towards the realisation of the dream through the promulgation of the Constitution of Kenya, 2010 was a long one indeed, spanning over two decades.[8] The dream of having gender equality in all areas of governance reflected in the highest law of the land came to pass when on 27th August 2010, the Constitution of Kenya was promulgated.

B. The Journey towards the Realisation of the Dream

Unlike the Independence Constitution[9] in which only one woman were fully involved in its making, thousands of women participated in the making of the 2010 Constitution. Women's capacity to build networks and negotiate for their space became apparent as they did what had not been done before in Kenya. They created a movement that was strong and steady for close to 20 years, the climax of which was the 2000-2005 period when the movement was felt in every village in Kenya and in all organs of the review process. They decided to tell their history, their desires, their experiences, as they know them and negotiate for truths about their experiences.

From Nyanza to Rift Valley and to Coast, from Nairobi to Western to Central and from North Eastern to Eastern and indeed from all corners of Kenya, women turned up in large numbers to share their views with the CKRC. They congregated in churches, in schools, in halls, in market places, in mosques and even in open fields ready to share the songs and pains in their hearts. The women who came from very different socio-economic

6 CKRC (n 3) 99.
7 CKRC (n 3) 100.
8 ibid.
9 (1963).

and political realities brought their *heart melodies*, their hopes and aspirations, determined to share them with those entrusted with keeping them and wrapping them in the constitution, and eventually making these dreams come true. In addition to their individual participation, the leaders in the women's movements and organisations also represented women. Women leaders from all over the country negotiated for a legislative and institutional framework that would govern the process.[10]

As a result of women's intense, organised and focused participation in the process, women were successful in ensuring their participation in representation in all organs of review, indicate constitutional, constituency committees(3cs) and district constitutional committees(Dccs), the commission, and the national constitutional conference and even in the committees of the conference.[11] Indeed, the freedom and confidence with which women participated in this process is best seen in their negotiations at the National Constitutional Conference, where they strategically lobbied in the committees on Devolution, Representation, Bill of Rights and the Legislature.[12] The choices of these committees were not haphazard. For years, women had walked the path of affirmative action for representation in leadership in both appointive and elective positions.[13] This had created movements represented by organisations such as the Women's Political Caucus, the Women's Political Alliance, the League of Kenya Women Voters, the Collaborative Centre for Gender and Development, among others whose main focus was representation, legislature, Senate, and Devolution. Other organisations such as the International Federation of Women Lawyers - Kenya Chapter (FIDA-Kenya), the Coalition on Violence Against Women (COVAW), among others had focused on issues covered in the Bill of Rights such as women's rights, and gender-based violence while Maendeleo ya Wanawake, among other organisations, focused on basic needs which also form the socio-economic rights. In this process, women set the agenda for themselves, determined priorities, asked the questions they considered important and validated their processes and results.

1. Expanding the definition of lawmaking

One of the most successful ventures during the constitution review process was women's role in facilitating the enactment of the law governing the making of a new constitution. At a meeting in 1998, organised by women's organisations, Prof Okoth-Ogendo presented a paper on the process of constitution making, the process of getting there and the role of women within it in a way that women understood. Leaders of women's organisations attended this meeting. He made women realise the need to equip themselves with relevant knowledge, which was necessary for their participation in the constitution making process. He made them feel confident that this process was not for lawyers; that it was for Kenyans to negotiate their co-existence, to agree together on how they wanted to manage themselves

10 See W Kabira, *Negotiating, Co-existence and Governance Structure: Essays on Gender and Constitution Making* (Nairobi: Collaborative Centre for Gender and Development, 2001).

11 See Constitution of Kenya Review Act (Cap 3A).

12 W Kabira, *Time for Harvest* (Nairobi: University of Nairobi Press, 2012) 223-253.

13 Kabira, *Essays on Gender* (n 10) 13-28.

and their resources, and how to ensure that people retain the power to make decisions even on how they wanted to be governed.[14] For him, it provided an opportunity to deal with those issues that affect them as individuals, communities and as a nation. His presentation at this meeting helped the women to define their place in the struggle for a new constitution and define strategies that they would use to ensure their views were taken on board. From that time onwards, women managed to negotiate their space in the law that was to guide the review and the making of the new constitution. The struggle to do this is a story for another day.

It used to be said that experts make constitutions" with, " The dominant narrative during the initial stages of the constitution making process was that "experts make constitutions" and Wanjiku (the common woman or man) had no business in this game. Okoth assured the women at this initial meeting that this was but a fallacy. The people must make constitutions. Women knew, however, that gender was not the only game in town. There were many other games and they strategised to deal with those other games as well in order to achieve their objectives. They understood that constitution making was a political process and stakes were high for many groups of people, particularly political and ethnic formations. Many of the women leaders had been in the struggle for the Second Liberation that ushered in a return of multiparty politics and therefore they could not be hoodwinked to think that this was going to be an experts' job or that it would be neutral. They therefore were well prepared to negotiate their co-existence with all other stakeholders.

Participating in the making of the Constitution of Kenya Review Act, 1999, was one of the greatest successes of women in the national struggle for a democratic nation. They were able to hold a series of meetings, identify the kind of process they thought would be most people-friendly and how they would be at the centre of the negotiation in making of the constitution. Women managed to lobby at various stakeholders meetings and got five out of 12 seats in the initial team of drafters chaired by Bishop Philip Sulumeti. The rest is history.

Women participated in negotiations on the process, proposed other review organs they thought best for maximum participation of Kenyans, made proposals on how they needed to be represented utilising the critical mass theory and asked for 30 per cent representation, which worked in some of the organs of the review such as the Constituency Constitution Committees (3Cs), the district representation and almost realised the one-third principle of representation in other organs such as the CKRC and the National Constitutional Conference.[15] They even managed to negotiate a position that ensured that women's organisations nominated their own representatives and managed to retain the representatives in spite of court cases, motions in Parliament and many other efforts to divide the women. The following quote from the parliamentary *Hansard* of 24 November 1998 reflects the kind of battles that women had to fight to decide who should represent them in the review process:[16]

14 ibid 221.
15 ibid.
16 ibid 37. Also see, *Hansard*, 24 November 1998.

Sir, I can see that they have created space for women's organisations in the review process which is fine. But many of women's organisations represented here in this Bill are urban based. They speak one language. They all reside in urban areas and yet the bulk of Kenyan women reside in rural areas. All I am trying to say is that, as we restructure representation of the various actors and interest groups like Kenyan Women Political Caucus, League of Kenya Women Voters … four out of five places should go to Maendeleo ya Wanawake which has grassroots support. Therefore, they (women's organisations) have no right to take places, which should really be due to groups, which are in the rural areas.

The words in the *Hansard* quoted above were from Amukowa Anangwe, the then Minister for Co-operative Development. Many male parliamentarians felt that they were better placed to speak on behalf of women, like they had done for centuries. Indeed, men have often been the source of public knowledge about women and have often created theories about women and advised them on how they should live their lives. As Dale Spender notes, "human beings tend to project onto the objects and events of the world the value system they have learnt, selecting evidence from the world which fits into and re-enforces the belief of their culture."[17] Many men have often spoken for women, as the *Hansard* shows. For centuries, women hardly spoke for themselves. Public knowledge about them has been from men. Even when they have spoken for themselves, the information has been hidden or ridiculed. That is why this process challenged the boundaries of the meaning of law. After all, men had represented women in the same Parliament for almost 40 years and they had not taken their interests into consideration. They had not "discriminated against them". The elections were "so-to-say" free and fair. Men were representing their constituents. They knew "what women wanted". There was a lot of "sympathy" for rural women and resentment by parliamentarians for "elite" women. Days when women agreed to be divided into "elite" and "rural" camps had however gone. Women leaders had also made sure that they had consulted their counterparts in rural areas and urban centres and they were all in agreement. They had identified their representatives through a consultative process. Through this process of negotiations, women expanded the law making processes and made it possible for them to be at the centre of constitution making and to additionally expand the knowledge of law making to include non-lawyers, women and marginalised groups, but not without their day in court.

The women commissioners nominated by the women's organisations were taken to court, through a process instigated by the ruling party KANU.[18] Women lawyers, led by FIDA Kenya defended the commissioners in court where the team of lawyers, led by a leading lawyer, Raychelle Omamo (now the Cabinet Secretary for Defence) had a field day.[19] They were in a world they knew and understood. The male lawyer for the National Council of Women of Kenya and Maendeleo ya Wanawake who took the women commissioners to court hardly understood the complex relationships of women's organisations, groups and networks. As Dale Spender says, "all human beings have a biased and limited view of the

17 Dale Spender, *For the Record: The Making and Meaning of Feminist Knowledge* (London: Women's Press Ltd, 1985) 27.
18 ibid 42
19 ibid.

world based in that it begins with self, and limited in that it is restrained by experiences ... Hence theoretically there are many ways of seeing the world ..." Women's way of seeing the world is a legitimate way but male lawyers in this case did not have the experience of women's world.

Kabira notes that during the proceedings:

> The lawyer referred to a procedure related to some cricket match, somewhere in Latin America. Those Caucus members who were not lawyers could not figure out what a cricket match had to do with them. Fortunately, the judge, [Justice Daniel] Aganyanya, did not seem to be impressed either.[20]

Nevertheless, the judge ruled that women were properly nominated. This process of bringing women's issues that are normally rejected as being outside legal processes expanded the boundaries of law by bringing in women's experiences and understanding of their world, their structures and declared them legitimate structures. Some of these structures, such as women's groups and community-based organisations, had been relegated to social services even in terms of legislation. The process of identifying these networks as institutions that can have procedures and processes to nominate women to work on the highest law of the land was a great achievement in the process of realising the women's dream.

2. Women Talk, Women's Dreams

One of the major contributions to this process was the use of methodologies such as women-only sessions that created spaces for women to speak together and in their language. Here, women were able to tell their story, individually and collectively, as they know it. This was a powerful tool that had not been fully appreciated and utilised. The women-only sessions gave them an opportunity to talk about their experiences within marriage, as wives, as mothers, as daughters who could not inherit property, as victims of rape, defilement, loveless marriages and many harmful traditional experiences.

These sessions created opportunities for women to consult together, to express their views in private where men were not part of the process. This space gave them the much needed opportunity to share their heart melodies without fear of condemnation, intimidation or other repercussions. At these sessions, women spoke about their fears, particularly those related to their private space. This became a site of knowledge making where women told their story about marriage, rape, defilement, oppression, polygamy, sexual harassment, being overburdened, and motherhood, among other concerns. The process allowed women to tell collective stories of poverty, abandonment by husbands, teenage pregnancies, inheritance issues, equality between men and women, children with disability, among others. They told their story like they lived in one village. It is, therefore, not surprising that the constitution has clearly stipulated the rights of women, protection of female and male children, violence within marriage, rape, defilement, rights of the elderly, persons with disability, social economic rights, citizenship issues, reproductive health, inheritance, property rights, retrogressive culture such as female genital mutilation (FGM), among others. Women insist-

20 ibid.

ed that these issues must be dealt with.[21]

Many arguments about the constitution being a set of principles did not make sense to women. Women had their opportunity to negotiate their co-existence within marriage, in families, as members of ethnic communities, and as citizens of Kenya. In this process, women generated knowledge about themselves, looked at facts about their lives and experiences and through processes of reflection, discussions and consultations reflected on them. They named their world, shared pains and agonies in their lives. Women became a reference group that claimed their right to name their world and make sense of it.[22] In a women-only session in Nyanza, a woman notes:

> When I got married he was very good to me. He would come home every day with something for our child and me … now he does not sleep in my house. He says, I smell, I am dirty. I don't cook well and that I have grown old. I have four children now. The oldest is eight years and the youngest one year old … I have to go working in the garden, or fetching firewood. I have to go looking for food every day.[23]

At the age of 24, she sees herself as an old woman. She feels neglected, ignored, unwanted, dirty, old and unappreciated. Her dreams of marriage and a good life where her husband would be by her side, where they would live together until death do them part is no longer there. It is dead. Her dreams can only now be realised, hopefully through her children. She cannot go back home because dowry was paid and, in any case, she comes from a culture where polygamy is not a big deal. In fact, it is the norm.[24] She thought her husband was in love with her and that they would become hustlers together. However, this was not to be. Her man had moved on to another younger, less haggard, cleaner woman who had no children. Her life was over. Women from different socio-economic, ethnic and political backgrounds shared this and many other experiences. This story challenged the dangerous single story that perpetuates stereotypes about the identity of women in relation to men, which states that women in Africa simply exist to marry, bear children, make the man happy, cook for him, etc. This is not the woman's story. It is not true to say that women's dreams begin and end with marriage and children. They have other dreams, which society prefers to bury in the sand. These are the dangers of the single story about women, which is told by others.

In yet another story of a woman from Fafi in a Muslim community, we hear her voice say,

> You know in Fafi there is something that pains us a lot; it is about men. You find a man marries a woman and brings her to town where his family lives … he leaves the woman whom he soon forgets together with the children … Islamic religion says a man can marry four wives but it does not say you can marry four wives then forget the first wife and her children … Our men have that problem; when you try to talk about it you are told you are against religion.[25]

21 ibid 89-213.
22 Spendor (n 17).
23 Kabira, Essays on Gender *(n. 10)* 102.
24 This is not a thing of the past. The Parliament of Kenya passed a law after the Constitution of Kenya, 2010, was promulgated which legitimised polygamy.
25 ibid 124.

From this story and many others, it is clear that women want their own spaces. The woman from Fafi is saying, you cannot leave me with your family and forget me and assume that I would be happy. Women in the community clearly understand that Islam does not say that when you marry you forget your first wife and children. She understands that this is not Islam. She disputes the interpretation of religion by men and asserts that this cannot be religion. She understands that people use religion to justify irresponsible actions such as marrying a wife, leaving her and the children with this family and then taking another wife and moving on. Similarly, many women from all over the country talked about their "private" lives and "public" lives. They helped us hear them, feel their pain, listen to their dreams of the social order that they have defined and contributed to the construction of knowledge based on their experiences. In listening to ordinary Kenyans, among them women, men, minority communities, young and old, those from different religions, traditional healers, among others, the process gave them the opportunity to name their problem and to bring forth rich information that formed the basis of the 2010 Constitution. In addition, the world they wanted to live in called for great thinkers like Okoth, who saw communities and individuals as resources in the creation of the new constitution: a resource that was to be respected and listened to with appreciation and recognition.[26] He created spaces within which women would share their dreams without any fears, freely and in this way, these dreams were further through the process of verbal documentation, analysis and drafting processed for wrapping. Sharing these dreams in women-only sessions helped the women to confirm that their thoughts and dreams, though safely kept in their hearts and minds, were collective. It encouraged and validated these dreams.

B. Okoth the Dream Keeper

There are many ways in which Prof Okoth-Ogendo, as the chair of the drafting committee, closely shaped the process of constitution making through organising the issues, development of questions that guided collection of views from Kenyans, leading the team in research analysis and preparation of reports, preparing the draft constitution and finally presenting it for debate and negotiations at the National Constitutional Conference. In the same conference, he ensured that women had opportunities to claim critical committees such as Bill of Rights and Representation of the People. As the leader in this area, Okoth helped greatly in wrapping and safekeeping the women's dream.

In many ways, he showed the direction the review of the constitution would take and how the focus on what Kenyan women said remained at the centre of the process. This was not without drama: in 2002, for instance, when CKRC was still collecting views from Kenyans and soon after the burial of Dr Ooki Ooko-Ombaka, the commission's first vice-chair, a draft constitution appeared. This suggested that somebody was preparing the draft constitution while the commission was still collecting views from Kenyans, supposedly

26 Women's participation in the review processes, their rallying around Affirmative Action provisions, presentation of memoranda by various groups and women's organisations is documented by various scholars including W Kabira, *Time for Harvest: Women and Constitution Making in Ke*nya (Nairobi: University of Nairobi Press, 2012); W Kabira and Gituto Mwangi, *Affirmative Action: The Promise of A New Dawn* (Collaborative Centre for Gender and Development: Friedrich Ebert Stiftung, 1998); Maria Nzomo, *Women in Politics* (AWARD, 2003).

believing that their process was a public relations exercise. The commissioners were called for an urgent meeting because this foreign and dubious draft constitution had appeared and was to be tabled. Okoth looked at the draft and said:[27]

> There cannot be a draft Constitution, no draft can be a draft of the commission of Kenya unless my committee (the research and drafting committee) has tabled it in plenary, debated by and adopted by the same plenary. The Draft would have the seal of the Commission. When the Draft Constitution of Kenya will be completed, it will be tabled here and these commissioners will be there to decide. End of story.

Okoth would not waste time on the foreign draft. He then called in the media and addressed them, saying that no draft existed and that when the draft was ready, the commission would address the media and release it to them. He became very protective of the views of Kenyans. He believed that the constitution was going to be made by Kenyans in a process that was different from the many other processes that he had witnessed, and indeed, his wishes prevailed in the end.

The issue of the foreign draft did not end there; a second draft appeared at the National Constitutional Conference. This draft was being circulated to selected chairpersons of the technical committees. When Okoth heard about it, he called the commissioners and Prof Idha Salim and himself (both vice chairs of the commission), disowned the draft at a press conference. At the final stage of preparing the commission's draft, Okoth kept a very close watch over the drafting processes and swore not to take a single drink the night before the draft constitution was released to the public. He wanted to ensure that what went to the public was the people's draft. He was indeed *The Dream Keeper*, not only for the women's dream but for the people of Kenya as a whole.

It is important for us to refer to these incidents because Prof Okoth-Ogendo believed and saw to it that the draft constitution truly reflected the wishes of Kenyans -- both men and women, different ethnic communities, big and small, Kenyans of different occupations, pastoralists, and farmers, among others. This belief and commitment to the Kenyan people created space even for women to expand the boundaries of knowledge of what law is and what it can be. At the National Constitution Conference, women delegates had a hard time retaining the gender commission on the general list of commissions, since it kept disappearing. One day it would be in, the next it would be out, yet the gender commission had been proposed by over 17,000 submissions presented by women's groups, organizations and networks.[28] At the conference, the sub-committee on "commissions and management of constitutionality "approved the commission and proposed three commissioners while other commissions had memberships of nine commissioners each". Okoth rejected the proposal at a conveners meeting and said the gender commission must be treated like all other commissions. However, women delegates had to fight to the end to ensure that this commission saw the light of day.[29] Okoth kept watch with the women on all relevant provisions as he

27 Kabira, *Essays on Gender* (n 10) 55.

28 See CKRC, *National Constitutional Conference (NCC) plenary proceedings.* Presentations and debate on draft provision on Devolution Culture and Affirmative Action. Nairobi, Kenya, 2003).

29 Kabira, *Essays on Gender* (n 10) 248.

did with others.

In leading the process as the chair of the Research and Drafting team, and therefore as the leader responsible for coming up with the draft constitution, Okoth and the commission expanded the concept of constitution making and the definition of knowledge through a process that ensured that women spoke for themselves, as did persons with disabilities and minority communities. The different groups were given the opportunity to define their world, their dreams. Women had the chance to produce the much-needed women-centred knowledge and experiences that led to the provisions in the new constitution. This, with the facilitation of Okoth *the dream keeper*, influenced the language of law making, institutions and their essence.

Prof Okoth-Ogendo, who was delegate No. 551 at the National Constitution Conference in May 2003 said that the process of reviewing the Constitution of Kenya was very unique because constitutions were not made during peace time in Africa. For Kenya, he noted, there was broad consensus of the need for a new constitution after long street battles. He pleaded with the people to seize the moment and complete the constitution.[30] His wishes came to pass when the Constitution was promulgated in 2010. Okoth was the man at the steering wheel since he took leadership of the research and drafting committee. It is at the stage of drafting that gender/women's issues are reduced in order to conform to what is traditionally good in constitutions. It has been often argued that constitutions are sets of principles and details are not needed but Okoth was willing and ready to break from tradition in order to ensure that the interests of all groups, including women were reflected in the constitution. Through this process and the decision to expand and transform meaning in terms of the constitution and constitution making, Okoth was able to wrap the women's dreams in the Constitution, 2010. Indeed, Prof Okoth-Ogendo was a good ally at all stages, on all matters concerning women, and helped to validate their experiences and dreams because women's secrets were safe with him.

III. WRAPPING THE DREAM: BREAKING DOWN THE BOUNDARIES OF LAW

A. Expanding the Definition of Good Institutions

Prior to the promulgation of the Constitution, 2010, Kenya's legal system was primarily based on the English system introduced during the colonial era. This system was modelled around the Westminster model as well as a strong presidential system – the result of decades of mutilation of the Independence Constitution by Kenya's postcolonial governments.[31] These amendments, to say the least, were a testament to the incompatibilities of the system and its institutions to the Kenyan socio-political context. After decades of political violence and institutional challenges in the 1980s and 1990s, the classical structure of government comprising the Executive, Judiciary and the Legislature, were brought to the test. These in-

30 See CKRC(n 28) above.

31 See for instance, Constitution of Kenya (Amendment) Act No.28 of 1964; Constitution of Kenya (Amendment) Act No. 38 of 1964; Constitution of Kenya (Amendment) Act No. 14 of 1965; Constitution of Kenya (Amendment) Act No. 17 of 1966; Constitutional Amendment Act No. 40 of 1966.

stitutions were not living up to the promise of ensuring good governance in Kenya.[32] During the review of the constitution, women argued that it was necessary to introduce a policy of affirmative action, which is based on the critical mass theory so as to ensure that women were represented in all areas of governance.[33] They argued that affirmative action would ensure that women's voices and experiences would be taken on board and that this knowledge and experiences of women would impact governance. In this argument, women expanded the definition of good institutions through the introduction of the "other" that had been locked out by traditional theories of governance. In addition, the traditional electoral system that Kenya had adopted was the first-past-the-post model while proportional representation models were adopted in countries like South Africa, among others.[34] The first-past-the-post model assumes that all have equal chances but women were able to argue that this is a historical fallacy and made a case for the introduction of affirmative action provisions for women and other marginalised groups.

The legislative framework that women negotiated made it possible for them to be represented in all institutions, including National Assembly, Article (97), the Senate (98), and County Assemblies (177) as well as in appointive positions including county governments, national government, all constitutional commissions, among others.[35] Article 27 (8) of the Bill of Rights embodies the spirit and letter of affirmative action and assigns responsibilities to the government to implement the rule that keeps one gender at not more than two-thirds. In addition, by putting Article 27 in the Bill of Rights, it means that only a referendum can alter it and that parliament cannot amend it as happened with similar provisions in the old constitution.[36]

Clearly, the Constitution has brought fundamental changes. No one can argue that man means woman and get away with it. The consciousness raising that was also brought by this process means that even those walking in the streets will laugh at concepts such as these. They know very well that man does not mean woman. Institutions are not proper unless they have women's presence as the women had argued, and this is taking root. Critical mass theory argues that women, because of their biology and experiences, have something different to bring to these institutions. It is no longer acceptable to see a house of parliament full of men and no women. The Constitution has redefined what a good institution looks like, at least in terms of representation. This creates an opportunity to go further and think beyond representation, to values and philosophies that define good and acceptable institutions. We have expanded our legal definition of good elective and appointive bodies. Under the old constitutional dispensation, it was enough to cast your ballot in a "free" and "fair" election, and women were not considered in defining "free" and "fair" voting. However, suffrage is not free if culture, tradition and resources keep one from being elected. The definition of good institutions is expanding to include social, economic, cultural, historical, and gender realities. Women have begun to define good and acceptable institutions of governance. They

32 CKRC (n 3) 37.
33 CKRC (n 3) 102.
34 CKRC (n 3) 182-189.
35 Republic of Kenya, *Constitution of Kenya* (Government Printers, Nairobi, 2010).
36 The Constitution of Kenya, 2010, Article 255.

are expanding the boundaries of law, bringing new interpretations to law on board. They decided that a parliament that had no women was not a good parliament; it is incomplete; it cannot be a good institution; and even the process of constituting it cannot be democratic as it is neither free nor fair.

Women argued that a small Senate of 46 members would be less expensive and therefore would be acceptable to men and sections of the general public and parliamentarians, but they argued that when a county elects one senator, the chances for women would be minimal. We already have a good example in the case of governors. Not even one woman was elected governor. For reasons that are well known, namely culture, tradition, lack of resources, societal myths about women and leadership, women knew it would be a Senate of men only. In their view, the Senate could not pass for the concept of a small, beautiful and less expensive institution. It would be a lopsided Senate that missed the experiences and contributions of women and therefore wanting. It would be small, male and ugly for women. Women argued that good, beautiful and reasonable institutions must reflect women and even go beyond to include other marginalized groups and communities. This created new knowledge about institutions and new meanings for institutions. This also brought in a new way of defining good and healthy, new aesthetics. What is beautiful? What is legal? What is democratic? All these concepts were being redefined through women's participation in the process of making the 2010 Constitution.

Prof Okoth-Ogendo had created the environment the nation needed and appreciation of a broadened constitution making knowledge base that gave *Wanjiku* the opportunity to have his/ her values and views of institutions taken on board. Okoth gave women the support, confidence, and belief in themselves. He often asked the women, "Tell me what you think we should say -- how you think what you say will be implemented and we shall take it from there".[37] Women would then consult each other, consult their women intellectuals, politicians and leaders who had been speaking for decades and who in many ways became their source of strength and power. As Dale Spender notes, "men have recognised that when women know the arguments against male power, women are different. Men have recognised that women are much less manageable when they learn that for centuries there has been a long and honourable tradition of women who have resisted and protested against men and their power."[38] Knowing that others have protested before and that all shared the same dissatisfaction stopped them from denying the reality of their pain. This knowledge is always a source of strength for women.

C. Expanding the Boundaries of Rights in Law

Kenya's Independence Constitution in its various forms was famous for its Bill of Exceptions. This Bill of rights entailed civil and political rights, which contained a long list of exceptions to their application. Kenyans negotiated a more expansive bill of rights, which included first, second and third generation rights. The result was a very expansive bill of rights. Many rural women gave their views on many rights including rights to land, socio-economic rights

37 Kabira, *Essays on Gender* (n 10).

38 Dale Spender, *Feminist Theorists: Three Centuries of Key Women Thinkers* (New York: Women's Press Ltd, 1993) 2.

particularly access to water, food, education, health, social services, and housing. Currently, these rights are protected under Article 43 of the Bill of Rights.[39]

Women were aware of all the crimes committed in private and public spaces, and organisations like FIDA Kenya, Coalition On Violence Against Women (COVAW), Centre for Rights Education Awareness (CREAW) among others had been dealing with cases of gender-based violence such as domestic violence, rape, defilement, wife battering, torture, including psychological torture, violence within marriage including marital rape, refusal by men to pay for the upkeep of children outside marriage, teenage marriages, date rapes, and harmful practices such as female circumcision. They had dealt with these cases and followed up with the police and the courts. They wanted to negotiate the rights of women and girls in private spaces and entrench them in the Constitution. It was therefore a strategic choice for women to focus on the Bill of Rights when the National Constitutional Conference started. It was hoped that the constitutionalisation of these rights would ensure that these rights are taken seriously. The Constitution has legislated against what was traditionally referred to as culture and, therefore, acceptable. It expanded the boundaries of law as we knew it to include equality, equity, inclusiveness, non-discrimination and protection of women, and the marginalized as captured in Article 10 of the national principles and values. In addition, the Constitution conferred the socio-economic rights of food, water, social security, health, education and housing (Article 43-1) which women presented to the commission in all the constitutional constituency fora. In addition, many other rights include Articles 26, 27, 28, 29 (c)&(d)(f) 38, 41 on labour relations, fair remuneration, Article 44 on language and culture, Article 45 on family, Article 53 on children, Article 54 on persons with disability, Article 55 on youth, minorities and marginalized groups and Articles 56 and 57 on older members of society.[40] The Bill of Rights and its expanded rights to include third generation rights was greatly influenced by women's participation in the process as well as other marginalized groups and communities and the larger civil society groups. Okoth, the wrapper of dreams for women and other groups, as leader of the drafting team was big enough to authoritatively say constitutions are made differently by different nations, ours would be made the way Kenyans wanted it.

What is significant is how many of these rights, including equality and freedom from discrimination, expanded the boundaries of rights in law. In addition, women cannot be discriminated against on the basis of sex, pregnancy, marital status, dress or any other grounds. The boundaries of law have expanded. Women have contributed significantly to this expansion and the state has been obligated to ensure this happens.[41]

D. Redefining Democracy

As we have seen in the previous discussion, the review process provided a site for women to create knowledge about themselves and to challenge the boundaries of law. The process even challenged what for centuries had been held as truth by the courts, where a woman

39 Republic of Kenya, *Constitution of Kenya* (Government Printer, Nairobi 2010).
40 ibid.
41 Ibid., Article 27, sub-article 6.

raped had to bear the burden of proof,[42] where oppression, tradition and culture were used to explain discrimination against women.[43] In these cases, women were sent back to communities to solve problems of oppression and discrimination against them that had hitherto prevailed as a result of cultural beliefs and obliviously in the interest of males; and male dominance continued to prevail -- a Catch-22 situation for women.

These women challenged traditional conceptions of democracy *as government of people, by the people, for the people*, for hundreds of years since the Greeks defined democracy for the world. The meaning of this concept did not include women, slaves and other marginalized groups. Yet, the definition acted like what was said was the truth. That is why the introduction of this paper noted that "Truth is a theory that is constantly being disapproved."[44] The process of defining our world, our institutions our rights, in the making of the constitution, saw women mobilize themselves and create knowledge that expanded our understanding of our lives.

IV. CONCLUSION

The traditional makers of knowledge and meaning in the field of law -- the judges, the lawyers, magistrates, members of parliament -- had created knowledge about law that had not taken into consideration women's realities. So, we have lived with the official view and knowledge of law. Realities of women's experiences with law have for a long time not been part of our mainstream knowledge about law and what this means for them. Neither have we heard the women's perspectives on all matters of law that have affected them. Men and the institutions they dominate have been the sources of public knowledge about women and law. The constitution making process helped construct knowledge about law and expanded the boundaries of law. Many aspects of culture, gender and tradition that were considered non-discriminatory are now proscribed in law and one can be sued on their basis under the Constitution. Women have contributed to expanding the boundaries of law and to bringing new meaning to definitions of good institutions and concepts of free and fair elections, thanks to Prof Okoth-Ogendo, the *dream keeper* who walked with women of passion.

There are historical experiences that we need to continue reminding ourselves of when we think about expanding the boundaries of law and creating feminist knowledge as well as considering new sites of knowledge making. We can remind ourselves of the fact that during slavery, law forbade black people in America from reading and writing. It was illegal for a black man, adult or child, male or female to learn to read, yet officially, elections were "free" and "fair". Alex Hailey in his book, and the movie, *Roots,* shows how blacks could only read in secret and if it was found out that they could read, the consequences were very severe as in the case of little Kizzy, who was sold to a cruel master.[45] Henry Louis Gates in his book, *Race, Writing and Difference* notes that "blacks were as a race constitutionally unable

42 ibid.
43 See for instance, *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.
44 Kabira, *Essays on Gender* (n 10) 440.
45 Alex Haley, *Roots: The Saga of an American Family* (New York: Doubleday Dell Publishing Group House, 1976).

to read and write" Invisible Blues.[46] You refuse their education and then you declare them "unable to read".

These authors hope that as the Attorney General follows up on the implementation of the constitutional provisions to ensure that not more than two-thirds of one gender occupy elective and appointive public offices, he will enhance the expanded space in law for women and other marginalized groups.[47] Okoth, the *dream keeper,* will be watching from above even if he/she does not fear the gaze of women as the institution handles this matter. We know from study that law as a discipline has expanded its space, interpretation and meaning, and the challenges of implementation remain but it will happen. It is already beginning to happen and this will continue.

We trust that there are other men and women, who will, like Prof Okoth-Ogendo, continue to be the dream keepers not only for women but also for others in society who have been traditionally marginalized. We have to continue to re-define truth from the different perspectives and find ways of breaking myths around women and marginalized people that deny their rights in societies. Law must help to create better communities, where concepts such as fairness, equality, democracy, governance and representation, embrace all in society. In the meantime, women will:[48]

Hold fast to dreams
For if dreams die
Life is a broken winged bird
That cannot fly
Hold fast to dreams
For when dreams die
Life is a barren field
Frozen with snow.

~Langston Hughes~

46 Henry Louis Gates Jr and Kwame Anthony Appiah, *Race, Writing and Difference* (Chicago: University of Chicago Press, 1986) 93.

47 See Republic of Kenya, in the Supreme Court of Kenya Ref. No of 2012 *Request for Advisory Opinion.*

48 A Alfred, *The Collected Poems of Langston Hughes* (New York: Knopf, 1994).

PART IV: OKOTH IN LAND AND GENDER DISCOURSES

CHAPTER 15

THE MORE THINGS CHANGE THE MORE THEY STAY CONSTANT: OKOTH'S CONTRIBUTION TO GENDER EQUALITY AND NON-DISCRIMINATION IN LAND MATTERS

Patricia Kameri-Mbote

I. PREAMBLE

Okoth was my dean when I joined the Faculty of Law at the University of Nairobi in 1984. I have not read any piece that he wrote focusing on gender. I, however, worked with him between 1990 and 2009 on a variety of occasions and can infer from those interactions that his scholarship would greatly benefit gender scholars and provide a launching pad for discourses on gender equality. His concern for marginalized communities and his spirited support for their rights to land resonate with women's quest for secure rights to land. More specifically, as my colleague, Okoth was supportive of Janet Kabeberi Macharia, Edith Mneney and myself when we put up a spirited fight for the introduction of a course on 'Women in the Legal Process' in the early 1990s in a Faculty boardroom that was male-dominated with a good number of self-acclaimed adherents to 'tradition' that dictated that women remain in the shadows. The course was to address the inadequacies of law in handling issues that affected women and was informed by developments in Norway and Southern Africa.[1]

I co-taught the course on law, science and technology (focusing on legal implications of developments in science and technology for law and how science and technology are dealt with in law and legal processes) with Okoth. I really enjoyed the challenges he threw my way in conceptualising the course. Okoth also supported my quest to wrest the shackles of oppression in the academy when I was denied promotion to the post of Senior Lecturer between 1999 and 2002 despite having met and surpassed all the qualifications.[2] When I responded to an advertisement for the post of Associate Professor instead of applying for the

1 Under the Women's Law Institute at the University of Oslo and the Women and Law in Southern Africa (WLSA) Research Project.

2 University of Nairobi regulations required that a candidate for the post of Senior Lecturer possess a doctoral degree and five publications. I should probably point out that there was a group of colleagues that had ascended to the rank of Senior Lecturer without these qualifications.

post of Senior Lecturer in 2001, Okoth was supportive even though I was not shortlisted because I was still a lecturer and needed to have done time as a Senior Lecturer. I discussed with him the unfairness of a system that shortlisted two men who had no doctoral degrees and one with no publications while denying me the opportunity despite the short-listing committee[3] penning a long epistle in their minutes about my stellar qualifications.

Okoth was also one of the two persons who nominated me to run for the politicized, ethnicised and abortive University of Nairobi School of Law deanship elections in 2007. These elections were held against the backdrop of a national wave of animosities that pitted ethnic communities against one another after the fallout between the parties in the National Rainbow Coalition (Narc) that ousted President Daniel arap Moi from his 24-year reign; the collapse of the Bomas of Kenya constitutional talks in 2004; and the 2005 referendum on the draft constitution.[4] In an uncanny twist of fate, when matters deteriorated significantly at the School of Law in late 2008 following that year's abortive deanship elections and Okoth was asked by the Vice Chancellor to act as a caretaker Dean, he called me into his office to discuss the way forward for the school. A colleague followed me in tow but Okoth asked her to leave him to discuss pertinent issues regarding our school with 'Patricia, the battle-hardened General'! I raise these issues to illustrate the fact that Okoth never treated me as subordinate on account of my age and gender. Indeed, I do so to underscore the fact that Okoth fanned my flame to fight against inequality and discrimination.

Earlier in 2001, as deliberations on the review of the constitution progressed and a debate arose as to whether gender had any place in the process, Prof Maria Nzomo, Prof Jacqueline Oduol and I were called to make a case for having gender in the Constitution. Okoth was among the very few supportive male commissioners in the Constitution of Kenya Review Commission (CKRC) in a very highly charged debate. I was to later work with him in the formulation and drafting of the National Land Policy between 2004 and 2009, and in the African Union Land Policy Initiative; and even in these spaces, he was supportive of women's rights. His zeal in the African Union initiatives led to the African Union's Framework and Guidelines on Land Policy in Africa[5] and the African Union Declaration on Land Issues and Challenges,[6] both of which continue to inform land policy and law in African countries.

This chapter focuses on women's rights to land in Kenya from a historical perspective, illustrating Okoth's contribution to the fight for gender equality and non-discrimination. That contribution is demonstrated through a review of the National Land Policy; the Constitution of Kenya, 2010; and the African Union's Framework and Guidelines on Land Policy in Africa, which was followed by the African Union Declaration on Land

3 Which included Okoth-Ogendo, Prof JB Ojwang (now Judge of the Supreme Court of Kenya) and Prof Arthur Eshiwani.

4 Kenyans overwhelmingly voted against the draft constitution.

5 Initiated in 2006, this land policy Initiative was a joint product of the partnership and collaborative effort of the African Union Commission (AUC), the UN Economic Commission for Africa (UNECA) and the African Development Bank (AfDB) to promote Africa's socioeconomic development through *inter alia* agricultural transformation and modernisation.

6 Adopted by the African Union Heads of State and Government in July 2009 in Sirte, Libya, bringing to fruition the effective implementation of the 'Framework and Guidelines on Land Policy in Africa' initiative.

Issues and Challenges. These were processes, which Okoth provided immense intellectual drive for and was intimately engaged in. Apart from being one of the vice chairmen of the Constitution of Kenya Review Commission, Okoth was also the Chief Rapporteur of the National Constitution Conference at Bomas in 2004, which generated the Bomas Draft Constitution. He also participated in the National Land Policy formulation process as one of the three members of the Technical Advisory Group and was a critical actor in fleshing out the policy in the Legal Thematic Working Group. He was also a major force behind the constitutional provisions on land contained in Chapter 5 of the Constitution, and the team leader in the process leading to the AU Guidelines.[7] In all these processes and the documents emanating therefrom, women's concerns with regard to land ownership, control and use were elaborated and addressed. We owe this to Okoth's intellectual acuity, clarity of mind and dexterity in legal writing.

The chapter is divided into six parts. Part I is the preamble, which explains how I knew Okoth and links him to my personal as well as the general quest for gender equality and non-discrimination. Part II lays out the gender problematique in land ownership, control and use in Kenya. Part III looks at women's land rights in Kenya from a historical perspective, laying the basis for the necessary interventions. Part IV lays out the international and regional legal framework on women's rights as a benchmark for the analysis of Okoth's contribution to gender equality and non-discrimination in land matters discussed in Part V. Part VI concludes by canvassing the continued discrimination of women in land matters despite the initiatives highlighted above. It argues that gender issues in land in Kenya validate Okoth's disenchantment with African elites' fixation with constitutions devoid of a commitment to follow through with the dictates of the constitutions they craft.[8] Indeed, the attainment of gender equality and non-discrimination - norms that challenge the social construction of maleness and femaleness which ascribe roles based on the power that actors exercise - require much more than normative legal provisions. This is particularly the case when the normative provisions relate to a critical resource such as land, and when the provisions seek to replace dominant paradigms such as male dominance and male control of pivotal resources.

II. GENDER PROBLEMATIQUE IN LAND OWNERSHIP, CONTROL AND USE IN KENYA

Women's entitlement to land and land-based resources in the East African region has not been optimal[9] owing to a variety of factors which include laws; policies; 'socio-economic change toward greater commoditization of and competition for land and land-based resources';[10] and the social ordering influenced by customary law that in most instances ex-

7 <www.uneca.org/sites/default/files/PublicationFiles/fg_on_**land_policy**_eng.pdf>accessed 7 June 2016.

8 HWO Okoth-Ogendo, 'Constitutions without Constitutionalism: An African Political Paradox' in D Greenberg, S Katz, B Oliviero and S Wheatley (Eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (OUP: New York, 1993)Chapter 4.

9 IDRC Report (2013), *Women's Access to Land and Natural Resources in Pastoralist and Forest Communities in East Africa* (Project Number 105526: with C Nyamu Musembi, K Mubuu & P Kameri-Mbote).

10 ibid1 (abstract).

cludes women from control, ownership and participation in decision-making. The net effect is the exclusion of women in land ownership and control with their access rights also being tenuous.[11] Feminist critiques of law and development have identified the marginalization of women from the means of production as a critical factor in the subordination of women.[12] As a lawyer, Okoth focused a lot on the ways in which law could change the situation of marginalized individuals and communities. A conceptualisation of the issue as the gender problematique in law with a view to isolating the ways in which laws, though couched in neutral terms, result in the exclusion of women in practice is apt and provides a basis for discussing Okoth's contribution to addressing this problem.

III. THE PROBLEM

In spite of women's contribution to the agricultural sector in Kenya,[13] there is glaring evidence that they do not have adequate access and control of the productive resources and they do not reap a rightful share from the fruits of their labour.[14] This is partly because they do not have the opportunity to make crucial decisions regarding the allocation and use of family property including land as the most primary resource among farming communities. Indeed, right from the family, community and up to national levels, women barely have the chance to determine the use of land, leave alone owning and controlling it. Land in most Kenyan communities is owned and controlled by men. This is as a result of cultural traditions that are embedded in a patriarchal ideology that nurtures and perpetuates male dominance over land and other resources. Perhaps a more pertinent issue is the fact that most women, especially in rural areas, do not make crucial decisions affecting their economies where they largely expend their skills and labour. Certain socio-cultural and institutional dynamics are at play inhibiting the voice of women on this front.[15]

The right of women to own property in Kenya is a function of many diverse factors, including law and custom. In so far as law is concerned, different legal norms apply to the issue of women's ownership of property. Indeed, in Kenya we have multiple legal norms that apply to the issue of women's ownership of property. These are drawn from statutory law, customary law and religious law. For instance, while the constitution and law provide for the right of all Kenyans to own property,[16] these provisions interface with and are mediated by customary norms that deny women the right to own property and only grant them vicarious rights of use through spouses, fathers, brothers and sons.[17] The marital status of women is particularly critical to a determination of whether they own or can have access to property. Moreover, there is a gendered determination of the types of property that women own. In a

11 E Boserup, *Women's Role in Economic Development* (St. Martin's Press: New York, 1970).

12 M Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (London: Zed Books, 2003).

13 Estimated at 65 per cent. See FAO, *The State of Food and Agriculture, Women in Agriculture: Closing the Gender Gap for Development, 2011-2012,* <http://www.fao.org/docrep/013/i2050e/i2050e.pdf> accessed 7 June 2016.

14 ibid.

15 See P Kameri-Mbote, 'The Land has Its Owners! Gender Issues in Land Tenure under Customary Law', in C Odote & P Kameri-Mbote (eds), *Breaking the Mould: Lessons for Implementing Community Land Rights in Keny*a (Strathmore University Press, 2016) 145-168.

16 See e.g. Articles 27, 40 and 45 of the Constitution.

17 See Kameri-Mbote, (n15).

study carried out by the Women and Law in East Africa Research group on inheritance laws and practices,[18] it was clear that women tended to own moveable property/ chattels but not land. Most women have access/possession of land but do not legally own it.[19] Indeed, for many women, the line between access/possession and ownership is blurred. Such access is also predicated on the social standing of the woman to the legal owner. Unmarried women are considered to be in a transitory stage awaiting marriage, which will bestow them with rights to land through their spouses. Even when it is evident that women are past the age of marriage and they are well advanced in years, they do not graduate to the status where they can be bestowed with rights to land in their natal homes. While there are no legal barriers to women's - married and unmarried - ownership of property, they do not own major forms of property such as land primarily because of societal perceptions of who should own these.[20]

Land is central to women's quest for equality and non-discrimination particularly in countries whose economies and people's livelihoods are dependent on land-related activities such as Kenya.[21] Within this context, it is important to consider that the lives of women and men are affected by a plurality of norms that mediate access, control and ownership of land and land-based resources.[22] Legal centralism and legal pluralism are, therefore, useful analytical frameworks as they provide different understandings of the law. While the former denotes a unified system of rules which are enforced through state machinery, the latter describes a system where the tiered and interactive normative systems operate within a system either within or without the formal state legal system.[23]

Legal centralism starts from the standpoint that state law or state recognized and enforced law is the most important normative order and all other norm-creating and enforcing social fields, institutions and mechanisms are illegal, insignificant or irrelevant.[24] Legal pluralism may be divided into two, namely, juristic and diffuse.[25] Juristic legal pluralism arises in situations where the official legal system recognizes several other legal orders and sets out to determine which norms of these legal orders will apply.[26] Thus, the official legal system provides an operating environment for the plural legal orders.[27] For example, a constitution may provide for the operation of certain religious or customary laws for particular ethnic or religious groups. In juristic legal pluralism, which is common in colonial and post-colonial Africa, state law is the ultimate authority and it dominates other plural legal orders. Diffuse legal pluralism arises where a group has its own rules regulating social behaviour whose op-

18 See W Mitullah et al., *Women Inheritance Laws & Practices (*WLEA: Nairobi, 2002); See also P Kameri-Mbote, 'Women, Land Rights and the Environment: The Kenyan Experience' [2006] 49(3) Development 45.

19 ibid.

20 Kameri-Mbote(n15).

21 P Kameri-Mbote, 'I want it and I want it now: Women and Land in Africa' [2013] 2 Perspectives 6. <*www.ielrc.orgl/content/a1309.pdf*)> accessed 23 February 2017.

22 See P Kameri-Mbote, 'Law, Gender and Environmental Resources: Women's Access to Environmental Justice', in Jonas Ebbesson & Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press: Cambridge, 2009) 390-407.

23 J Griffiths, 'What is Legal Pluralism?'(1986) 32 (24) Journal of Legal Pluralism and Unofficial Law 5.

24 ibid 3.

25 ibid 8.

26 ibid 9.

27 ibid.

eration is neither sanctioned nor emanates from state law.

In Kenya, we have juristic legal pluralism with[28] the Constitution as the supreme law of the land; with statutes drawing authority and legitimacy from the Constitution; and customary law and religious law operating within the confines of constitutional principles.[29] State law denotes rules promulgated by the state. It postulates law as a coherent and unified system of rules enforced through the state court machinery, uniform for all persons, exclusive of other law and administered by a single set of institutions.[30] Laws applied by post-colonial states comprise of imported European substantive and procedural law as well as customary law as interpreted by the courts. Okoth-Ogendo devoted considerable time to the discussion on the issue of imposition of property law and how this invalidated norms that communities had lived with and under for many years.[31] For many women, the fact that they are trapped within the state's interpretation of the construction of families, its assumptions about the status of women in customary law has been a barrier to advancement even when the broader areas of the law have been reformed for the benefit of women.[32] Yet, imposed law has also has a liberating effect for women, especially in property relations by providing spaces for women to claim rights that they would not have been entitled to under customary law.[33]

Customary law is the law of small-scale communities which people living in these communities take for granted as part of their everyday experience but it excludes outsiders. For outsiders to know the content of customary law, they have to either be told about it or read about it.[34] Whether read about or narrated, customary law is once removed from the source, and written accounts of customary law are not direct accounts of community practice but the work of informants each of whom, in recounting a particular rule, brings to bear on the subject his/her preconceptions and biases.[35] 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 (sometimes sub-tribal) and despite the general consensus on certain fundamental principles, there are nuances in each that only one well versed with the community's way of life can identify.[36]

The hallmark of African customary law is the dominance of older male members over

28 Sally Engle Merry, 'Legal Pluralism' (1988) 22 (5) Law & Society Review869.

29 Griffiths (n 23).

30 A Griffiths, *In the Shadows of Marriage: Gender and Justice in an African Community* (Chicago: University of Chicago Press, 1997) 3.

31 HWO Okoth-Ogendo, 'The Imposition of Property Law in Kenya' in Barbara Harrel-Bond and Sandra Burman (eds), *The Imposition of Law* (New York: Academic Press, 1979); See also one of the historical land policies and their application in Kenya; see, HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Nairobi: Acts Press, 1991).

32 W Ncube & Stewart et al, *Paradigms of Exclusion: Women's Access to Resources in Zimbabwe* (Harare: WLSA, 1997).

33 See HWO Okoth-Ogendo (n 31) above; where he problematises the idea that the use of customary law was predicated on its not being 'repugnant to justice and morality'. That clause, which was contained in many Judicature Acts of post-colonial states, could however be used to empower women by striking out discriminatory practices.

34 TW Bennett, *Human Rights and African Customary Law Under the South African Constitution* (Cape Town: Juta,1995)

35 See e.g. Eugene Cotran, *Restatement of African Law*, University of London, School of Oriental and African Studies. Restatement of African Law Project, *Volume 2 of The Law of Succession*,(London: Sweet & Maxwell, 1969).

36 At about the end of the 19th century when colonialism began, it is recorded that Kenya had as many as 64 tribes. See DT Arap Moi, *Kenya African Nationalism: Nyayo Philosophy and Principles* (NAIROBI: MACMILLAN PULISHERS, 1986).

property and lives of women and their juniors.[37] Allied to this is the centrality of the family as opposed to the individual[38] and the definition of the family in expansive terms to include ascendants and descendants and more than one wife in polygynous unions.[39] An outsider looking at these societies' structures may aver that women have no rights to land and are perpetual minors under customary law.[40] It has, however been contended that women were better off under customary law than they are currently because they were accorded great protection as mothers and assured of a share of and access to resources even where they did not exercise political leadership of the community.[41] The women-unfriendly customary law has gradually developed as African societies have undergone change, most of which can be seen arising from colonisation and privatisation. The battle of the sexes at customary law is in one sense therefore a struggle over scarce resources and power as overlords in the form of colonial powers and states in modern African states have assumed control over all aspects of the lives of Africans, prompting the African males to consolidate the one bastion of their authority, namely customary law.[42] In some cases, notions of customary law such as the concern for women have been dropped, making women very vulnerable. The removal of protection has not been accompanied with fewer roles for women within the community. Their roles of reproduction and production have remained intact (rural women in Africa contribute substantially to food production).

Under religious law, Islamic, Christian, Hindu and African religion are recognized religions and the relevant law applies in personal matters such as marriage, burial and devolution of property upon death.[43] While religious law has no direct relevance to land ownership, its application to personal law makes it relevant in some land issues such as those relating to matrimonial property and succession. Besides the different legal orders do not operate in isolation and there are intersections between them in application.

Many women find themselves situated in the intersection between different systems of laws and a plethora of normative orders that influence the choices that they can make and the decisions that are reached about their lives by others.[44] Thus legal pluralism takes on a new meaning, recognising that there are regulatory and normative systems other than formal law that affect and control people's lives. This has implications for land ownership, control and use.

37 A Armstrong, 'Customary Law in Southern Africa: What Relevance for Action'[2003] 7(1) Newsletter

38 See HWO Okoth-Ogendo, '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).

39 Armstrong n 37.

40 ibid.

41 ibid.

42 ibid.

43 P Kameri-Mbote, 'Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences', *VRÜ-Verfassung und Recht in Übersee – Law and Politics in Africa, Asia and Latin America* (2002).

44 P Kameri-Mbote, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process'(2003) University of Nairobi Law Journal.

IV. WOMEN'S LAND RIGHTS IN KENYA: IMPLEMENTATION CHALLENGES IN HISTORY

Prof Okoth-Ogendo's work was mainly on land and it is instructive to explore the terrain of women's land rights that his work impacted on. This will complement the discussion on the gender problematique in land in the section above. Within this context, it is important to note that land in Kenya is vested in different legal entities and has been governed under different laws, each of which has implications for women's rights to own, access and use land. Before 2010, the main classifications of land ownership in Kenya were individual, government and group or customary.[45] The norms under the legal regimes before the promulgation of the 2010 Constitution were gender-neutral and did not favour men or women. However, in practice around the implementation of the norms, gender discrimination arose and women were excluded. This is on account of the nature of the societies in which the laws were applied, which did not consider women as the gendered construction of maleness and femaleness as far as land is concerned; and the gender division of labour, which assigns different roles to men and women.

The Registered Land Act[46]; the Registration of Titles Act[47]; the Land Titles Act[48]; and the Transfer of Property Act[49] governed individual ownership of land. While the provisions of these laws were gender-neutral, available data shows that very few women had land registered in their names.[50] There is an argument that registration was bound to exclude most women from acquiring titles to land since women only had rights of use under customary law which the registration system sought to replace with English law while men had rights of disposal and allocation. The tenure reform process did not adequately protect the rights of use and concentrated on rights of control and ownership, which were vested in the more powerful members of society – men. Rights of use which women had were thus subordinated[51] by the registration process, which also weakened the position of women in relation to land.[52]

Cases of family representatives seeking to evict the other family members are not uncommon.[53] In some instances, male members have challenged the rights of daughters to land and sought to exclude them in succession cases.[54]

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45 The designation of this as customary can be misleading: the norms that were used were in some instances such as for group ranches. The legal forms used were not quintessentially customary but more group oriented and predicated on formal laws governing groups (societies' registration) while what had brought the people together in the first instance was their customary organisation. See JM Migai-Akech, *Rescuing Indigenous Tenure from the Ghetto of Neglect* (ACTS Press: Nairobi, 2001); BD Ogolla and J Mugabe, 'Land Tenure Systems and Natural Resource Management' in JB Ojwang and C Juma (eds.), *In Land We Trust: Environment, Private Property and Constitutional Change* (Initiative Publishers: Nairobi and Zed Books: London, 1996) 85–116.

46 Cap 300, Laws of Kenya (Repealed).

47 Cap 281, Laws of Kenya (Repealed).

48 Cap 282, Laws of Kenya (Repealed).

49 Statute of General Application borrowed from India, the Indian Transfer of Property Act (1882)

50 I Ikdahl et al., *Human Rights, Formalisation and Women's Land Rights in Southern and Eastern Africa*, Studies in Women's Law No. 57 (Institute of Women's Law: University of Oslo, 2005).

51 ibid.

52 ibid.

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

54 See *Rono v Rono & Another* (2008) KLR G&F 803.

With respect to government land, the Government Lands Act, Chapter 280 of the Laws of Kenya, gave the President power to make grants or dispositions of any estates, interests or rights in or over unalienated government lands.[55] The Commissioner of Lands also had power to divide any portion of government land into plots for the erection of buildings for business and residential purposes.[56] Under the pre-2010 regime, a lot of government land was converted to private land and granted mainly to politicians supporting the government.[57]

By the late 1990s, a lot of government land had been illegally and irregularly disposed of, prompting the appointment of a presidential Commission of Inquiry into Illegal/Irregular Allocation of Public Land.[58] It made its recommendations in 2004, which have remained largely unimplemented. It is important to point out that ownership of land by the government did not assure women access to such land.[59] While there has been a hue and cry over the conversion of government land to private ownership, no empirical research has been done to indicate who the beneficiaries of the grants are in gender disaggregated terms. Anecdotal evidence however is available in the annexes to the 2004 Commission Report, where the beneficiaries of the land are listed and there are not many women included.[60]

Under group ownership, the Trust Lands Act[61] and the Land (Group Representatives Act)[62] are still the operative laws.[63] Under the former, trust land consists of areas that were occupied by the natives during the colonial period and which have not been consolidated, adjudicated and registered in individuals' or group names, and native land that has not been taken over by the government.[64] These rights are in some cases guaranteed under some form of customary tenure.[65]

Tenure to trust land has dramatically changed from the trust status to ownership by individuals, legally constituted groups and the state. Rights of individual community members are extinguished through the change in hold and those with rights to use such as women do not usually get recompensed for the loss they suffer.

With regard to the Land (Group Representatives) Act, it was recommended by the Report of the East Africa Royal Commission of 1953-1955, whose view was that the individualisation of land ownership was the main aim but noted that such ownership could also be extended to groups such as companies, co-operatives and customary associations of

55 Section 3, Government Lands Act (Repealed).

56 See s. 9 of Chapter 280 of the Laws of Kenya.

57 See MO Odhiambo, 'Liberalisation, Law and the Management of Common Property Resources in Kenya: The Case of Public Land and Forests' (27 March 1996) (mimeographed paper presented at the East African Regional Symposium on Common Property Resource Management, Kampala, 26-28 March 1996) (on file with the author) noting that the President deals with government land as if it is his personal estate.

58 Ndung'u Land Commission (Named after its chairman, Paul Ndiritu Ndung'u).

59 See P Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya: The Case of Land Tenure and Wildlife* (ACTS Press: Nairobi, 2002).

60 Annexes to the Ndung'u Report.

61 Chapter 288, Laws of Kenya.

62 Chapter 287, Laws of Kenya

63 Will be repealed once the Community Land Act is enacted.

64 *See* §115 of the Constitution of Kenya (1963).

65 *See e.g.,* P. Ondiege, "Land Tenure and Soil Conservation," in C. Juma & J. B. Ojwang (Eds.), *In Land we Trust: Environment, Private Property and Constitutional Change* (Acts Press: Nairobi, 1996) 117.

Africans.[66] The group ranch status is granted to a group of herders that is shown to have customary rights over the range or pastureland in question. A group is defined as a "tribe, clan, family or other group of persons, whose land under recognised 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" where such person has, under recognised customary law exercised rights in or over land which should be recognised as ownership.[67] Each group has to have a constitution and is required to elect between three and 10 persons as its representatives.[68] Most group ranches are in the areas occupied by pastoral communities in Kenya.

Group ranches have faced challenges such as, lack of the authority of traditional leaders;[69] their being treated as inferior to individual rights;[70] non-recognition of pastoralism in Kenya as an important land use system[71]; and failure to get title deeds on account of the cost of registration which is pegged on acreage and many are expansive making the cost prohibitive.[72]

Group ownership through both the Trust Land Act and the Land (Group Representatives) Act has not fostered gender equality in land matters. Given the patriarchal social ordering and the importance of land, it would be surprising if indeed women have greater rights in these areas. In a study carried out among the Samburu, Rendille and Maasai where group ranches are the norm, it was noted that most forums for making decisions were dominated by men and that most of these cultures excluded women from such fora.[73]

The challenges outlined above hindered women's enjoyment of land rights. We noted above that Prof Okoth-Ogendo never wrote specifically on the issue of gender. However, in Part V, we will demonstrate how his work greatly influenced and shaped women's quest for land rights in Kenya and in Africa. More specifically, the National Land Policy; the Constitution of Kenya, 2010; and the AU Framework and Guidelines on Land Policy provided a launching pad for women to articulate and claim their rights.

66 See, Report of the East Africa Royal Commission of 1953-1955, Cmd. 9475 (1955). [351]

67 Land (Group Representatives Act) (Repealed), § 23 (2) (a).

68 ibid 5.

69 See, JG Galaty,'Introduction : Nomadic Pastoralists and Social Change - Processes and Perspectives' in JG Galaty & PC Salzman (eds), *Change and Development in Nomadic Pastoral Societies* (E.J BRILL:NETHERLANDS, 1981) 4 and JG Galaty, "Land and Livestock among Kenyan Maasai: Symbolic Perspectives on Pastoral Exchange, Change and Inequality" in J.G. Galaty & P.C. Salzman, (Eds.), *Change and Development in Nomadic Pastoral Societies* (E.J Brill: Netherlands, 1981) 68.

70 Kameri-Mbote(n 59).

71 *See, e.g.*, A Bourgeot, 'Nomadic Pastoral Society and the Market: The Penetration of the Sahel by Commercial Relations' (1981) 16 (1-2) Journal of Asian and African Studies 116; and, C Lane, *Pastures Lost: Barabaig Economy, Resource Tenure, and the Alienation of their Land in Tanzania* (INITIATIVES PUBLISHERS: NAIROBI, 1996).

72 C Odote, 'Dawn of Uhuru? Implications of Constitutional Recognition of Communal Land Rights In Pastoral Areas of Kenya' [2013] 17(1) Nomadic Peoples 87.

73 P Kameri-Mbote & K Mubuu, *The Impact of Traditional/Religious Institutions on Gender Relations and Gender Discriminative Practices and Scope for Changing the Negative Trends: A Case Study of Select Pastoral Communities in Kenya* (Report prepared for the Netherlands Development Cooperation Organisation (SNV): Nairobi, October 2004).

V. INTERNATIONAL AND REGIONAL LEGAL BEST PRACTICE ON WOMEN'S RIGHTS TO LAND

In looking at the legal status of women in Kenya and assessing their land rights, one has to look at both the international and domestic dimensions. Kenya is a signatory to many international legal instruments that have a bearing on the legal status of women.[74] Kenya also has domestic laws touching on this issue. There is consequently no shortage of provisions in the area of equality of the sexes in international law. The 2010 Constitution included international law as part of Kenyan law[75] and has a raft of provisions on equality and non-discrimination.[76]

Way before the 2010 Constitution, Kenya hosted the 1985 World Conference on Women where[77] issues of equality in the areas of political participation, education, employment, civil codes pertaining to family law, ownership of property, availability of credit, health and social security, to name but a few, were identified as crucial intervention points towards gender equality.[78] With respect to land, Paragraph 62 of the *Nairobi Forward Looking Strategies*[79] specifically pointed out that agrarian reform measures 'should guarantee women's constitutional and legal rights in terms of access to land and other means of production and should ensure that women will control the products of their labour and their income as well as benefits from agricultural inputs, research, training, credits and other infrastructural facilities'.

Paragraph 74 further required that all women, particularly married women, be vested with the right to own, administer, sell or buy property independently as an aspect of their equality and freedom under the law. This provision has implications for ownership, control, access and management of resources by women. Paragraphs 174-188 dealing with food, water and agriculture underscored the need to recognise and reward women for their performance of tasks hereunder; to equip them with resources necessary to perform the tasks; and ensure that they actively participate in planning, decision-making and implementation of programmes.[80] Paragraph 182 specifically required that rural women's rights to land be secured to ensure that they have access to land, capital, technology, know-how and other productive resources that they need.[81]

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74 Kenya is a member of the United Nations and would therefore have an international legal obligation to provide for equal rights to men and women as provided for in the UN Charter and the Universal Declaration of Human Rights. Kenya is also a signatory to the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Convention on the Political Rights of Women and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women.

75 Article 2 (5 & (6) of the Constitution of Kenya 2010.

76 ibid Articles 10 and 27 among others.

77 United Nations World Conference to Review and Appraise the Achievements of the UN Decade for Women, Nairobi *(***1985**). See also Sara Ruto et al. (eds.), *The Promises and Realities: Taking Stock of the 3rd International Women's Conference* (Nairobi: African Women & Child Feature Service & Ford Foundation,2009).

78 See *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace* Nairobi, 15-26 July 1985(United Nations: New York, 1986).

79 ibid.

80 ibid.

81 ibid.

The World Summit on Sustainable Development (WSSD) Plan of Action in 2002 also identified women as key to the attainment of sustainable development.[82] It explicitly states that women need to be provided with access to agricultural resources and that land tenure arrangements should recognize and protect indigenous and common property resource management systems. This is in recognition of the critical role that agriculture plays in addressing the needs of a growing global population, its inextricable link to poverty eradication, especially in developing countries and the realisation that enhancing the role of women at all levels and in all aspects of rural development, agriculture, nutrition and food security is imperative.[83] Paragraph 38 (i) points to the need to adopt policies and implement laws that guarantee well defined and enforceable land and water use rights, and promote legal security of tenure, recognizing the existence of different national laws and/or systems of land access and tenure, and provide technical and financial assistance to developing countries as well as countries with economies in transition that are undertaking land tenure reform in order to enhance sustainable livelihoods. Paragraph 38 (f) identifies the need to enhance the participation of women in all aspects and at all levels relating to sustainable agriculture and food security.

The Protocol to the African Charter on Human and Peoples' Rights on Women's Human Rights (the African Protocol) adopted by the African Union's General Assembly in 2003 also pays particular attention to the rights of women to land. This is the region's most comprehensive document on the rights of women and elaborates Article 18(3)[84] of the African Charter on Human and Peoples' Rights, which addresses women's rights. Kenya ratified the Protocol in 2010. Its provisions resonate with the provisions of Kenya's Constitution. For instance, Article 6 (j) provides that during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely; Article 7 (d) deals with property rights in instances of separation, divorce or annulment of marriage, providing that women and men shall have the right to an equitable sharing of the joint property deriving from the marriage. Further, Article 15 exhorts states to take appropriate measures to provide women with access to land and the means of producing nutritious food; in Article 16, states parties are required to grant to women access to adequate housing whatever their marital status; Article 19 exhorts states' parties to promote 'women's access to and control over productive resources such as land and guarantee their right to property'.

These provisions resonate with those in the African Union Solemn Declaration on Gender Equality[85] which, at paragraph 7, calls on governments to actively promote the implementation of legislation to guarantee women's land, property and inheritance rights including their rights to housing. They are among many others that provide the standard against which the national legal system is to be measured. It is within this context that we

82 United Nations, *World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development*, 4 September 2002.

83 ibid para 38.

84 Article 18 is on the protection of the family and vulnerable groups. Article 18 (3) provides that "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions".

85 Adopted by Heads of State in July 2004, Addis Ababa, Ethiopia.

look at Okoth's work and how he contributed to the integration of these tenets into the Kenyan legal system.[86] In so doing, he provided pathways for women to deal with discriminatory statutory and customary law generally but specifically with respect to land rights.

VI. OKOTH'S CONTRIBUTION TO GENDER EQUALITY AND NON-DISCRIMINATION IN LAND MATTERS

In this part, we look at work that Okoth was engaged in that impacted on gender equality and non-discrimination in Kenya. In essence, Okoth's work was geared towards ensuring conformance of Africa's and Kenya's land policy and law terrain with international best practice.

A. Land Policy Initiative

Okoth was the leading consultant to the United Nations Economic Commission for Africa's Land Policy Initiative, which generated the *Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods*.[87] The policy guidelines point to the need to address gender inequalities, including women's unequal access to land noting that:

> If law and policy are to redress gender imbalances in land holding and use, it is necessary to deconstruct, reconstruct and reconceptualise existing rules of property in land under both customary and statutory law in ways that strengthen women's access and control of land while respecting family and other social networks. [88]

The guidelines also called for the reformulation of formal gender-neutral laws to result in social realignments in land holding and the perception of women as subordinates who are mainly dependants.[89] They underscored the need for a fully gendered, informed and participatory mobilization and continuous engagement of all stakeholders in the land sector as a central plank in the application of the guidelines.[90] These guidelines provide a platform for engendering land reform. Alongside these Guidelines, the AU Declaration on Land Issues and Challenges[91] was adopted to facilitate the implementation of the Policy and Guidelines. In the Declaration, States resolved to both ensure "that land laws provide for equitable access to land and related resources among all land users including the youth and other landless and vulnerable groups such as displaced persons" and to "strengthen security of land tenure for women, which merit special attention".

These guidelines have provided a clear overview of the historical, political, economic and social background of the land question in Africa and a template for many African countries to follow in framing their land policies. They include land policy development and implementation lessons and best practices from across the continent, which can guide coun-

86 Okoth did not work alone. There were others working with him and we do not mean to appropriate all the initiatives to him. As we pointed out above, our point is that Okoth devoted considerable time to the initiatives.
87 AU Guidelines on Land Policy (n 7) above
88 ibid 23.
89 ibid 25.
90 ibid 65.
91 AU Guidelines on Land Policy (n 7)

tries in framing their own policies. The Land Policy Initiative (LPI) has embarked on assisting member states in the implementation of the declaration on land issues and challenges in Africa in accordance with the Framework and Guidelines on land policy on the continent in order to achieve socio-economic development, peace and security, and environmental sustainability.[92] It has embarked on assisting states in developing or reviewing their land policies as well as in implementing and evaluating these policies. It has two ambitious goals:[93] to have 20 member states develop land policies and adopt implementation tools that enhance women's secure access to land; and recognize the legitimacy of Africa's customary based land rights and institutions by 2020; and to have 10 member states putting in place transparent, efficient and cost-effective land administration systems which are reflective of Africa's unique realities by 2020.

It has also initiated capacity building initiatives to support countries in reviewing and implementing their land policies.

B. Kenya National Land Policy

Kenya's first National Land Policy was drafted between 2004 and 2007 and enacted in 2009.[94] Okoth was one of the three members[95] of the Technical Advisory Council (TAC) that spearheaded the crafting of the policy from conceptualization to the final draft. Gender concerns were canvassed in all aspects of the policy formulation process from the membership of the team tasked to generate the policy to the land policy principles[96] and the guiding values.[97] Among the contemporary manifestations of the land question identified are 'gross disparities in land ownership, gender and trans-generational discrimination in succession, transfer of land and the exclusion of women in land decision making processes'[98] and 'disinheritance of women and vulnerable members of society, and biased decisions by district tribunals, committees and boards'.[99]

The policy also addresses the protection of human rights for all, specifically dealing with laws, customs and practices that discriminate against women, minorities, children and persons with disabilities, with respect to access to and ownership of land rights.[100] The policy also called for the 'recognition, protection and registration of community rights to land and land-based resources, taking into account multiple interests of all land users, including women.'[101] With regard to inheritance, the policy required the proscription of all customary law, which discriminates against women and children.[102]

Paragraph 170 (e) requires the government to address the land rights of women among a category of issues requiring special intervention. Among the issues raised are: rec-

92 <http://www.uneca.org/lpi/pages/about-lpi > accessed 24 February 2017.
93 <http://www.uneca.org/lpi/pages/about-lpi > accessed 24 February 2017.
94 Republic of Kenya, *Sessional Paper No. 3 on National Land Policy*, (Government Printer: Nairobi, 2009).
95 The others were Prof Paul Syagga and Dr Naomi Kipury.
96 Republic of Kenya, National Land Policy n 94) para 7 c.
97 ibid para 8 h.
98 ibid para 24(c).
99 ibid para 25(f).
100 ibid para 39 (h).
101 ibid Para 66 (d) i.
102 ibid Para 91.

ognition and protection of land rights of women in pastoral communities;[103] legislation to ensure effective protection of women's rights to land and related resources;[104] repealing laws and outlawing regulations, customs and practices that discriminate against women in relation to land;[105] establishing a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources;[106] provision for joint spousal registration and documentation of land rights, and for joint spousal consent to land disposals;[107] and proportionate representation of women in institutions dealing with land at all levels.[108]

The policy addresses the issue of matrimonial property separately, requiring that laws be reviewed to ensure that they conform to the principle of equality between women and men;[109] enactment of specific legislation governing division of matrimonial property;[110] protection of the rights of widows, widowers and divorcees through the enactment of a law on co-ownership of matrimonial property;[111] appropriate legal measures to ensure that men and women are entitled to equal rights to land and land-based resources before marriage (in cases of inheritance), during marriage, upon dissolution of marriage and after the death of the spouse;[112] and mechanisms to curb selling and mortgaging of family land without the involvement of the spouses.[113]

The acceptance of these proposals was somewhat surprising considering the resistance to women's land rights when the Draft Constitution was put to a referendum in 2005 and was rejected.[114] The Committee of Eminent Persons appointed by the President in 2006 to advice on the way forward following the defeat of the Draft Constitution in the 2005 referendum found that gender was one of the nine most contentious issues in the document that had been subjected to the vote.[115] Okoth died in April 2009 before the policy was published as *Sessional paper No. 3 of 2009***.** His absence in the last stages of the policy must be the reason why the published documents included a provision discriminating against women in land matters.[116]

C. Constitution of Kenya 2010

The Constitution of Kenya, 2010, was the end product of a long process of negotiation,

103 ibid Para 183 (e).
104 ibid Para 223 (a).
105 ibid Para 223 (b).
106 ibid Para 223 (c).
107 ibid Para 223 (d).
108 ibid Para 223 (h).
109 ibid Para 225 (a).
110 ibid Para 225 (b).
111 ibid Para 225 (c).
112 ibid Para 225 (d).
113 ibid Para 225 (e).
114 ibid.
115 See Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process* (Government Printer: Nairobi, 30 May 2006).
116 Para 223 securing inheritance rights of unmarried daughters. The origin of this provision must have been the backlash in the 2005 referendum. It had been agreed that the principle of non-discrimination in land matters was for all women not just unmarried women.

which started in the early 1990s and gained momentum in the late 1990s and early 2000.[117] The Constitution of Kenya Review Commission (CKRC) was established in 2000 and Okoth served as both a commissioner and vice chair to the commission. The first draft of the constitution was produced in 2002 and subjected to discussions that generated a second draft that formed the basis of discussions in the Bomas Constitutional Conference in 2004 at which Okoth served as rapporteur. Between 2004 and 2010, different drafts of the constitution were generated, including the Wako Draft[118] that was rejected in the referendum referred to above in 2005.[119] The 2010 Constitution resulted from the work of the Committee of Experts tasked to look at the different drafts and come up with a harmonized draft. The draft was subjected to a referendum in 2010 and promulgated the same year. Okoth had passed on a year earlier. Had he been alive at the time of the promulgation, he would have been proud to see that issues he had worked to had included in the Constitution and had survived the politics. The chapter[120] dealing with land; proposals on protection of marginalised and minority groups and general provisions on equality formed an integral part of the celebrated document.

The Constitution contains an explicit and unequivocal statement on the equality of women and men in Kenya;[121] provision for the application of this principle in political, economic, cultural and social spheres;[122] prohibition of discrimination on different grounds including gender;[123] and a legal and constitutional basis for affirmative action measures to redress past patterns of discrimination in Kenya and a requirement to go beyond formal equality to substantive equality.[124] The Constitution removed the age old 'cultural exemption'[125] that subjected women to the application of discriminatory customary law in personal law matters as an exception to the equality principle.[126] The Constitution also provides that not more than two thirds of members of any appointive or elective body should be of the same gender,[127] making it possible to redress the exclusion of women in land decision making bodies, among others. These provisions are facilitative of the move towards an equal society. The implementation of the Constitution has encountered gender specific realities and power equations that do not allow for the change in systems for a gender equal society. On the specific issue of representation in elective positions, there has been a lot of jostling that

117 P Kameri-Mbote and N Kabira, 'Separating the Baby from the Bath Water: Women's Rights and the Politics of Constitution making in Kenya' [2008] 14 (1) East African Journal of Peace and Human Rights1.

118 Named after its principal author, the then Attorney General Amos Wako.

119 See discussions on the gender interplay with the politics of constitution making in Kameri-Mbote and Kabira (n 117) above.

120 Chapter 5 of the Constitution of Kenya 2010.

121 ibid Art.27 (1).

122 ibid Art.27(3).

123 ibid Art. 27(4).

124 ibid Art. 27(6).

125 UNIFEM, *Promoting the Human Rights of Women in Kenya: A Comparative Review* (UNIFEM:Nairobi, 2010) (With Celestine Nyamu Musembi, Winnie Kamau & Nancy Baraza).

126 Section 82 (4) Constitution of Kenya 1969 as revised in 1997 (Now repealed).

127 Art. 27(8) of the Constitution of Kenya 2010.

has seen the matter in court several times.[128] The Supreme Court has directed the Attorney General and Parliament in all cases to pass the relevant legislation to ensure conformance with the Constitution. The attempts by Parliament to pass the necessary law have been protracted. The latest attempt was a Bill[129] published on 24 July 2014. Its First Reading was on 30 July 2015. It was introduced for Second Reading on 22 March 2016 and debate thereon finalised on 19 April 2016.[130] The Bill needed the support of 233 members to become law. When it was put to the vote on 28 April 2016, only 195 votes were cast for it: this was 38 votes short of the constitutional threshold. The Speaker directed a second vote within five (5) days and this took place on 5 May 2016. The requisite quorum was however not attained on the day of voting. The Speaker directed that a vote be taken despite the lack of quorum and the Bill garnered 179 votes whereupon it was deemed to have lapsed.[131]

Article 10 on National Values and Principles of Governance also includes equity, social justice, inclusiveness, equality, non-discrimination and protection of marginalized.

On property, the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.[132] On land specifically, Chapter 5 includes the principles of equitable access to land; security of land rights; and elimination of gender discrimination in law, customs and practices related to land and property in land.[133] Among the laws required to be passed under Article 68 are those that deal with the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage,[134] and to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land.[135]

A number of laws have already been passed to give effect to the provisions of the Constitution. These include the Land Act;[136] the Land Registration Act;[137] The Marriage Act;[138] the Matrimonial Property Act;[139] and the Community Land Act.[140] The review of the Law of Succession is at an advanced stage. These new laws recognize gender equality and

128 See e.g. Republic of Kenya, In the Supreme Court of Kenya, (2012), *In the Matter of an Application for Advisory Opinion under Article 163 (6) of the Constitution and In the Matter of Article 8, Article 27(4), Article 27(8, Article 96, Article 98, Article 177 (1) (b), Article 116 and Article 125. Article 89 (2), Article 89 (4), and the Consequential Provisions in the Sixth Schedule Section 27 (3) of the Constitution of the Republic of Kenya and In the Matter of the Principle of Gender Representation in the National Assembly and in Senate;* and *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* [2015] eKLR.

129 Two-Thirds Gender Rule Laws (amendment) Bill 2015 tabled by Aden Duale, Majority Leader in the National Assembly on 31 July 2015.

130 National Gender and Equality Commission (NGEC), *Legal Opinion on the not More Than Two-Thirds Gender Principle Bills in Parliament*, 2016 (On file with the author).

131 P Kameri-Mbote, 'Achieving Gender Representation in Kenya: Emerging Issues in the Constitution', Paper prepared for the International Commission of Jurists (May 2016).

132 Article 45 (3) Constitution of Kenya 2010.

133 ibid Article 60.

134 ibid Article 68 c iii.

135 ibid Article 68 c vi.

136 Act No. 5 of 2012.

137 Act No. 3 of 2012.

138 Act No. 4 of 2014.

139 Act No. 49 of 2013.

140 Act No. 27 of 2016.

contain provisions on the protection of the spousal right to matrimonial property even when not noted; requirement for spousal consent to any dealing with matrimonial property; recognition of the equality of both men and women in a marriage when it comes to acquisition, administration and disposal of property;[141] and the recognition of spousal non-monetary contribution to matrimonial property.[142]

Married women's rights to property, especially land, has been an issue of great concern. Prior to 2014, Kenya had five different regimes governing marriage. These included civil,[143] religious (Christian,[144] Muslim[145] and Hindu[146]) and customary marriages.[147] In addition to these substantive pieces of legislation, there were two other statutes governing marriage.[148] The Marriage Act now governs all marriages, 2014, which consolidates the marriage law while including separate provisions to govern each regime.

The Matrimonial Property Act[149] regulates the management of property within marriage. This law came into operation in January 2014 and was expected to create fairness and certainty in the division of matrimonial property. Sadly, however, some decisions made by courts after the enactment of this law still grant women fewer rights to the matrimonial property using the previously applicable law – the English Married Women's Property Act of 1882 -- thus denying women the protection anticipated under Article 45 (3) of the Constitution on equal rights of spouses to matrimonial property.[150]

It is interesting to note that decisions made before the enactment of the Matrimonial Act had adopted an expansive reading of Article 45(3) of the Constitution.[151] It is also encouraging to note that women are increasingly taking on their male relatives in disputes related to property, including land,[152] and courts have held customary practices that deny women the right to inherit land to be discriminatory.[153] The hope is that over time, the principles of equality and non-discrimination in land matters will be the dominant narrative and

141 Section 4, Matrimonial Property Act, Act No. 49 of 2013.

142 ibid Section 7.

143 Governed by the repealed the Marriage Act of Kenya, Cap. 150 of the Laws of Kenya.

144 Governed by the repealed African Christian Marriage and Divorce Act, Cap. 151 of the Laws of Kenya.

145 Governed by the repealed Mohammedan Marriage Divorce and Succession Act, Cap. 156 of the Laws of Kenya.

146 Governed by the repealed Hindu Marriage and Divorce Act, Cap. 157 of the Laws of Kenya.

147 Governed under the diverse customary laws of various tribes in Kenya.

148 The Marriage and Divorce Registration Act, Cap. 155 of the Laws of Kenya and the Subordinate Court (Separation and Maintenance) Act Cap. 153 of the Laws of Kenya.

149 Act No. 49 of 2013.

150 See e.g. *SNK V MSK & Others* [2015] C.A. No 139 of 2010, (decided in April 2015) where the Court of Appeal, deciding an appeal arising from a decision of Ang'awa J of 2005 stated: "Our Parliament has now enacted the MPA, 2013, which was not in existence at the time of the hearing of this matter in the High Court." The judge concluded that the determination of this appeal could not be based upon a law that was not in existence when the High Court matter was decided.

151 See *Agnes Wanjala William v Jacob Vander Goes,* C.A (MSA) 127 of 2011 where the court stated that *Echaria v Echaria* (CA No 75 of 2001 [2007] eKLR) required a revisit, noting that its harshness had since been ameliorated by the new constitutional dispensation which provided for equality and social justice and placed an obligation on all parties to live up to the values set out in it.

152 See e.g. <http://www.standardmedia.co.ke/article/2000201939/quiet-revolt-as-sisters-take-on-brothers-in-succession-feud-in-kenya> accessed 7th June 2016 where it is pointed out that a quiet revolution is unfolding in the courts as women lay claim to inheritance wealth citing the new Constitution that outlawed discrimination.

153 See *Vivian Cherono v Maria Chelangat Kerich***,** Civil Case No. 84 of 2012 (eKLR) available at <http://kenyalaw.org/caselaw/cases/view/98800/> accessed 23 August 2014.

that discrimination of women in land matters will be a thing of the past. The path however is still long, arduous and strewn with challenges that need to be surmounted, such as the customary perception that women cannot own land.[154]

VII. CONCLUSION: ENCOUNTERS BETWEEN REALITY AND RHETORIC

Okoth played his role by working hard to ensure that equality and non-discrimination were realised in land matters. His participation in legal and policy processes that provided impetus for gender sensitive land reform in Africa and in Kenya specifically continue to provide the alleys of hope that women continue to peer through despite the setbacks they continue to face.

Indeed, while the law clearly provides for gender equality, the principle is yet to be realized in practice. *De jure* equality is yet to yield *de facto* equality. Law has encountered gendered realities that have resulted in non-observance and sometimes-outright contestation of the principle of gender equality. Some of the earliest matters in court over the provisions of the Constitution of Kenya, 2010, related to the issue of gender representation in elective and appointive positions.[155] The issue of whether the realisation of gender equality should be immediate or progressive has refused to go away six years after the Constitution was promulgated. People's lives continue outside the purview of the norms in the Constitution, particularly in the areas of gender equality. This vindicates Okoth's assertion that while African elites are fixated with the idea of constitutional documents, they reject the notion of constitutionalism which espouses fidelity to the principle that the exercise of state power must seek to advance the ends of society with the end result being an optimal balance between those with power and the those for whose benefit power is to be exercised.[156] Indeed, Okoth notes that *in no society has that balance been achieved through the promulgation of a constitution, per se.*[157] This view resonates with Tove Stang Dahl's that:

> As long as we live in a society where women and men follow different paths in life and have different living conditions, with different needs and potentials, rules of law will necessarily affect men and women differently. The gender-neutral legal machinery … meets the gender-specific reality…[158]

Laws and policies are important entry points in promoting gender equity and equality within very stratified patriarchal societies and can be the alleys of hope and windows of

154 Kameri-Mbote, The Land Has Its Owners (n15) above.

155 See e.g. *Advisory Opinion No. 2 of 2012* in the matter of an application for advisory opinion under Article 163 (6) of the Constitution of Kenya -and In the matter of Article 81, Article 27 (4), Article 27 (6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1) (b), Article 116, Article 125 and Article 140 of the Constitution of Kenya 2010-and In the Matter of the Principle of Gender Representation in the National Assembly and the Senate-and In the Matter of the Attorney-General (on behalf of the government) as the applicant.

156 Okoth-Ogendo, Constitutions without Constitutionalism (n 8) above.

157 ibid 79-80.

158 T Stang Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (Oslo: Norwegian University Press, 1987).

opportunity for the promotion of women's access to, control over and access to resources.[159] They are however 'inadequate to address the entrenched question of women's rights to land, especially within a plural normative context where the application of policies and constitutional provisions is mediated by customary law interpreted to exclude women from land ownership and access'.[160]

159 P Kameri-Mbote, et al., 'Pathways to Real Access to Land-Related Resources for Women: Challenging and Overturning Dominant Legal Paradigms' in A Tsanga and J Stewart (eds), *Women and Law: Innovative Regional Approaches to Teaching, Researching and Analysing Women and Law* (The North-South Legal Perspective Series No. 5, Weaver Press: Harare, 2011) 333-369 (With Anne Hellum & Pauline Nyamweya).

160 Kameri-Mbote, The Land Has Its Owners (n15) above.

CHAPTER 16

GENDERED LAND QUESTIONS AND THE MARGINALIZATION OF MAASAI WOMEN

Agnes K. Meroka

"This land I give you, O man and woman. It is yours to rule and till. You and your posterity."
Ngugi wa Thiong'o[1]

I. INTRODUCTION

Prof Okoth Ogendo challenged the thesis that security of land tenure, which has been seen as one of the core pillars leading to economic development, can only be attained through land tenure reform (land tenure reform essentially being the transformation from customary or indigenous forms of tenure into formal tenure, characterised by registration and titling).[2]He demonstrated the ways in which formality created insecurity of land rights, resulted in economic inequalities and also disrupted socio-cultural institutions, but at the same time he was pragmatic. Prof Okoth-Ogendo conceded that formalization of land tenure could not necessarily be avoided, but he insisted that for a system of land administration to work effectively in Africa, there was need to democratize it and allow for community engagement and participation.[3]

In line with Prof Okoth-Ogendo's thesis that formalisation can, contrary to the notion that it is the path to economic development, create insecurity and disenfranchisement, this chapter analyses the ways in which privatisation and individualisation of land among the Maasai of Kajiado has impacted upon women, creating a situation whereby women are dispossessed of land at the household level. This chapter also demonstrates the ways in which Maasai women are excluded from effectively participating in community strategies aimed at addressing the effects of formalization of land tenure. It argues that there is a need to remove the barriers that prevent gender concerns from being taken seriously and addressed, because left unaddressed, gender concerns continue to impact negatively not just on women, but on the community as a whole.

1 Ngugi wa Thiong'o, *The River Between* (Heinemann Educational Publishers: Oxford, 1965) 2.

2 HWO Okoth-Ogendo, *Tenants of the Crown: Evolutions of Agrarian Law and Institutions in Kenya* (ACTS Press: Nairobi, 1991); HWO Okoth-Ogendo, 'The Perils of Land Tenure Reform: The Case of Kenya' [1986] Land Policy and Agriculture in Eastern and Southern Africa 72.

3 HWO Okoth-Ogendo, 'The Last Colonial Question: An Essay in the Pathology of Land Administration Systems in Africa' (A keynote presentation at a workshop on Norwegian Land Tools Relevant to Africa, Oslo, Norway, 3-4 May 2007).

This chapter, therefore, uses the Maasai as a case study in order to highlight the gender dimensions of the following theses, which Prof Okoth-Ogendo developed:

i) Contrary to the popular opinion that formality is the roadmap for creating secure land tenure which in turn would lead to economic development, formality can create insecure land tenure; and
ii) There is a need to allow for greater participation at the community level in the design of land administration systems, otherwise such systems are likely to remain unresponsive to the needs of communities.

Using the feminist theory of intersectionality to interrogate the framing of Maasai land loss, this chapter relies on empirical data to argue that Maasai women constitute a subaltern category to the extent that law does not adequately address their concerns relating to land loss which occurred as a result of the state's implementation of privatisation and individualisation of land; and secondly, Maasai women are excluded from the community's popularised struggles to redress land rights violations that occurred as a result of state policy on privatisation and individualisation of land.

This chapter begins by discussing the concepts of subalternity and intersectionality, highlighting how they help to better understand the forms of disadvantage that women face, and discussing the need to understand the forms of disadvantage that women experience not only through the lens of gender, but also other lenses, in this case, ethnicity. It then discusses the relationship between the Maasai community and the state as an aspect of citizenship and demonstrates the ways in which the Maasai, as a community, have been marginalised due to the implementation of the state policy of privatisation and individualisation of land. This is followed by a discussion on the marginalisation of Maasai women in law and also in community strategies aimed at addressing the negative effects of state policy on land. The chapter concludes by discussing the need for taking an intersectional approach when coming up with strategies that are aimed at addressing gender inequality and ethnic marginalisation.

II. UNDERSTANDING INTERSECTIONALITY AND SUBALTERNITY

Crenshaw[4] has demonstrated that even where law addresses questions of inequality and disadvantage, there is a possibility that categories of people, such as black women, may still not benefit from such legal provisions, because law does not necessarily respond to disadvantage that arises from the intersections of gender and race.[5] This is because law generally responds to inequality using the *single sphere of identity* model.[6]

Thus, law would address inequality occurring on the basis of gender *or* race, but not inequality occurring on the basis of gender *and* race. One of the key factors that prevent law from responding to intersectional forms of disadvantage is the question of dominance, whereby within sections of the law, one sphere of disadvantage is dominant. Thus, for in-

4 Kimberle Crenshaw, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics' [1989] 1 University of Chicago Legal Forum 139.
5 ibid.
6 ibid.

stance, in Crenshaw's[7] analysis, in anti-race policy, race is the dominant factor, whereas gender constitutes a marginalised category; and in gender policy, gender is the dominant factor whereas race is marginalised. The result was that the concerns of black women were not addressed in anti-race policy, which was largely informed by the experiences of black men; and neither were they addressed in gender policy, which was largely informed by the experiences of white women.[8] Intersectionality highlights the need to address dominance, particularly within categories that have historically been regarded as marginalised.

In the Kenyan context, this position is also discernible. The Constitution, at Article 27, prohibits discrimination on any ground, including sex. Thus, women enjoy the right to equality and equal treatment under the law. With specific regard to land, Article 60(f) provides that land in Kenya shall be held, used and managed in accordance with the principle of elimination of gender discrimination in law, customs and practices related to land and property; Article 68 further requires Parliament to enact laws which protect the rights of women with regard to property. However, applying the intersectional approach requires an analysis of how multiple spheres of identity may limit women from enjoying equality as provided for in the Constitution. In the case of Maasai women, ethnicity is a sphere of identity that may lead to forms of disadvantage which the law does not respond to and, therefore, may limit women from enjoying the freedom from discrimination as provided for under Article 27 of the Constitution.

In this sense, Maasai women constitute a subaltern category. They belong to a marginalised ethnic community, which has suffered the loss of land precipitated by the colonial and post-colonial state's view that pastoralist land use does not fit into the Kenyan agrarian and capitalist economy.[9] Due to the history of land alienation and loss, the Maasai view themselves as a marginalised ethnic community,[10] and human rights activists, as well as indigenous people's movements, also view them as such.[11] However, it is important to interrogate whether in fact the gender concerns are represented in the discourses that have led to the recognition that the Maasai are marginalised. This means that even within marginality there exists dominance -- that is, the subaltern.

The term subaltern was first used by Antonio Gramsci, to refer to groups that had "*insufficient access to modes of representation*."[12] In this regard, and with reference to the Indian context, Guha argued that:

> Parallel to the domain of elite politics there existed throughout the colonial period another domain of Indian politics in which the dominant actors were not the dominant groups of elite society or the colonial authorities but the subaltern classes and

7 ibid.

8 ibid.

9 Mukhisa Kituyi, *Becoming Kenyans: Socio-Economic Transformations of the Pastoral Maasai* (Nairobi: ACTS Press,1990);

10 David J Campbell, 'Land as Ours, Land as Mine: Economic, Political and Ecological Marginalisation in Kajiado' in Richard D. Waller (ed), *Being Maasai: Ethnicity and Identity in East Africa* (London: James Currey Publishers, 1993) 258-272.

11 Lotte Hughes, 'Malice in Maasailand: The Historical Roots of Current Political Struggles' [2005] 104 (415) African Affairs 207; Dorothy L. Hodgson; 'Being Maasai, Becoming Indigenous: Postcolonial Politics in a Neoliberal World' (Bloomington: Indiana University Press, 2011).

12 Swati Chattopadhyay and Bhaskar Sarkar, 'Introduction: The Subaltern and the Popular' [2005] 8 (4) Postcolonial Studies 357, 359.

> the groups constituting the mass of labouring population and intermediate strata in town and country -- that is the people.[13]

While Guha used the terms *popular* and *subaltern* synonymously, the two terms are distinct[14] and for Gramsci, the "subaltern not only included the working class of the industrial revolution, but all those for whom the progress made by the industrial revolution created conditions which left them out of the game."[15] In developing this term further and still within the context of subaltern studies in India, Spivak argues that "subalternity is where social lines of mobility, being elsewhere, do not allow the formation of a recognisable basis for action."[16]

Subalternity in this sense does not simply refer to the exclusion of particular groups or categories from established institutions or formal structures, but rather, it refers to a group's lack of agency to challenge such exclusion. We see, therefore, that their resistance or difference from the elite identifies the subaltern and the popular groups, but at the same time, the subaltern and the popular are distinguishable concepts, though not completely incommensurable as Ghosh[17] argues. Dominance in this sense, therefore, emerges where the experiences of a category of people are subsumed within the views of a broader category, and no opportunities are presented to articulate difference within this broader category.

Dominance is one of the themes that Prof Okoth-Ogendo addressed, albeit within the context of agrarian law.[18] Nonetheless, his analysis points to the need to understand the ways in which dominant discourses lead to outcomes of marginality, even where the aim within such discourses was to address inequality and disadvantage.[19] Prof Okoth-Ogendo demonstrated how the nature, characteristics and historical foundations of land tenure under African customary law are sidelined or ignored altogether within the context of the dominant discourses on land and development.[20] He argued that it should not be taken for granted that these dominant discourses sufficiently explain the realities of agrarian law in Africa, and that it is important to understand the realities about the normative characteristics and historical foundations of the law, otherwise interventions aimed at promoting development would more than likely fail.[21] Dominance, therefore, is seen here as inhibiting the effective operation of the law; it tells a one-sided story that is assumed to be holistic. Prof Okoth-Ogendo therefore demonstrates the need to expose dominance, and intersectionality is a conceptual framework that provides tools, which enable us to do so.

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13 ibid 4.

14 Walter D. Mignolo, 'On Subalterns and Other Agencies' [2005] 8 (4) Postcolonial Studies 381.

15 ibid 385.

16 Gayatri C Spivak, 'Scattered Speculations on the Subaltern and the Popular' [2005] 8 (4) Postcolonial Studies 475, 476.

17 Bishnupriya Ghosh, 'The Subaltern at the Edge of the Popular' [2005] 8 (4) Postcolonial Studies 459.

18 HWO Okoth-Ogendo, *Tenants of the Crown: Evolutions of Agrarian Law and Institutions in Kenya* (Nairobi: ACTS Press,1991).

19 ibid.

20 HWO Okoth-Ogendo, 'The nature of land rights under indigenous law in Africa' in Aninka Claassens and Ben Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act*, (UCT Press; Cape Town, 2008).

21 Okoth-Ogendo (n 18).

III. CITIZENSHIP AND THE CREATION OF MARGINALITY AMONG THE MAASAI

Flowing from the theme of dominance within marginality, it is useful to discuss the ways in which the Maasai have been marginalized as an ethnic community. This is foundational in analyzing how Maasai women have developed as a subaltern category. Citizenship is used here as a conceptual framework for analysing the relationship between the state and individuals within a given ethnic community. Traditionally and in the context of liberal democracies, citizenship refers to a relationship between individual and the state, with the state seen as having an obligation to protect and guarantee the rights of an individual.[22] Conversely, individuals have certain obligations towards the state, for instance, it is a function of citizenship for one to pay taxes, and participate in nation building. Citizenship, in this sense creates an equal playing field, and one therefore enjoys equal rights, regardless of gender or ethnicity.[23] This construction of citizenship is problematic, because it denies the lived experiences of people who experience disadvantage on the basis of gender, ethnicity, class or religion.[24]

In the African context, citizenship is not only understood as the relationship between the state and the individual, but other levels of identity and belonging are relevant, such as the ethnic communities and kinship groups to which individuals belong.[25] The individual is also seen as having obligations towards the ethnic community and kinship group, and also the state is seen as having obligations towards the ethnic community and the kinship group.[26] The importance of kinship and ethnic groups in the African context demonstrates that ethnic and cultural differences matter; and within these differences, inequality can arise. Africanist political discourse highlights the ways in which political economies can be ethnicised so that they favour some communities while disadvantaging others.[27] The ethnic community in the African context is perceived also as a vehicle through which political and economic goods may be accessed and controlled.[28] Yet ethnicity is not endlessly pervasive, and it can bring people together in positive ways, allowing people to develop for themselves the sort of communities that they imagine are ideal.[29] African ethnicities can therefore be polemic. The notion, however, that ethnicity would die with the rise of the modern nation state as individuals embrace their national identities has long been dispelled, and what is clear is that ethnicity remains an important aspect of citizenship in African states.[30]

What then, is the position of women within the ethnic community and how are gender interests represented within and through the ethnic community? The fact that ethnicity

22 For a general discussion on the meaning, nature and development of the concept of citizenship, see Derek Heater, *Citizenship: The Civic Ideal in World History, Politics and Education*, 4th edition (Manchester: Manchester University Press, 2004). See also Maurice Roche, 'Citizenship, Social Theory and Social Change' [1987] 16(3) Theory and Society 363.

23 ibid.

24 Nira Yuval-Davis, 'Women, Citizenship and Difference' [1997] 57 Feminist Review 4.

25 Patrick Chabal, *Africa: The Politics of Suffering and Smiling* (London: Zed Books, 2009).

26 ibid.

27 Bruce Berman, 'Ethnicity, Patronage and the African State: The Politics of Uncivil Nationalism', [1998] 97 (388) African Affairs 305.

28 ibid.

29 John Lonsdale, 'Moral Ethnicity and Political Tribalism' [2014] 11 Occasional Paper 131.

30 Jean Francois Bayart, *The State in Africa: The Politics of the Belly* (London and New York: Longman, 1993).

remains a key factor in determining the lived experiences of people means that women's rights can no longer be negotiated within the confines of the state-individual relations. Other aspects/levels of citizenship and belonging must be explored as they also constitute means through which women's rights may be promoted and protected.[31] Feminist analyses of difference and intersectionality point to a need to integrate gender analyses within broader critiques of the concept of citizenship,[32] which have demonstrated that the concept has traditionally ignored experiences of inequality, assuming that in a liberal democracy all individuals are equal. It calls for the amplification of female experiences, so that it is not taken for granted that critiques of citizenship are in themselves gender inclusionary.

With regard to the Maasai, the concept of citizenship is relevant in analysing the role, which the state has played in creating the community's marginalisation, and how in turn the community has responded to such marginalisation in gender exclusionary ways. The Maasai constitute one of the marginalised ethnic communities in Kenya, because historically, they experienced the loss of land, which they occupied and controlled.[33] Much of this land has been put to agricultural production, while some of it has been set aside for use as wildlife reserves, with the aim of attracting tourism.[34] In turn, land loss has adversely affected their pastoralist way of life.[35] The Maasai have lost land in two principal ways: colonial land alienation processes which gave rise to historical injustices, and through contemporary land sales, and through these processes of land loss, the relationship between the state and the community is further explored.

A. Land Loss through Colonial Land Alienation Processes

Prof Okoth-Ogendo analyses in great detail the ways in which land alienation processes occurred in Kenya, and how these led to the disenfranchisement of the African natives.[36] It is important to note that both agricultural and pastoralist communities were disenfranchised by colonial land policies; however, colonial land policies were initiated with the aim of improving agricultural production so as to address dissatisfaction arising out of land distribution among agricultural communities.[37] For pastoralist communities on the other hand, colonial land policies were initiated with the aim of causing them to abandon altogether their mode of production.[38] Thus, the way in which the state engaged with agricultural communities on the land question was necessarily different from the way in which it engaged with pastoralist communities on the same issue. Indeed, the argument therefore has been that agricultural communities were treated more favourably by the state as compared to pastoralist communities such as the Maasai.[39]

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31 Yuval-Davis(n 24) above.

32 Dorothy Louise Hodgson, *Once Intrepid Warriors: Gender, Ethnicity and the Cultural Politics of Maasai Development* (Bloomington: Indiana University Press,2001); Nira Yuval-Davis, 'Women, Ethnicity and Empowerment' [1994] 4 (1) Feminism and Psychology 179.

33 Eugene Hillman, 'The Pauperization of the Maasai in Kenya' [1994] 41 (4) Africa Today 57.

34 ibid; Campbell (n 10).

35 ibid.

36 Okoth-Ogendo, Tenants of the Crown (n 18) above.

37 ibid.

38 Campbell (n 10); Kituyi (n 9) above.

39 Hillman (n 33) above.

During the colonial period, the Maasai elders signed two treaties in 1904 and 1911, under which they agreed to move from lands, which they occupied in order to make room for European settlement and agrarian production. It should be noted that women were not included in the signing of these agreements. The Maasai were forced to move out of well-watered pastures in Laikipia and into arid and semi-arid land in the southern reserve, thereby threatening their pastoralist mode of production. Women disproportionately suffer from these harsh environmental conditions, because in addition to requiring water for pastures, they also require water for day-to-day household chores such as cooking.[40]

Concerned about the increasing vulnerability and impoverishment of their community, Maasai leaders complained about the loss of land in Laikipia before the Kenya Land Commission in 1932 and in a memorandum, they requested that Laikipia be returned to the Maasai.[41] The Kenya Land Commission denied this request.[42] As a result, the community attributes the land problems that they currently face to the loss of prized pastureland following the implementation of the 1911 treaty.[43] Although the colonial and post-colonial governments in Kenya blamed increasing poverty among the Maasai on pastoralism and the overstocking of cattle,[44] the land into which the Maasai were moved after 1911 could not support pastoralist activities. That land lacked permanent water sources and was prone to drought. Overgrazing and overstocking resulted from the poor quality of the land and along with other factors such as increase in human and livestock populations and diseases, the land was further degraded.[45]The Maasai became vulnerable to harsh environmental conditions and were impoverished as a result.

In 1962, during the negotiations for independence, Maasai leaders again requested the recognition that Laikipia belonged to the Maasai who occupied it before colonial alienation, and for the restitution of that land to the Maasai upon its vacation by European settlers.[46] Concerned about safeguarding the interests of the settlers, the colonial government had initiated re-Africanisation programmes in the White Highlands.[47] Through these re-Africanisation programmes, the colonial government sought to re-settle landless nationalists and freedom fighters from the Kikuyu community, who posed a significant threat to the colonial government and settlers, in the White Highlands.[48]

Re-Africanisation of the White Highlands ended racial segregation, allowing Africans to settle among Europeans, but at the same time, it entrenched ethnic division among the Africans.[49] If the colonial government agreed to the request for restitution, which the Maasai made, the Kikuyu nationalists would continue to threaten European interests in the White Highlands. As a result of these vested interests, the colonial government denied its

40 Aud Talle, *Women at Loss: Changes in Maasai Pastoralism and their Effect on Gender Relations* (Stockholm: University of Stockholm, 1988).
41 Lotte Hughes(n 11).
42 ibid.
43 ibid.
44 ibid.
45 Campbell (n 10).
46 Lotte Hughes (n 11).
47 Okoth-Ogendo, Tenants of the Crown (n 18) above.
48 ibid.
49 Lotte Hughes (n 11).

legal obligations under the 1904 and 1911 treaties, and instead argued that the treaties gave rise only to a moral obligation on its part.[50] As will be discussed later in this chapter, the quest for restitution by the Maasai is ongoing, but it is gendered, as it does not represent the concerns of Maasai women.

This moral obligation was defined as one that guaranteed current land rights, meaning that no more land would be alienated from the Maasai, but there was no obligation to return land that was alienated during the colonial period.[51] Under the moral obligation, the British government agreed to help the Maasai reach an agreement that would safeguard their land rights with the new and independent government. However, in 1963, the British government declared that it had discharged all its obligations toward the Maasai and that it did not have any further duty to negotiate with the new government on its behalf.[52] This left the Maasai vulnerable to the continued loss of their land to non-Maasai communities in independent Kenya.[53] The independent African government had made it clear that the Kikuyu who squatted in the Rift Valley would be granted secure land rights in the former White Highlands, meaning that land would not be returned to the Maasai and other communities, which occupied it during the pre-colonial period.[54] Further, the independent government was concerned about protecting individual economic rights over land, and not communal interests.[55] The independent government encouraged the commodification and marketisation of land, which further contributed to the loss of land by the Maasai to other ethnic communities.[56] Land loss occurred primarily in two ways: colonial acquisition of land for European settlement, and alienation through sales.

B. Land Loss through Sales

There were fundamental ideological differences that informed the claims made by the Maasai on the one hand and the responses of both the British government and the independent African government to those claims, on the other hand. The Maasai claimed the restitution of land to the community as a whole. They did not consider how individual interests impacted on those claims.[57] The British government had, on its part, initiated land reform programmes aimed at privatising and individualising land.[58] The independent African government supported the individualisation of land and after independence, it continued with

50 ibid.
51 ibid.
52 ibid.
53 ibid.
54 Christopher Leo, *Land and Class in Kenya* (University of Toronto Press: Toronto, 1984).
55 MPK Sorrenson, *Origins of European Settlement in Kenya* (Nairobi: Oxford University Press,1968); Thomas C. Pinckney and Peter K Kimuyu, 'Land Tenure Reform in East Africa: Good, Bad or Unimportant?' [1994] 3 (1) Journal of African Economies 1.
56 Hillman (not 33).
57 Lotte Hughes *(n 11)*.
58 This was first done through the publication of the Swynnerton Plan, which was used to introduce individual land tenure in the Kikuyu native reserve. The report of East Africa Royal Commission 1953-1955 which recommended individualisation throughout all the native reserves in Kenya was later implemented before Kenya gained independence in 1963. For a detailed discussion on the individualisation of land in Kenya, see Anne P Munro, 'Land Law in Kenya' [1966] Wisconsin Law Review 1071.

the implementation of colonial land reform programmes.[59]

The way in which formalization of property rights happened in many parts of Africa had created the problem of insecure land rights,[60] whereby some African natives acquired land while others lost land, hence creating a society differentiated on the basis of class, and majority of the landless were actually women, who were not recognised as legal subjects under the law of property.[61] Privatisation and individualisation of property rights among the Maasai led to insecure land rights, and especially for Maasai women.

The independent African government recognised the problems that the Maasai were facing as a result of land alienation processes, but rather than restitution of lost lands, the government implemented land tenure changes to address these problems.[62] The independent African government focused on the creation of secure economic rights over land as a means of addressing land problems that the African communities faced. There were three modes of land tenure that were adopted under three separate statutes -- public land tenure under the Government Lands Act[63] (GLA) which adopted the provisions of the 1915 Crown Lands Ordinance and which related to all public land held by the government; private land tenure under the Registered Land Act[64] (RLA) of 1963 which related to land that was privately held by individuals; and trust lands under the Trust Lands Act of 1939, which related to land held by local authorities in trust for the communities that the local authorities represented.

Communal land tenure was predominant among the Maasai as a result of their pastoralist way of life. Nonetheless, the government implemented private land tenure among the Maasai through the creation of group ranches. These ranches were privately held under the Registered Land Act, and were governed by the Land (Group Representatives) Act[65] of 1968. Privatisation, individualisation and marketisation of land were gender exclusionary processes and this was reflected under the group ranches scheme, as only Maasai men could be registered as members of particular ranches.[66] Thus, it is only men who could make decisions concerning group ranches, and women therefore could only use the land within the group ranches, but could not control it, and consequently it was only Maasai men who could engage in transactions relating to land within the ranches.[67]

Each ranch was registered under the Registered Land Act as the private property of its members. However, only the names of selected trustees who were registered as such under the Land (Group Representatives) Act appeared in the register under the Registered Land Act. This legal loophole led to corrupt and irregular dealings within the group ranches, be-

59 Oginga Odinga, *Not Yet Uhuru* (Heinemann Educational Books: London, 1967).

60 Okoth-Ogendo, Tenants of the Crown (n 18).

61 Ann Whitehead and Dzodzi Tsikata, 'Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-Turn to Customary' [2003] 3 (1) (2) Journal of Agrarian Change 67; Ingrid Yngstrom, 'Women, Wives and Land Rights in Africa: Situating Gender beyond the Household Debate over Land Policy and Changing Tenure Systems' [2002] 30 (1) Oxford Development Studies 21.

62 Kituyi (n 9); Lotte Hughes (n 11).

63 Government Lands Act, Chapter 280 of the Laws of Kenya.

64 Registered Land Act, Chapter 300 of the Laws of Kenya.

65 Land (Group Representatives) Act, Chapter 287 of the Laws of Kenya.

66 Talle (n 40).

67 ibid.

cause it essentially allowed persons who were in the position of trustees to be recognised as the holders of property rights and without the necessary restrictions requiring them to act in the best interests of the beneficiaries under the trusteeship system. Consequently, many trustees abused their positions of trust and authority by parceling out for themselves large tracts of land, which they registered in their individual names and which they later sold to third parties.[68]

The effect is therefore two-fold. First, even the male household heads who were registered as members of group ranches were in a vulnerable position because they were left under the mercies of the trustees who were not necessarily acting in the best interest of the group ranch members. Secondly, the trusteeship system further disenfranchised women because it led to the dispossession of land from entire households, thereby removing any influence women may have had with regard to the decision making processes relating to land (it was assumed household heads represented entire households, and at the household level, therefore, individuals could make their concerns known to their representative, and in this way women could influence their husbands or sons to make particular decisions; by dispossessing entire households, therefore, women were left with no means through which to channel their concerns).

The creation of group ranches among the Maasai introduced the notion of private ownership of land. The government was critical of traditional land use by the Maasai, deeming it unsustainable as it led to overstocking, which in turn led to overgrazing and to the inefficient use of resources.[69] The government aimed to create a better and more effective form of ranching through the introduction of private land tenure. Thus, alongside the creation of group ranches, individual ranches were also created where large parcels of land were granted to those who were considered progressive.[70] Such individual ranches could only be registered under the names of household heads, which were men.

The purpose of creating these individual ranches was to provide a model of good ranching practice that those in the group ranches could emulate.[71] Instead, those in the group ranches saw only the benefits of individual ownership, because those who held individual ranches had absolute control over their property. Those in-group ranches therefore coveted individual ownership and the government was only too eager to accommodate them in a manner that was at the very least, extra-legal.[72]Choosing to ignore the proper legal mechanisms and institutions that would have been used to determine the sub-division of group ranches, then President Moi issued an edict stating that if the Maasai people wanted to own their land individually, then they should be allowed to do so, for all Kenyans had a right to own their land.[73] As a result, from the mid-1980s, sub-division of the group ranch-

68 Lotte Hughes (n 11).
69 Campbell (n 10).
70 MMEM Rutten, *Selling Wealth to Buy Poverty: The Process of the Individualization of Land Ownership among the Maasai Pastoralists of Kajiado District, Kenya, 1890-1990*(Verlag Breitenbach Publishers: Saarbrücken, 1992); John G Galaty, 'Social and Economic Factors in the Privatisation, Sub-division and Sale of Maasai Ranches' [1992] 30 Nomadic Peoples 26.
71 ibid.
72 ibid.
73 ibid.

es started in earnest.[74] In this way, the Maasai came to own land individually and privately from the parcels that were sub-divided from the group ranch system.[75] Indeed, the Maasai were faced with internal disagreement that reflected the conflict between communal and individual interests.

The sub-division of group ranches represented a shift from the principles of communal ownership to those of the free market. Under communal principles of land ownership, land belonged to the community as a whole and individuals had only access and user rights. Under the principles of the free market, land is a form of property capable of generating income and individuals have the right to dispose of that property regardless of the effect such disposal may have on the community as a whole. After the sub-division and individualisation of group ranches, land sales increased in Maasailand.[76]

Consequently, other ethnic communities acquired land in Maasai districts (now counties under the current Constitution of Kenya). The Maasai who sold land used the proceeds from the sales to re-stock herds after the devastation left by drought and famine; to educate their children and to obtain the comforts of modern living such as permanent houses, vehicles and television sets.[77] Modern living must be sustained through some form of income; where Maasai sold land but did not invest the capital in some sort of income generating activity; it followed that they would have to sell more land in order to sustain their new way of life.[78] Accordingly, land that could be an important source of economic capital was used to finance expenditure in what development experts working among the Maasai refer to as "*selling wealth to buy poverty*."[79]

While land sales have led to the loss of land among the Maasai, it is important to note that they have also opened up Maasai counties to development.[80] Maasai towns have developed into urban centres; transport channels have improved; more schools and hospitals have been built. Employment opportunities for the local community have also increased, so that one does not necessarily have to rely on land or pastoralism to make a living. The Maasai are being assimilated and integrated into the dominant Kenyan economy.[81] They have been obliged to change their way of life as pastoralists, and instead participate in other economic activities.

In addition, land sales have been crucial in addressing land scarcity and land hunger in other parts of the country, particularly in the capital city, Nairobi, and some parts of the former White Highlands.[82] Historical accounts indicate that as a community, the Maasai continued to hold large portions of land despite their dispossession during the land alienation process in the colonial period.[83] The government encouraged the opening up

74 ibid.
75 ibid.
76 ibid.
77 ibid.
78 ibid.
79 ibid.
80 ibid.
81 ibid.
82 ibid.
83 ibid.

of markets in land in Maasai counties, as this was one way of re-distributing land in the country.[84] Consequently, the Maasai are selling land to communities from other parts of the country.[85]

Whereas it had been predicted that the Maasai would adapt to Kenya's capitalist and agrarian economy by abandoning the pastoralist way of life, this has not happened. Both colonial and post-colonial states attempted to put in place measures that would transform the Maasai way of life, and it is these measures that largely contributed to the marginalisation of the Maasai as a community. The prediction that changing the way in which the Maasai hold and use land would help to integrate the Maasai within Kenya's capitalist economy has been disproved. Indeed, what has emerged is that Maasai culture and way of life has not been abandoned altogether, but has instead transformed in response to land loss, which threatens the pastoralist way of life. The phenomenon of the so-called landless pastoralist is now evident, whereby the Maasai wander as far as Nairobi in search of pasture for their cattle.[86] While it may be assumed that harsh environmental conditions contribute to this phenomenon, the reality is that if the Maasai had sufficient land to allow them to move freely within a given locality as had been envisioned when the group ranches were created, then there would be no pastoralists wandering as far as the capital city in search of pasture.

Maasai women were disenfranchised further, because they were excluded from the decision-making processes, which were aimed at transforming their way of life. The law that was passed in order to facilitate the process of transformation was gender exclusionary -- as we have seen so far, the law which provided for the creation of group ranches did not recognise female membership; only men could hold individual ranches; upon sub-division of group ranches, sub-divided parcels were registered under the names of individual ranch members who were men. In this way, women were marginalised within marginality.

IV. CREATING SECOND CLASS CITIZENS: THE MARGINALISATION OF MAASAI WOMEN'S EXPERIENCES OF LAND LOSS

As a community, the Maasai continue to struggle for the recognition of their land rights.[87] The male respondents who were interviewed cited the loss of land due to colonial land alienation practices as the main land problem which the Maasai still face as a community, thus framing the question of historical injustices as an issue which affects the ethnic community. The men also discussed the question of corrupt and illegal transactions in land as a major issue that is now affecting the Maasai as a community. In addition to this empirical data, much of the literature on the Maasai land problems discusses historical injustices arising from colonial and post-colonial land policies as the issues that continue to impact negatively

84 ibid.

85 ibid; Campbell n 10; and also from data gathered from observation made during the data collection process between April 2010 and September 2011.

86 Interview with JC on 12 April 2010, Kajiado Town.

87 Parselelo Kantai, 'In the Grip of the Vampire State: Maasai Land Struggles in Kenyan Politics' [2007] 1 (1) Journal of Eastern African Studies107.

on the Maasai as a community.[88] Thus, the issues, which the male respondents raised, are actually framed as issues that affect the Maasai as a community.

Empirical data however revealed that Maasai women cite land sales as the primary cause of the problems they face regarding land. One respondent, who is a women's leader in Kajiado, put it poignantly when she said that Maasai women do not know much about historical injustices, and neither do they have the luxury of participating in the politics of the community when they are faced with the daily struggles of having to care for families.[89] She further stated that even at the height of the campaigns for restitution during which land rights activist Moses ole Mpoe was killed in what was suspected to be an assassination, Maasai women did not know much about the campaigns because the claims for restitution would not make a difference in the lives of women -- they would still have little or no access to the land which was restituted, or in the case of monetary compensation, the money would go to the men.[90] Another women's rights campaigner in Kajiado indicated that the politics of women are concerned with such questions as female genital mutilation and early marriage, and many women's rights campaigners focus on these issues, which adversely affect women and girls on a day-to-day basis, rather than on the question of land.[91] Unsurprisingly, none of the female respondents cited land loss through historical injustices as a problem the Maasai women face.

Consequently, the concerns of Maasai women are not necessarily treated as questions that affect the community as a whole, and are relegated to the position of "women's issues." The effect of this is that the so-called women's issues are not taken seriously either within state mechanisms that are aimed at addressing the land problems the Maasai community faces or through community initiatives aimed at redressing the injustices the community has suffered. The danger is that the women's issues not only affect women, but also have implications for entire households at a micro-level and ultimately and they also have an effect on the community as whole.

Land sales affect women in a number of ways. However, they do not necessarily create complete landlessness. What they cause is a unique situation whereby individual households are left with some land, but that land is not sufficient to sustain the pastoralist way of life.[92] We have seen in the preceding section that rather than abandon pastoralism altogether, the Maasai are actually adapting to prevailing conditions by transforming their pastoralist activities, giving rise to the phenomenon of the landless pastoralist. It is this transformation of the pastoralist way of life as a result of land loss through sales that impacts negatively on Maasai women, Maasai households and the Maasai community.

88 ibid; Rutten (n 70).

89 Interview with JT on 20 January, 2011, Nairobi.

90 ibid*;* Moses ole Mpoe was a Maasai land rights activist who was shot and killed at a time when he was engaged in campaigns against government plans to use the Rose Farm land in Narok for the resettlement of persons who were internally displaced following the 2007/08 post-election violence. For details of this story, see <http://www.standardmedia.co.ke/?articleID=2000024024&pageNo=1>, accessed 6 February 2016.

91 Interview with MAL on 27 February, 2011, in Bisil Location, Kajiado County.

92 Rutten (n 70).

A. Land Sales Erode the Traditional Role Played by Women in the Process of Succession

Land sales have the effect of negating the traditional role that women play as gatekeepers and decision-makers with regard to processes of succession. Succession processes among the Maasai require that upon the death of a family patriarch, the property he held would devolve to his widows (this was in the context of polygamous marriages) in equal shares. The older women respondents indicated that the custom among the Maasai is that each widow would hold the property in trust for her male children, and it is only after she had sub-divided the property among her sons that they would have rights of control over their respective shares. However, before land was privatised and later individualized among the Maasai, this process of succession applied mainly to the cattle held by the family. With privatisation and individualization, this was extended to land as well.

Among the Maasai, polygamy is still common, but where land sales occur, the family may not be left with sufficient land for all the male children. Tensions and fights over land can therefore result within families, where individuals begin to struggle for what is now a scarce commodity. Indeed, one respondent from the lands office in Kajiado noted that many of the disputes the office deals with have to do with fights among members of the same family. Thus, Maasai women do not support the sale of land because land represents household security, an inheritance for their children and family harmony. In addition, through processes related to the succession of land, women play an active role in ensuring family harmony through the distribution of land, and land sales therefore erode traditional mechanisms that are of great cultural significance to women. In this sense, women's ethnic identity is in some respects derived from land and land sales therefore threaten the cultural significance that women attach to land.

Maasai women therefore value their ethnic identity and they are able to identify processes, which negatively affect or even negate this identity. This data is in line with the conceptualisation of citizenship as a sphere of identity that involves not only the relationship between the state and the individual, but also of the relationship between the individual and the ethnic community.[93]By eroding the significance that women attach to their ethnic identities, land sales create a situation whereby women are relegated to a position of second-class citizenship.

B. Land Sales Erode the Economic and Social Security that Women have Traditionally Enjoyed

Land sales erode the economic and social security, which land, creates for women. Female respondents indicated that land is more valuable to them because they can access some of its benefits -- for instance, they are assured of their children's inheritance and pasture for their flock. Whereas upon the sale of land, it is very unlikely that they will benefit from the cash generated from such sales as men often keep all the proceeds, and once the cash is used up, the households are left in an even worse off position, with no money and no land. The female respondents also indicated that they can make some decisions regarding land, for instance in the context of succession, but with regard to money, women have no

93 Yuval-Davis (n 24); and Chabal (n 25).

decision-making authority at all. The emergence of a capitalist economy, which encourages the sale of property (land and cattle) in an open market has been supported by the state and it has been seen as a viable alternative to the pastoralist way of life as it would lock the Maasai into the dominant Kenyan economy.[94] This capitalist economy erodes protections that women have within the pastoralist mode of production, without putting in place any safeguards to protect the vulnerable position that women find themselves in.[95]

C. Land Sales Erode the Traditional Pastoralist Way of Life

Land sales create scarcity of land among the Maasai, and while the assumption has been that the Maasai will get involved in different economic activities that do not necessarily require them to hold and control a lot of land,[96] this has not been the case, and as empirical data revealed, the Maasai still invest proceeds of land sales in purchasing cattle. In the nomadic culture, families move from one area to another together, but land sales erode this by separating families. Female respondents indicated that once land is lost within the household and the pastoralist way of life is threatened, their sons and husbands are forced to move around with their cattle, some as far as Nairobi, looking for pasture.

This separation has negative consequences for women and for entire households because it undermines the attachment that women have to cattle, which are not only of economic significance to them, but also play an important cultural role because the possession of cattle identifies one with and embodies practice of the Maasai way of life.[97] Women are also forced to look for other means of earning income because they no longer have access to the produce from cattle which they would traditionally rely on for subsistence, and they are left to fend for themselves and their young children because their husbands do not necessarily send them money for subsistence. Many of the female respondents indicated that they had to find work in the surrounding urban areas, primarily working in the tourism industry where they took jobs in hotels. One community worker indicated that the separation of families for indefinite periods of time also promotes the spread of HIV/Aids by encouraging extra-marital affairs among married couples, and the men who are now landless pastoralists are in a high risk category of contracting disease in essentially the same way as long-distance truck drivers are.[98]

D. Land Sales Lead to Difficulties in Accessing Basic Amenities

Land sales generally occur in a manner that does not take into consideration the specific challenges that women face once land has been sold. Thus, land is parceled out and sold starting from the point that is closest to roads of access. This means that homesteads of the families that sell land will be moved further and further from access roads. Land parcels that are close to access roads will attract higher prices, and this is a compelling factor that leads to homesteads being pushed further from such roads when sales occur. Women who have to

94 Kituyi (n 9).
95 Talle (n 40).
96 Kituyi (n 9).
97 Talle (n 40).
98 Interview with JC on 12 April 2010, Kajiado Town.

work as a result of land sales are therefore forced either to travel for long distances in order to access their places of work or to rent houses closer to their places of employment. It also means that women and their children live far away from basic amenities such as schools and hospitals. Some of the women who were interviewed cited the long distances they have to walk in order to access hospitals as one of the reasons why they prefer to give birth at home. Even more problematic was the link female respondents indicated exists between the harmful cultural practices of female genital mutilation and early marriage, whereby they indicated that where it was difficult for children to access schools, it was preferable to have the girl child married, and in order for marriage to occur, the girls would have to undergo FGM. Essentially, where women cannot access basic amenities with relative ease, practices that endanger the lives of women and girls, such as home-births and FGM, are fueled.

V. THE INADEQUACY OF LEGAL MECHANISMS ADDRESSING CHALLENGES ARISING FROM LAND SALES

The Constitution of Kenya, 2010, provides for the protection of culture at Article 11, while Article 60 provides that equity, efficiency and sustainability are some of the principles that govern land administration and management. Article 60 of the Constitution also provides for elimination of gender discriminatory law, practices and customs with regard to land. Essentially, therefore, law ought to respond to the concerns of Maasai women. Land sales ought to be regulated in a manner that will ensure that the Maasai are able to practise and enjoy their cultural way of life, and that pastoralist land uses are sustainable, and by so doing; the concerns of women will be addressed, thus addressing gender discrimination.

Empirical data revealed that land sales on a willing-buyer, willing-seller basis among the Maasai are encouraged as long as they are within the law. When interviewed, officials from the lands office in Kajiado indicated that there commitment to ensuring that sales occur in accordance with legal provisions. The lands office in Kajiado is one of the busiest in the country, recording almost as many transactions as the one in Nairobi. Land in Kajiado is highly sought after because of its proximity to the capital, Nairobi, where there is land scarcity. For this reason, the lands office seeks to address illegal and corrupt transactions, such as land grabbing, and to ensure that all dealings are performed in the prescribed legal manner. The idea of trying to ensure that all land transactions are performed in accordance with the law actually responds to one of the issues raised by Maasai men, who indicated that corrupt and illegal transactions present a challenge for the community. As already noted, women do not generally benefit from the proceeds of land sales because men sell land and receive the proceeds. Where corrupt transactions occur, it is the men who primarily suffer loss when they are dispossessed of land and receive no financial benefit.

While there are provisions within the law limiting the extent of land sales, and which are aimed at guarding against landlessness and protecting vulnerable groups such as women and children, they are not always followed, and neither are they necessarily adequate in ensuring that women's interests are protected. A respondent from the lands office indicated that the provisions of the Land Control Act protect women to a certain extent, but conceded that there are no clear mechanisms for ensuring that gender concerns are addressed.[99]

99 Interview with NMW on 15 April, 2010, Government of Kenya offices, Kajiado.

Section 6 of the Act provides that dealings in agricultural land require Land Control Board consent, without which they are void; while section 9 provides for the circumstances under which consent may be denied. Section 9 does not specifically provide for creation of landlessness as one of the grounds upon which consent may be denied. The Land Control Act is, however, one of the statutes that should be repealed so that new legislation, which is in line with the Constitution, may be enacted.

Currently, however, as was reported by a respondent from the lands office in Kajiado, the practice in the area does not permit one to sell land without obtaining consent from the Land Control Board. The Board must be satisfied that the wife/wives have consented to the sale before allowing the transaction. However, there are no mechanisms to ensure that the consent is given freely, and it is possible for some men to use violence to force their wives to consent.[100] Another respondent, who is a women's leader in Kajiado, indicated that consent can be bought, and here, she was highlighting the fact that even if a wife were to refuse to give consent, the Land Control Board could still issue consent for the sale to proceed through corrupt practices, thus highlighting the ways in which mechanisms aimed at protecting women create incentives for corrupt practices to occur.[101] In addition, composition of the Land Control Board is problematic. It is primarily comprised of men, given that the First Schedule of the Land Control Act requires that more than half of the members of a Land Control Board shall be owners or occupiers of land: men are primarily the ones who own and control land in Kajiado. For this reason, gender issues may not be well understood and decisions of the board may also not reflect the concerns of women.

Another area where women's concerns are not taken into account is the process of survey. As already noted, when the Maasai sell land, it is parceled out from the point closest to access roads, and it is the land closest to the road that is sold off, while the family homestead is pushed further from the road. This means that the process of survey does not necessarily take into consideration the effect that such sub-divisions have on women and their children. A respondent from the survey office in Kajiado confirmed that it is not generally the practice for surveyors to concern themselves with the social and economic outcomes of carrying out sub-divisions of land, although he conceded that the process was expensive and it would be better if persons carrying out sub-divisions of land could be made aware of how such sub-divisions are likely to affect them in future, in order to get value for their money.[102]

Since 2012, Parliament has enacted new land laws in tandem with the provisions of Kenya's current Constitution. Of particular significance is the Matrimonial Property Act, 2014, whose aim is to protect the property rights of married women. Section 6 of this Act defines matrimonial property to include matrimonial homes and any moveable or immovable property acquired during the subsistence of the marriage. Section 12(1) further provides that an estate or interest in matrimonial property shall not, in the case of the subsistence of a monogamous marriage, be alienated without the consent of either spouse. Sub-section (2) provides that in the case of a polygamous marriage, the man and any of his

100 ibid.

101 Interview with JT on 20 January, 2011, Nairobi.

102 Interview with DS on 4 October 2011, Kajiado town.

wives have an interest capable of protection by caveat or caution under the law relating to registration of title.

The provisions of the Matrimonial Property Act offer some protection to Maasai women due to the requirement for spousal consent, although this is limited to monogamous marriages. Research data revealed that polygamy is still common among the Maasai, and that women in the community would benefit from legal provisions requiring each wife in a polygamous marriage to give her consent before the sale of land. The provisions of the Act are also limited to matrimonial property, so that property falling outside this category is not subject to the requirement for spousal consent. Given the nature of pastoralist land use, this is a severe limitation because, as we have seen already, the Maasai sell most of the land that they hold and use for pasture but they retain the bit on which the homestead is built. The homestead land is not sufficient to support the pastoralist way of life and hence families are forced to adjust to the phenomenon of being landless pastoralists, and it is this phenomenon that Maasai women wish to avoid. The challenge lies in determining whether land used for pasture falls within the category of matrimonial property and, pursuant to section 7, determining a wife's contribution to the acquisition of the property, which in most cases would be non-monetary. The requirement for consent also does not provide that such consent is only valid if it is given freely, without the threatened or actual use of violence.

Regardless of, and also as a consequence of, the minimal protection that women have under the law, they engage in innovative strategies aimed at preventing land sales. Many of the female respondents indicated that they often have to devise clever ways of securing land for their children, such as taking custody of title documents to land in order to prevent their husbands from completing sales; using polygamy as a vehicle through which land could be safeguarded because it is generally much more difficult for a husband to obtain spousal consent from multiple wives as compared to one wife in a situation where all the wives have a common interest in preventing their husband from selling land; and relying on the provisions of statutory law to place caveats on transactions relating to land, as a result of which any attempted sale of the family land would be frustrated. Women rely on a mixture of statutory, customary and social strategies to prevent massive sales of land in order to safeguard their ethnic and gender interests. Law does not adequately respond to the specific concerns of Maasai women with regard to land sales, and women are forced to be creative in dealing with the problems they face, which is a demonstration of agency.

This failure of the law and resulting agency is not unique to Maasai women. Indeed, the legal system has historically failed to adequately respond to the needs of marginalized communities such as the Maasai, and it is for this reason that communities have resorted to bottom-up struggles to secure recognition for their land rights. However, because the issues raised by women are seen as women's issues, community initiatives aimed at addressing gaps in the law also ignore these gender issues, as we shall see in the following section.

VI. EXCLUSION OF WOMEN AND GENDER CONCERNS IN COMMUNITY STRUGGLES FOR THE PROTECTION OF LAND RIGHTS

The question of historical injustices has a long history, and the Maasai have remained resilient in their quest for justice, such that the issue has survived the three post-colonial

regimes in Kenya.[103] This struggle is politicised, so that the community engages with the state through their elected political leaders, and it is primarily the political leaders who negotiate with the state on behalf of the community.[104] Professionals and human rights activists have also been involved in the campaigns; the community itself has been engaged in public demonstrations and picketing, as they demand the return of stolen lands.[105] Most importantly, petitions for claims of restitution have been presented to the government, most notably urging the government not to renew leases to land out of which the Maasai had been moved in the 1904 and 1911 agreements.[106]

While the campaigns have not borne much fruit and have in fact, on a number of occasions, produced a violent backlash from the state,[107] they constitute a relationship between the state and the community and are, therefore, an important aspect of citizenship. They bring persons who share a common heritage of disenfranchisement together, for the sole purpose of engaging with the state in order to remedy the violation of rights and stop further violations from recurring. However, empirical data reveals that few women have been involved in the struggle for restitution of land to the community, and those that are, are mainly economically elite and educated women.[108] It follows that with regard to a core aspect of Maasai ethnic politics, women are again excluded, hence limiting the extent to which they are able to engage with the state.

The campaigns also signify future aspirations of the Maasai community following the promulgation of the Constitution in 2010, which has extensive provisions for the protection of land rights. Indeed, the argument now is that Kenya must address the question of historical injustices relating to land in order to protect its constitutional democracy and ensure political stability.[109] Hence, the Maasai campaigns have not been in vain, and should the historical injustices be addressed, it would be an enormous victory for the Maasai community.

Yet, there is little co-relation between the restitution of land that was lost during the colonial period and the security of women's land rights. As already highlighted earlier, even if the Maasai were to be compensated for the historical injustices they have suffered, it is very likely that the same gender imbalances that currently exist will continue to apply to any such land. This means that the political struggle for compensation over historical injustices is informed by pre-existing gender imbalances and inequalities, and should such compensation be awarded under these conditions, Maasai women will not be any better off as a result of the resolution of the question of historical injustices. Community initiatives challenging the operation of land policies that negatively affect women are lacking. The Maasai for restitution has not factored gender concerns into the struggles. In fact, the discourse on restitution is gender blind; assuming that the community, regardless of gender, will benefit should restitution occur.

103 Kantai (n 87).
104 ibid.
105 ibid.
106 ibid.
107 ibid.
108 Interview with JT on 20 January, 2011, Nairobi.
109 K Kanyinga, 'The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Violence in Kenya' [2009] Journal of Contemporary African Studies 325.

Land sales of restituted land are likely to occur should historical injustices be addressed without taking into consideration the concerns of Maasai women. The problem of landless pastoralism would persist even after restitution. There is a need, therefore, to bring on board gender perspectives in the struggle for restitution, as this would remove Maasai women from the category of the subaltern and the whole community would use their agency to advance the popular struggles. There is a need also for the politics of gender and women to align with the politics of the ethnic community and kinship group.

VII. CONCLUSION

The problem discussed in this chapter is two-fold: the failure of the law to respond adequately to the problems Maasai women experience as a result of land sales (this being a problem that resulted from the state policy of privatisation and individualisation of land); and the exclusion of gender concerns from community based struggles for the recognition and protection of land rights. By taking an intersectional approach, primarily in the way in which given problems are framed, women's voices can be heard and their experiences of disadvantage addressed. Land rights in Kenya, as in most parts of Africa, are affected not only by gender, but also by such other spheres of identity as ethnicity and even religion. Thus, rather than frame the exclusion of the concerns of Maasai women from law and from community initiatives as a gender issue, it ought to be framed as both a gender and an ethnic issue. Thus, it is no longer sufficient to analyse questions of women's land rights by looking specifically at how gender as identity impacts on land rights. This is because other forms of identity also affect land rights, yet as in the case of the Maasai; there is a tendency to ignore gender specific issues in discussions of land and ethnicity.

An intersectional approach is therefore useful in this regard, as it requires an analysis of the way in which formalisation of land rights not only affects particular community interests, but also the gender specific concerns, and further it requires an integration of these analyses, so that neither gender nor community concerns are addressed in mutually exclusive ways. This means that there is a need to integrate gender concerns within the Maasai initiatives that are aimed at addressing the land problems the community faces. The task here would require an analysis of whether that which is framed, as a community problem is in fact a community problem. It means not taking it for granted that issues framed as being universal are in fact universal. Intersectionality as an analytical paradigm offers tools that are useful in such an undertaking -- the constitutive analyses of multiple spheres of identity.

Taking an intersectional approach will mean taking those that are considered gender issues (and therefore secondary or not as important as the community issues) and framing them as part and parcel of community issues. More importantly, it would also address the danger of excluding women from benefitting from the gains made through community struggles, as in the case of the Maasai women who feel that they may not necessarily benefit from restitution for historical injustices, because it would mean that gender and the rights of women are already an integral part of the claim and struggle for restitution. Intersectionality in this sense is not just a *process* (the analyses of problematic issues in order to integrate gender), but also an *outcome*, allowing women to benefit when problematic issues are addressed, because gender issues were in the first place framed as part of the problem requiring redress.

Part V – LAND USE

CHAPTER 17

LAND TENURE AND USE AMONG INDIGENOUS COMMUNITIES IN KENYA: TRADE-OFF WITH CLIMATE CHANGE MITIGATION STRATEGIES

Elvin Nyukuri

I. INTRODUCTION

"For climate change adaptation and mitigation purposes, it is essential that security, access to land and resources be guaranteed in perpetuity across generations." [1] These are the words that Prof Okoth-Ogendo wrote in his works on climate change and land tenure in early 1990s. While the debate on climate change was only picking up at that time, his emphasis on guaranteed security over land to both present and future generations for sustainability is still dominant in climate change global debate and literature. He acknowledged that Africa was agrarian, therefore capacity building for climate change and mitigation should focus on the control and management of land and land resources as well as forestry and grasslands together with human settlement as key among these areas.

In Kenya, forests are a major habitat of the people who identify with the indigenous movement, mainly the pastoralists and hunters and gatherers. However, security and access to their ancestral land has been exposed to multiple competing interests, forestry, conservation, mining, cash crop farming, and individual land holding sub-divisions. This competition is further heightened by climate change responses of the actors with vested interests.

Secondly, the contemporary land tenure and use policies in Kenya have reiterated an economic utility and individualized land ownership - different from the indigenous peoples land tenure. As discussed by Okoth,[2] this is a push by free enterprise economists and planners on account of inability of indigenous tenure institutions to stimulate agricultural development. And because of their communal nature, the indigenous institutions are

1 HWO Okoth-Ogendo, 'Climate Change Adaptation and Mitigation: Exploring the Role of Land Reforms in Africa' in Nathalie Chalifour et al (eds), *Land Use Law for Sustainable Development* (Cambridge University Press, 2006) 60-70, 65.

2 HWO Okoth-Ogendo. 'The Perils of Land Reform: The case of Kenya'. Department of Public Law. University of Nairobi. <https://learning.uonbi.ac.ke/courses/GPR203_001/document/Property_Law_GPR216-September,_2014/Articles/H.W.O_Okoth-Ogendo-The_perils_of_land_tenure_reform-_the_case_of_Kenya.pdf > accessed 21 February 2017.

incapable of accommodating modern production methods, techniques and practices. As observed by Doyle and Gilbert,[3] the indigenous people have been reduced to "sacrificial lambs of development". The development policy is in favour of a tenure system that supports large-scale agriculture, mining, and conservation programmes for economic purposes. According to Prof Okoth-Ogendo, land reforms and policies within the national framework need to ensure that social and political fairness in the allocation of land resources in particular contexts need to enable societies to arrest potential abuse of land resources, especially in marginal and protected areas.[4] He further noted that "land reforms could add significantly to African efforts towards climate change management".

Over the years, Kenya has discouraged hunting and gathering as a viable way of life and instead pressurised indigenous people to become sedentary farmers. But with the adoption of the 2010 Constitution, this situation is set to be reversed given provisions in it clearly stating that the marginalized must be protected.[5] The marginalised are those 'who have retained and maintained a traditional lifestyle and livelihood based on a hunter-gatherer economy'.[6] Knowing that forest communities have been denied rights to the forests, the Constitution also recognizes that community land consists of ancestral lands traditionally occupied by the hunter-gatherer community.[7] It also provides that any unregistered community land shall be held in trust by the relevant county government. Further, it forbids the disposition of community land except in terms of legislation specifying the nature and extent of rights of members of each community, individually and collectively.[8] Together with other legislation, such as the Land Act 2012, which prohibits the allocation of public land to communities or other persons where these fall within forest and wildlife reserves or along watersheds or have been reserved due to their natural value, [9] the forest hunters and gatherers' land is still public property. In addition, the Kenya government favours resettlement of affected communities and permitting their access to forest resources rather than recognition of their ownership in the interest of conservation. This shows that even with the new Constitution, the protection of indigenous peoples' land rights remains significantly curtailed.

This chapter outlines the challenges faced by indigenous people, particularly the forest dwellers, over their land tenure and how these lands have been compromised by climate change affecting their way of life and livelihoods. It also looks at how national policies have tackled the plight of indigenous people's land tenure and, lastly, makes recommendations on the way forward. The chapter borrows from the findings of a doctoral degree thesis on 'Climate Change, Policy and Vulnerability of the Indigenous Communities in East Africa -- the Batwa and Ogiek,[10] to illustrate these challenges.

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3 C Doyle and J Gilbert, 'Indigenous Peoples and Globalization: From 'Development Aggression' to 'Self-Determined Development" (2008) 7 European Year Book Centre of Minority Issues.

4 Okoth-Ogendo (n 1).

5 Republic of Kenya, *The Constitution of Kenya*, *2010* Article 10 (2) (b).

6 ibid Art. 260.

7 ibid 4. Art, 63 (2) (d) (11) of the Constitution of Kenya 2010.

8 ibid 4. Art, 63 (4).

9 Land Act 2012, s.12 (2).

10 Elvin Nyukuri, 'Climate Change, Policy and Vulnerability of the Indigenous Communities in East Africa -- the Batwa and Ogiek' (PhD Thesis: Open University, UK, 2013).

II. BACKGROUND TO OGIEK LAND USE AND TENURE

Anthropological studies on the Ogiek, also referred to as the Dorobo, indicate that the group lived in the forest areas of East Africa and practised hunter gathering as the main source of livelihood in pre-colonial times.[11] The representatives of this group are today scattered over various parts of Kenya, but the majority are found in the Mau Forest.[12] The Mau Forest Complex is divided into seven forest blocks about 170 kilometres northwest of Nairobi and stretches west, bordering Kericho, Narok County to the north and Bomet County to the southwest.[13] It has been described as the largest water tower in the East African region and the main catchment area for 12 rivers draining into six major lakes in Kenya.[14] It is in this forest that Ogiek earned a livelihood through hunting and gathering.

Land plays a central role in the lives of the Ogiek. It is also viewed in terms of its use as a source of livelihood and, therefore, requires to be safeguarded and controlled by the Ogiek because they identify with it. In order to manage and control the resources from this forested land and hence gain access to food all year round, the Ogiek were organized in clans. Communally held pieces of land were administered through councils of elders, selected according to clan and family units. The clan, as reported by Blackburn,[15] was the most important social and land holding unit among the Ogiek. It was the responsibility of the clan to manage different blocks of forest together with the animals and plants in them. In addition, clan elders and parents ensured that methods for preservation and conservation of the environment were passed down from one generation to the next.[16] Prof Okoth-Ogendo referred to such lands as commons. He notes that they [commons] represent not a species of public property but of private property for the group that controls it; individual members of the group have clear rights and duties in respect of the resources in it and clear decision making structures exist for their utlilisation and management.[17]

The Ogiek value for justice over forestland runs from colonial times to the post-independence period. Since independence, many groups have controlled the Mau forest with sole interest in its resources. One such group is the timber companies. Logging companies, including Pan African Paper Mills, Raiply, Timber and Timsales Limited control the extraction of timber in the forest.[18] In parallel with timber extraction, the Government of Kenya started a land resettlement programme on cleared areas in 1991, which has often

11 RH Blackburn, 'Okiek History' in BA Ogot (ed), *Kenya before 1900* (Nairobi: East Africa Publishing House, 1976).

12 JK Towett, *Ogiek Land Cases and Historical Injustices, 1902-2004*, (Egerton: Ogiek Welfare Council, 2004). < http://freeafrica.tripod.com/ogiekland > Accessed 14 November 2009.

13 Government of Kenya, *Report of the Prime Minister's Task Force on the Conservation of Mau Forest Complex'*. (Nairobi: Government Printer, 2009).

14 PM Kundu, S China and MC Chemelil, 'Automated Extraction of Morphologic and Hydrologic Properties in River Njoro Catchment in Eastern Mau, Kenya'(2008) 1 (2) Journal of Science, Technology, Education and Management 14.

15 RH Blackburn (n 11)146-150.

16 L Obare and JB Wangwe, *Underlying Causes of Deforestation and Forest Degradation in Kenya* (Word Rainforest Movement, 2004). <http://www.wrm.org.uydeforestation/Africa/Kenya/html> Accessed 14 October 2012.

17 HWO Okoth-Ogendo, 'The Tragic African Commons: A century of expropriation, suppression and subversion' (2002) No. 24 *Land Reform and Agrarian Change in Southern Africa*, School of Government, University of the Western Cape, South Africa.

18 ibid 11.

been characterised as politically motivated. Sang[19] notes that the majority of the Ogiek were given five-acre parcels of land each. At the same time, other Kalenjin communities related to the Ogiek, namely the Tugen and Kipsigis, who practised agro-pastoralism, were also settled in the area. The 1992 pre-election clashes saw more internally displaced persons being settled in the Mau landscape. These parcels of land were surveyed by the Ministry of Lands and Settlement and allocated to new settlers.[20] Since 1993, the Kenya government for the settlement of people systematically carved huge parts of the Mau forest out from other communities. This has caused constant conflict with the Ogiek who see the destruction of forests and the alienation of their lands as a continued threat to their existence.

Through further policy developments, the Ogiek lost their land to the government when a presidential decree in 1980 established the Nyayo Tea Zones Development Corporation.[21] This increased the country's acreage under tea for the purpose of creating employment in rural areas but also created a buffer around the Mau forest to prevent encroachment. By 2001, the extraction and settlement had dramatically altered the landscape with 61,586.5 hectares of forest converted to settlements.[22] Failure to implement policies and legislation governing the use of forests has been blamed on corruption and political interference; the pressure to expand agriculture was singled out as the main driver of deforestation.[23] A survey by a Mau task force in 2009 found that the forest excision did not follow the environmental impact assessment guidelines. A total of 107,707 acres of land representing approximately 25 per cent of the Mau complex area, had been converted to settlement and farmlands.[24]

Control of the Mau resources is influenced by politics. This is evidenced by the abortive implementation of the recommendations of the Ndung'u Commission.[25] The Ndungu Commission recommended an inventory of public land and the computerization of land records as well as a comprehensive land policy. It also recommended the formation of a lands title tribunal to look into cases of unsuspected illegal and irregular allocation and to embark on the process of revocation. The report acknowledged that most of this land was not allocated to the landless and needy people as intended, but to the local political leaders. In 2005, a year after the release of the Ndung'u Report and with the attempts at its implementation under way, the then President issued 12,000 title deeds to the Ogiek community in Nakuru to influence voters in favour of the draft constitution in upcoming referendum.[26] Two years later, in 2007, the government reversed the eviction orders and issued title deeds to squatters, hoping to recover lost popularity and win support from the

19 J Sang, 'Land Rights: A central issue in conflict resolution and management among the Ogiek of Kenya' in V Tauli-Corpuz and J Carino (eds.) *Reclaiming Balance* (Tebtebba Foundation, 2004). <www.tebtebba.org. > Accessed 3 January 2010.

20 Government of Kenya, *Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land by (Ndungu Commission Report)* (Nairobi: Government Printers, 2004).

21 ibid 10.

22 ibid 11.

23 B Abwoli, 'Emerging Local Economic and Social Dynamics Shaping East Africa Forest Landscapes' in *Forest and Society: Responding to Global Drivers of Change* (SAGE, 2009) 315-333.

24 ibid 11.

25 ibid 18.

26 The Standard Team, 'Kibaki criticised over Ogiek title deeds' (The Standard, 17 October 2005).

larger Kalenjin community.[27] The Kalenjin community had benefitted from the allocation of the land in the Mau forest under the previous government. The state failure during the 2008 post-election violence led to the banishment of many forest workers from Mau and left numerous forest stations unmanned, resulting in further encroachment and destruction of the forest by neighbouring communities interested in wood and farmland.[28]

While a comprehensive land policy[29] is now in place, and is expected to address the historical land injustices, the resettlement of Ogiek and other communities remains a challenge.[30] This challenge stems from the fact that there were more beneficiaries in the land allocation other than the Ogiek, including internally displaced persons and those who acquired land illegally and re-sold it to third parties. In addition, the land settlements should not have been made in the first place because it is a water catchment area.[31] Going by the recommendations of the Mau Task Force, some of the Ogiek and other communities in the Mau have been relocated and settled outside the critical catchment area.[32] The Ogiek community find themselves in a vulnerable position in relation to the state, not knowing what to believe in between politics and policy. The Ogiek position has prompted the Minority Rights Group to continue to demand rights for the Ogiek threatened by illegal evictions from their ancestral land.

As shown above, lack of justice translates to people being deprived of their ability to achieve their basic functioning. The Ogiek have been unable to carry out any developments on these lands because of the tenure uncertainty and their insecurity. As argued by the capability approach,[33] it is up to the society to protect opportunities that enable people to live well and achieve the things they value. But in this case, the Ogiek community lack freedom to carry out the activities that would improve their wellbeing. The community is facing eviction because of the need to protect the Mau ecosystem stemming from its role in mitigating climate change. The achievement of the common good and justice being done for the sake of all is one way of delivering fairness. However, equally, one could argue that the measures to protect the Mau forest is an injustice towards the Ogiek because of the lack of compensation by the state. The other implication is that lack of identity of an indigenous forest community renders them invisible to the larger network of indigenous peoples. Being part of this large network provides all indigenous forest communities with the opportunity to be represented in international meetings and negotiations, such as the Conference of Parties (COP).

27 PM Kagwanja, *Fighting for Mau Forests: Land, Climate Change and the Politics of the Kibaki Succession* (Nairobi: African Policy Institute, 2010). [eBook]. <http://www.open.ac.uk > Accessed 13 May 2012.

28 E Siringi, 'Forest Conflict amidst National Controversy in Kenya: Lessons of the Mau Forest Complex'(2010) 8 (1) Environment and Natural Resources Journal9.

29 Republic of Kenya, Sessional Paper No. 3 of 2009 on National Land Policy.

30 P Syagga, Public Land, Historical Land Injustices and the New Constitution (Nairobi: Society for International Development-Regional Office for East and Southern Africa, 2011). Also see, D Taylor, P Robertshaw and RA Marchant, 'Environmental Change and Political Economic Upheaval in Pre-colonial Western Uganda'(2000) 10 (4) The Holocene527.

31 ibid.

32 K Njoroge, 400 families evicted from Mau forest finally move to new land. (The Standard, 30 Sep 2012). http://www.standardmedia.co.ke/?articleID=2000067279 >Accessed 10 October 2012.

33 AK Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

III. LAND TENURE AND USE COMPROMISED BY CLIMATE CHANGE

The relationship between land use and climate change becomes clearer when it is examined through the interaction of land use associated to forests. The connection with forests is important because of the lifestyle of the indigenous peoples who depend on it. Indigenous and other communities adjacent to the forest rely on forest products, such as wood timber or fuel, but indigenous forest communities mostly rely on medicine from plants for health care and other products such as honey for income generation. Climate change is affecting the forest sector and its resources. Temperature rises that lead to droughts, floods, forest fires and outbreak of pests and diseases reduce the capacity of the forest to provide livelihood products.[34] Forest communities are therefore not able to access such resources in times of disaster, and yet these resources provide one means by which such communities may adapt to climate change.[35] Others agree on the use of forests as food sources and employment during times of stress.[36] Forest fires resulting from persistent droughts contribute to lack of fuel wood, which play an important role in indigenous forest communities' livelihoods. Droughts (and by contrast floods) also have a detrimental effect on water supplies. Lack of these resources also compromises the health of households. Access to resources such as land is a prerequisite for understanding the impacts of climate change.[37]

Climate change is also expected to reduce the amount of land used for agricultural purposes. This is expected to increase pressure on forest land and therefore affect the livelihoods of inhabitants.[38] Woodburn[39] points out that there is a tendency for people to identify with different forms of livelihoods that represent ethnic differences. He gives an example of the hunters and gatherers who no longer practise this form of livelihood and who have been excluded from their forests but still view themselves and are seen by others primarily as hunters and gatherers. The Ogiek are a case in point. Developments in land and conservation policy in Kenya has led to relocation of the Ogiek to agricultural lands, in particular, where they face challenges such as lack of skills in farming and livestock keeping, and have restricted access to the forest for beekeeping purposes. While on the agricultural land, the Ogiek continue to face an additional challenge whereby land to which they were allocated had no formal titles, which makes them vulnerable to actions by the Kenya government and any other forces, including timber companies in the area. The implications that land insecurity has on the Ogiek is that it prevents them from undertaking activities that would enable them to function and live as they would choose.

Tropical forest communities are also marginalized from decision making on climate

34 M Idinoba, FB Kalame, J Nkem, D Blay and Y Coulibaly, 'Climate Change and Non-wood Forest Products: Vulnerability and adaptation in West Africa'(2009) 60 Unasylva231,232.

35 R Seppälä, A Buck and P Katila (eds)., *Adaptation of Forests and People to Climate Change: A Global Assessment Report* (IUFRO World Series, 2009). <www.iufro.org/download/file/4485/4496/Full > [Accessed 13 October 2010].

36 S Eriksen and J Silva, 2009. 'The Vulnerability Context of Savanna Area in Mozambique: Household Drought Coping Strategies and Responses to Economic Change'(2009) 12 (1) Environmental Science and Policy33.

37 WN Adger, I Lorenzoni, KO O'Brien (eds), *Adapting to Climate Change: Thresholds, Values, Governance*. (Cambridge: Cambridge University Press, 2009a).

38 M Asch, 'Levi-Strauss and Political: The Elementary Structures of Kinship and the Resolution of Relations between Indigenous Peoples and Settler States' (2005) Journal of the Royal Anthropological Institute 425-444.

39 J Woodburn, 'Indigenous Discrimination: The Ideological Basis for Local Discrimination against Hunter-gatherer Minorities in Sub-Saharan Africa' (1997) 20 Ethnic and Racial Studies345-6.

change policies and initiatives.[40] Yet, they have been managing complex problems within the forest territory and potentially hold valuable knowledge for solving such complex problems.[41] The national land policy defines minority communities as those that are culturally dependent on specific geographical habitats, and notes that these communities have not been adequately represented in decision making in government. Before the initiation of land resettlement, the Ogiek were involved in local and regional networks, bartering honey and wild meat. Honey was eaten, stored for future use, brewed into beer and traded. However, during times of stress, communities such as the Ogiek, devise coping strategies to different livelihoods away from the forest. Bilsborrow and Prof. Okoth Ogendo supported this argument when they argued that when facing deteriorating environmental conditions, including climate change, households tend to device coping mechanisms and migrate as a measure to mitigate these effects.[42] The Ogiek have diversified ways of living through farming and herding, business, sale of charcoal and timber, and others lease out land to other communities for income. Despite the difficulties encountered in the new field of sedentary life, a majority of them have adopted the new lifestyle. They have created mutual aid networks, for instance, self-help groups, men and women groups, church organizations, and NGOs, which they care for and use in times of stress.

The forest sector provides the greatest mitigation opportunities through Reducing emissions from Deforestation and Forest Degradation (REDD).[43] At the international and national levels, REDD+ is supported for two major reasons. One, deforestation accounts for 12 to 18 per cent of the global greenhouse gas emissions. Two, addressing the problem of greenhouse emissions is thought to be the low-cost option to reduce carbon dioxide emissions.[44] Kenya has since received financial and technical assistance towards UN-REDD national programme involving forests, with some being inhabited by indigenous peoples. Currently, there are nine projects under REDD in the country. This include the Kasigau Corridor REDD Project Phases I (Rukinga Sanctuary) and II (the Community Ranches); the International Small Group & Tree Planting Programme; Aberdare range/ Mt Kenya small scale reforestation initiative; the Forest Again Kakamega Forest; Mikoko Pamoja Mangrove Carbon; and the Mbirikani Community and Biodiversity Project; the Enoosupukia Forest Trust Project; Tree flights Kenya Planting Project and the Chyulu Hills REDD+ Carbon Credit Program.

Some of these projects are found among the indigenous people's lands, for example the Chyulu Hills REDD+ Carbon Credit Program and the Mbirikani Community and

40 J Salick and a Byg, *Indigenous Peoples and Climate Change* (Oxford: Tyndall Centre, 2007). <http://tyndall2.webapp3.uea.ac.uk/sites/default/files/indigenous%20Peoples%20and%20climate%20chnage_pdf > Accessed 15 February 2010.

41 J Ford, F Berrang, M King and C Furgal 'Vulnerability of Aboriginal Health Systems in Canada to Climate Change' (2010) 20 (4) Global Environmental Change668.

42 RE Bilsborrow and HWO Okoth Ogendo, 'Population-driven Changes in Land Use in Developing Countries' (1992) (21) Ambio: A Journal of the Human Environment/Royal Swedish Academy of Sciences 37.

43 REDD means supporting efforts to stop forests from being cut down or degraded and thereby reducing the amount of carbon dioxide that is released from deforestation and degradation. <http://www.ipcc.ch/publications_and_data/publications and_data_glossary.shtml > accessed 24 February 2017.

44 H Gregersen, H El Lakany, A Karsentry and A White, *Does the Opportunity Cost Approach Indicate the Real Cost of REDD+?* (Washington DC: Rights and Resources Initiative, 2010).

Biodiversity Project. These projects compromise tenure rights through displacement. At the community level, the REDD+ scheme works on the basis that land owners are compensated for planting trees and therefore offer an opportunity for rural communities in terms of cash flow.[45] However, this can only benefit the indigenous peoples through empowerment and improving their social economic status if REDD respects their tenure system.

In Kenya, the customary and statutory systems of land ownership are recognized. Researchers point out that a significant portion of forested areas in sub-Saharan Africa are state-owned and many national governments do not recognize the customary and traditional rights of the indigenous people to the lands that they inhabit.[46] There is a big grey area where people have some customary rights but the statutory rights are not clear or adequately defined. These forest tenure arrangements have implications. One, landowners and users have limited rights to make changes in land use but not to deforest. Two, legitimate users clearly have the statutory right to deforest or change use on part of the land or all their land. Three, land owners may occupy and use land where legal property rights are unclear but where the land has been used for many generations. For example, in *Joseph Letuya & 21 Others v Attorney General & 5 Others,*[47] Kenya's Environment and Land Court acknowledged that the Ogiek are an indigenous community. However, the court declined to recognize Ogiek land rights on the basis of ancestral title, holding that land rights in Kenya accrue only when formally allocated by the government.[48]

Forests store carbon, which is the largest cause of climate change. Research has highlighted the potential negative impacts of carbon credit schemes on indigenous people's rights to their lands and resources.[49] Researchers have also observed that tenure security is necessary for communities such as the Ogiek to enjoy the benefits of carbon credits because it requires them to have legal rights to the forest land involved.[50,51] Examples of carbon credit schemes are the Clean Development Mechanism (CDM) and those under voluntary carbon market. CDM projects are forests related [afforestation/reforestation] and involve the lands of the indigenous peoples. Others are from geothermal, wind, hydro and biogas power projects, and bio residue briquettes. Carbon credit schemes found in indigenous people's lands include the Olkaria geothermal project, wind power projects in northern Kenya, and forest carbon projects in Chyulu and Mbirikani areas.

One of the approaches used by the government of Uganda to achieve the REDD+ objective is local payments for environmental services, which entails individual farmers being

45 JD Unruh, 2008. 'Carbon Sequestration in Africa: The Land Tenure Problem' (2008) 18 Global Environmental Change125.

46 C Toulmin, *Climate Change in Africa* (London and New York: Zed Books, 2009).

47 [2014] eKLR.

48 ibid 11-12.

49 T Grifith, *Seeing REDD? Forests, climate change mitigation and rights of indigenous peoples and local communities* (Forest Peoples Program, 2009).

50 ibid 44.

51 L Cotula and J Mayers,'Tenure in REDD - Start Point or Afterthought? *Natural Resources Issues* No.15. (London: International Institute for Environment and Development, 2009); S Eriksen and J Silva, 'The Vulnerability Context of a Savanna Area in Mozambique: Household drought coping strategies and responses to economic change'(2009) 12 (1) Environmental Science and Policy33.

involved in afforestation and reforestation carbon schemes.[52] Under these carbon schemes, an individual farmer or small groups of farmers enter into contracts to sell carbon stored in trees planted on their lands. Contracts are negotiated through intermediary NGOs but the buyers are companies in developed countries. In exchange for regular carbon payments, farmers must maintain the trees for a long period of time, approximately 25 to 50 years, but they are also entitled to the benefits from selling timber and any associated non-timber forest products. However, a community such as the Ogiek would be disadvantaged under this scheme because they lack land or formal titles that would enable them to enjoy benefits from carbon schemes.

IV. POTENTIAL IMPACT ON CULTURE

Climate-induced changes in the forest landscapes can also have effects on the cultures of indigenous forest people. Indigenous people have been described as social groups that are identified with a specific culture that is distinct from other dominant groups in the society.[53] Climate change will lead to land dispossession.[54] Others have noted that this dispossession is particularly affecting the indigenous forest people such as the Ogiek -- impacting on their culture, social networks and local knowledge, which are valued for survival.[55],[56] Societies that are removed from their lands not only lose the economic basis for livelihood but their culture as well.[57] In Kenya, thousands of the Ogiek have been forced to abandon their homes and original habitat in the Mau forest because of conservation measures.[58,59]

Culture is universally important, but for indigenous forest people, culture is intimately interconnected to their environment.60,61 For example, Kidd and Kenrick 62 discuss how the Batwa describe themselves as children of the forest. They show how the Batwa consider hunting and gathering as a way of life and how the sharing of forest products in a communal way and participating in activities bring the community together. The African Charter on Human and People's Rights (Article 20, 21, and 22) also emphasises the

52 D Mwayafu and L Peskett, 'REDD-plus in Uganda: Are Existing Approaches' to Benefit Sharing a Challenge?'(2009) <http://red-net.org/files/REDDinUganda.pdf > [Accessed 12 July 2012].

53 R Abate and EA Kronk (eds)., *Climate Change and Indigenous Peoples: The Search for Legal Remedies* Cheltenham: Edward and Elgar Publishing Limited, 2014).

54 ibid 47.

55 M Macchi, *Indigenous and Traditional Peoples and Climate Change: Issues paper* (Gland: International Union for Conservation of Nature, 2008).

56 P Kameri-Mbote and E Nyukuri, 'Climate Change, Law and Indigenous Peoples in Kenya: Ogiek and Maasai narratives' in A Randall and EA Kronk (eds)., *Climate Change and Indigenous Peoples. The Search for Legal Remedies* (Cheltenham: Edward and Elgar Publishing Limited, 2013).

57 D Goulet, 'Culture & Traditional Values in Development, The Ethics of Development' in: S Stratigos and PJ Hughes (eds)., *The Pacific in the 21st Century* (University of Papanua: New Guinea Press, 1987).

58 R Ochieng, 'A Review of Degradation Status of the Mau Forest and Possible Remedial Measures'. (Munich: GRIN Verlag, 2009).

59 K Collins, 'Kenya makes climate effort before Copenhagen' (Reuters, 2009). <http://www.reuters.com/article/2009/11/11/us-kenya-envoronment-idUSTRE5AA2V20091111 > [Accessed 15 June 2011].

60 NK Menzies, *Our Forest Your Ecosystem, Their Timber: Communities, Conservation and the State in Community Based Forest Management* (New York: Columbia. University Press, 2007).

61 R Tsosie, Indigenous People and Environmental Justice: The impact of climate change (2007) 78 University of Colorado Law Review1625-.

62 C Kidd and J Kenrick , 'The Forest Peoples of Africa' in V Couillard and J Gilberts. (Eds.), *Land Rights and the Peoples of Africa* (Moreton-in Marsh, UK: Forest Peoples Program, 2009).

right to cultural development for indigenous people, among them indigenous forest people. The relationship between culture and livelihood is best illustrated by De Boeck,63 who looked at the symbolic meanings of hunger among the Alunde of Zaire (also a forest community). According to De Boeck, illness was often seen and linked to social relations. He noted that an individual suffering was often evidence of broader problems within his or her own clan. For example, when illness struck close family members, they gathered and made decisions about its causes and the appropriate therapy. The forest was implicated symbolically throughout diagnosis and treatment. Thus, the potential effects of climate change, such as increases in forest fires, may undermine activities that define indigenous forest cultures.

More specifically to sub-Saharan Africa (SSA), the significance of trees in supporting cultural and traditional practices has been identified for different communities. Among the Kikuyu community in Kenya, the Mugumo tree has been used as a sacred place where elders meet to discuss important livelihood issues and sometimes to solve local conflicts and disputes.64 The lack of regeneration by some tree species as a result of the effects of climate change would have implications for those who use these trees for cultural practices. For example, indigenous people who rely on special plants for part of their initiation ceremonies could be affected as a result of lack of regeneration of these plants.

V. LEGISLATION AND IMPACT ON INDIGENOUS FOREST COMMUNITIES

The Constitution of Kenya, Article 63(2) (d) recognizes that community land consists of ancestral land and lands traditionally occupied by the hunter-gatherers community. It provides that any unregistered community land shall be held in trust by county government. Article 63(4) forbids the disposition of community land except in terms of legislation specifying the nature and extent of the rights of members of each community, individually and collectively. This shows that even in such constitutions, the protection of the land rights of indigenous popluations remains significantly curtailed. Indigenous forest-dependent communities' lands, including those inhabited by the Ogiek, is exposed to multiple competing interests such as forestry, cash crop farming, and individual landholdings' sub-divisions.

Evidence of the Ogiek as a forest community can be found in the Kenya Constitution[65]and land policy.[66]The two documents recognize the rights of indigenous groups and have provisions for addressing the historical land injustices, which recognize the rights of the indigenous peoples over ancestral lands. The Bill of Rights in the Constitution provides that "a person belonging to a cultural or linguistic community has the right, with other members of that community, to enjoy the person's culture."[67] Under Article 36, the "state shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups develop their cultural values, languages and practices". This provision, as stated in the Constitution, needs to protect the land rights of the Ogiek [indigenous

63 F De Boeck, 'When Hunger Goes around the Land: Food and Hunger in Luunda Land'(1994) 29 (2) Man New Series 257.

64 EW Donias and CJP Colfer, 'Socio-cultural Dimensions of Diet and Health in Forest-Dwellers Systems' in CJP Colfer (ed), *Human Health and Forests: A Global Overview of Issues, Practice and Policy* (London: Earthscan, 2008).

65 Republic of Kenya, *The Constitution of Kenya* (Nairobi: Government Printer, 2010).

66 ibid 27.

67 ibid 61 Article 44.

people] on the basis of customary law. However, the Ogiek are among many people who were affected by successive development over land allocations. Implementing recommendations suggested in the Ndung'u Report[68] and the Mau Task Force report[69] mean that the Ogiek, together with other communities settled on the forest land, are relocated to other areas in order to convert the forest back to its original form. While this is seen as good for mitigating climate change, the attachment of the Ogiek to these agricultural lands will once more be affected, contributing to further disintegration of the community, undermine its culture and ability to adapt to climate change. The other implication is that lack of identity of an indigenous forest community renders it invisible to the larger network of indigenous peoples. Being part of this large network provides all indigenous forest communities with the opportunity to be represented in international meetings and negotiations, such as the Conference of Parties.

The United Nations expert mechanism on the rights of indigenous peoples',[70] in referring to such groups with specific identities, histories and cultures, characterizes them as non-dominant, vulnerable and disadvantaged. According to the ACHPR/IWGIA,[71] the culture and way of life of indigenous people has been subject to discrimination and their very existence is under threat of extinction. Anaya[72] and Tsosie[73] point out that the indigenous forest people have been marginalised in the development arena and are perceived as being backward. This is reflected in policies that undermine their livelihood and culture, and especially by the dominant development paradigms, which favour settled agriculture over other modes of production -- such as pastoralism and subsistence hunting and gathering.[74]

The Paris Agreement[75] acknowledges indigenous peoples in the preamble as well as in the preamble of the decision text. It notes that countries need to recognize indigenous people's rights when taking actions to address climate change. The other aspect discussed on indigenous knowledge is the need to include people in the exchange of knowledge on adaptation. Additionally, the agreement recognizes indigenous people's traditional knowledge in efforts aimed at helping themselves and neighbours to adapt. However, the agreement is very broad and includes very few texts on indigenous peoples such as the Ogiek. In addition, the inclusion has very little impact on adaptation policy at the national level. At the national level, Kenya has a policy on environment,[76] which establishes climate resilience and low carbon development as a national priority. The country also adopted the National Climate

68 ibid 18.
69 ibid 11.
70 United Nations expert mechanism on the rights of indigenous peoples.
71 ACHPR and IWGIA, *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's work on indigenous peoples in Africa* (ACHPR & IWGIA: Banjul and Copenhagen, 2006).
72 S Anaya, *Indigenous Peoples in International Law* 2nd ed. (New York: Oxford University Press, 2004).
73 ibid 58.
74 ibid 36.
75 Paris Agreement on Climate Change 2015.
76 National Environment Policy 2013. Available at <http://cickenya.org>

Change Response Strategy,[77] the National Climate Change Action Plan 2013-2017,[78] and Climate Change Act.[79] The Action Plan recognizes carbon trading as instrumental in raising the $2.5 billion required annually to get Kenya onto a low carbon climate resilient path.

VI. CONCLUSION

The starting point of the vulnerability of the Ogiek is related to effects and changes in the forestland, which affects their livelihood, security and identity. Some of these changes are related to developments in policy over the utilization of forest resources and the conflict over control of land and its use. Among the Ogiek, the developments in land and conservation policy led to relocation of the community to agricultural lands in particular, where they faced challenges such as lack of skills in farming, livestock keeping and restricted access to the forest for beekeeping purposes. While on the agricultural land, the Ogiek faced an additional challenge whereby land to which they were allocated had no formal titles, which made them vulnerable to actions by government and any other forces, including timber companies in the area. They face constant evictions without notice. The implication that land insecurity has on the Ogiek is that it prevents them from undertaking activities that would enable them to function and live, as they would choose.

The Ogiek narrative shows that laws and institutions that structure resource access and control can shape local experiences of vulnerability. Such laws include the current land policy, which advocates individual land titles. While individual land titling favours the Ogiek since they have been incorporated into agriculture, they still do not have security of tenure because the land given to them and to other neighbouring communities was not awarded by following the right legal procedures. It has also been argued that the conversion of the forest into agriculture was a mistake because it affected the Mau ecosystem, according to the Mau Task Force findings and the Ndung'u Report. The global initiatives to address climate change also contribute to the dispossession among the indigenous peoples of their land.

77 Government of Kenya, *Kenya National Climate Change Response Strategy* Ministry of Environment and Natural Resources (Nairobi: Government Press, 2009).

78 Government of Kenya, *National Climate Change Action Plan* (NCCAP) (Nairobi: Ministry of Environment and Natural Resources, 2013). <http://www.kccap.info > Accessed 22 February 2017.

79 No. 11 of 2016.

CHAPTER 18

DEVELOPMENTS IN ENVIRONMENTAL GOVERNANCE IN KENYA: EXPERIENCES USING THE OWINO-UHURU CASE

Charles Odidi-Okidi & Collins Odote

I. INTRODUCTION

Environmental governance refers to legal and institutional processes and practices for environmental protection and management at national and international levels. Prof Okoth-Ogendo defined it as the "framework of decision-making regimes (social, economic, cultural and political), both public and private, which determine the allocation and use of environmental resources and which, therefore, determine how and when the environment changes or is changed."[1] Applied to Kenya, this implies that these are arrangements by which public and private persons and institutions anticipate and respond to any challenges to the environment in the country. This has been recognized so much so that jurists of old presupposed that when such challenges cease to exist, there is no need to develop such laws or governance mechanisms. This is the essence of the age-old maxim that *cesante ratione legis cessant et ipsa legis,* which translates to, "the law itself ceases if the reason of the law ceases".

By the same token, where there is a blatant threat or challenge to the environment and no response is forthcoming, the public will, inevitably enquire into why there is no legal response. Is there no appropriate system of governance out there? It is in this context that the tragic incident of Owino-Uhuru, where the people of Mswambweni were exposed to the toxic emissions with the disastrous health consequences must be seen. As will be discussed below, the inhabitants of Owino-Uhuru suffered widespread harm, with only mild and belated responses from the relevant government authorities. Thus, when there occurred deplorable and continuing pollution caused by sustained emissions from Kenya Metal Refinery at Owino-Uhuru slum in Mombasa, public protests led one of Kenya's television stations to interview two individuals,[2] supposed to be legal experts on environment, to brief the public on the situation. The questions were to lead to an explanation of the highlights of

1 HWO Okoth-Ogendo, 'The Juridical Framework of Environmental Governance' in HWO Okoth-Ogendo and GW Tumushabe (eds), *Governing the Environment: Political Change and Natural Resources Management in Eastern and Southern Africa* (Acts Press: Nairobi, 1999) 41-62, 42.

2 HWO Okoth-Ogendo, 'Constitutions without Constitutionalism: An African Political Paradox" in D Greenberg, SN. Kartz, B Oliviero and SC. Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (OUP, New York, 1993) Chapter 4.

environmental governance in Kenya and how they would respond to such an instance of gross harmful effects on residents and the environment. Consequently, the deplorable instance offers an opportunity to ascertain the existence of actual substantive law and institutions that can and should respond to such environmental problems. At the same time, it offers an opportunity to conjecture why responses are inept. Finally, it provides a chance to point out areas for future research exploration with a view to improving the framework for environmental governance. The context of this case is provided in section three, following a discussion of the link between land and the environment in section two.

As will be evident below, the two experts did not provide satisfactory responses to the questions raised by the journalist about what substantive laws or decided cases exist to inform the public on how environmental governance should have dealt with the problem at Owino-Uhuru. In our view, there are at least two books out there that have covered environmental governance in Kenya fairly well.[3] An appreciation of their content and subsequent constitutional and legislative developments in the country provides a basis for exploring solutions to the problems arising from this case.

It is useful to respond to the cognate questions that were raised over possible legal responses to acute environmental contamination by lead from the Kenya Metal Refinery at Owino-Uhuru. That pollution incident has not been published in any book, although the story has appeared in a number of local newspapers.[4] Therefore, to make reference to it obliges us to give a summary of the salient features, drawing on our recollections from the popular media.

The two experts showed that the one environmental case they could recollect in Kenya was the suit by the late Wangari Maathai against the Kenya Times Media Trust,[5] which was prosecuted and decided as a common law case. In other words, the available cause in instances where a plaintiff is required to demonstrate that his or her personal and legally protected interests have been or are likely to be breached. This chapter will, in the fourth section, demonstrate that there are in fact common law principles which could have been applied.

The fifth section of this chapter will also demonstrate that there are also constitutional provisions that would be applicable to the case as a matter of contemporary environmental governance in Kenya. The sixth section will show that there is the Environmental Management and Coordination Act (EMCA) enacted in 1999. The two experts made no mention of it and therefore denied the Kenyan public information on that comprehensive legal regime of environmental governance. As we discuss this law, we shall indicate that Prof

3 United Nations Environment Programme, *The Making of a Framework Environmental Law in Kenya* (Nairobi: United Nations Environment Programme and African Centre for Technology Studies, 2001) and CO Okidi, P Kameri-Mbote and Migai Akech (eds), *Environmental Governance in Kenya: Implementing the Framework Environmental Law* (Nairobi: East African Educational Publishers, 2008). No comparable publication has been released since.

4 The story first appeared as a report by two investigative journalists on KTN television on 26 April 2015 at 7 pm. Thereafter, it was covered in *The Standard* newspaper on Wednesday 29 April 2015 page 8 and on May 2015 p. 4. A brief report was published was in *Daily Nation* on 4 May 2015 p. 16 col. 1. . See, B Okeyo & A Wangila, 'Lead Poisoning in Owino Uhuru Slums in Mombasa-Kenya' (2012) Eco-Ethics International-Kenya Chapter <http://www.publishresearch.com/download/128> accessed 20 February 2017.

5 *Maathai v Kenya Times Media Trust Ltd* [1989] eKLR.

Okoth-Ogendo had expressed doubts over the Kenyan Parliament ever enacting the law.

In the seventh section, the chapter will demonstrate that there is a large body of case law on environmental governance, some of which might be relevant to the Owino-Uhuru disaster, if we may characterize the issue as such. In the television interview, the two experts only referred to the suit by Wangari Maathai, which, however failed. In law, this case does not help the Owino-Uhuru victims. It will do so by discussing the place of the Environment and Land Court in dealing with environmental challenges.

The eighth section will conclude. In the discourse, this chapter will seek to link the discussions between environmental governance and the theme of this book, which is land. That linkage will be had in the concept of land use, which is about rules and regulations governing the anthropogenic uses of land. The chapter takes the position that a critical aspect of land tenure addresses itself to the manner in which land is used and managed. These are governed by rules on environment, too. For example, those whose land contains wetlands will find themselves restricted from the kind of uses they can put the land to, out of the rules that seek to ensure the conservation and wise use of the wetlands.[6]

II. THE LINK BETWEEN LAND AND ENVIRONMENT

For long, the linkages between land tenure and land use have largely been restricted to conversations about how to maximize production, especially agricultural production.[7] Traditionally, land tenure concerned itself with the absolute power that the landowner had to do with the land as they pleased. However, developments have demonstrated that land is a finite resource. Consequently, "land is not another form of property that can be appropriated and used at the absolute discretion of individuals or groups without regard to wider social and ecological interests."[8] Property rights need to incorporate a conservation or ecological ethic.[9] In effect, the nature and quantum of property rights society invests in individuals or groups and the manner in which those rights are exercised have important implications for the sustainable use of land, the conservation of natural resources, and the maintenance of essential ecological processes.[10]

The discourse on land is consequently one of property rights in land from both a tenure and use perspective. While Prof Okoth-Ogendo's main writings were on the tenure aspects of land,[11] even he appreciated the place that land use plays in a sound framework

6 C Odote, 'Wise Use and Sustainable Management of Wetlands in Kenya', in CO Okidi, *et al* (eds), *Environmental Governance in Kenya: Implementing The Framework Law* (East African Educational Publishers: Nairobi, 2008) 335-354.

7 BD Ogolla and J Mugabe, 'Land Tenure and Natural Resource Management' in C Juma and JB Ojwang (eds), *In Land We Trust: Environment, Private Property and Constitutional Change* (Initiative Publishers and Zed Books: Nairobi and London 1996) 85-116, 85.

8 ibid 94-5.

9 ibid 95.

10 ibid.

11 See his main work, being, HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Africa* (Acts Press: Nairobi, 1991).

for land governance.[12] This justifies his writings on environmental issues too.[13] One of the areas that concerned Okoth in his writings was that of climate change. His focus on climate change was justified by the fact that Africa is still "predominantly agrarian."[14] Adaptation and mitigation measures, the two tools for responding to climate change, have to be aligned to address land-related activities. In the African context, this focus on control and management of land and land-based resources needs to target agriculture and related activities; forestry and grasslands; hydrology and water resources; and human settlements.[15] A review of Kenya's policy framework on climate change will reveal the accuracy of Prof Okoth-Ogendo's assertion.[16]

In reforming land policies in Africa, environmental imperatives come into play. Such reforms must ensure that land uses result in productive and sustainable use management of land.[17] Okoth argued that reforming land-use structures should be designed to achieve five broad objectives.[18] *First,* they provide a framework for standard setting in land use matters.[19] The rationale for standard setting is to ensure that proprietary functions do not compromise national policy goals, especially those directed at sustainable management of resources.[20] This is critical for environmental governance. The *second* function relates to land use planning and management. This function focuses on enabling state or community organs to audit the performance of specific land use requirements.[21]

Objective *three* of reforming land use structures is geared towards facilitating control of, or exercise of, trusteeship over sensitive ecosystems.[22] Objective *four* is to provide infrastructure for the delivery of support services to land use operations,[23] while objective *five* seeks to infuse new and efficient technologies into land use systems.[24] These reforms will ensure the sustainable development of land and land-based resources.

To achieve sustainability in the use and management of land, the state is under a duty to regulate the manner in which land is used. The law provides for powers of development control, also known as police power, exercised by the state as an incident of sovereignty. Police power is useful for ensuring environmental management. To ensure that owners of

12 HWO Okoth-Ogendo, 'Managing the Agrarian Sector for Environmental Sustainability' in CO Okidi, P. Kameri-Mbote and Migai Akech (eds), *Environmental Governance in Kenya: Implementing the Framework Environmental Law* (Nairobi: East African Educational Publishers, 2008).

13 Okoth-Ogendo (n 1).

14 HWO Okoth-Ogendo, 'Climate Change Adaptation and Mitigation: Exploring the Role of Land Reforms in Africa' in N Chalifour, *et al* (eds), *Land Use Law for Sustainable Development* (Cambridge: Cambridge University Press, 2007) 60-70,63.

15 ibid.

16 P Kameri-Mbote and C Odote, 'National Laws on Climate Change Liability: Kenya' in R Lord (ed), *Climate Change Liability: Transnational Law and Practice* (Cambridge: Cambridge University Press, 2012) 296-318.

17 African Union, *Framework and Guidelines on Land Policy in Africa* (Addis Ababa: UNECA, 2010).

18 Okoth-Ogendo, 'Climate Change Adaptation (n 14) 66.

19 ibid.

20 ibid.

21 ibid.

22 ibid.

23 ibid.

24 ibid.

property rights maintain sustainability of natural resources, the state can create rules to regulate use of property rights based on police power.[25]

III. THE OWINO-UHURU ENVIRONMENTAL DISASTER

What seems to be a disastrous pollution incident at Owino-Uhuru in Changamwe, Mombasa, is clearly a major challenge to environmental governance in Kenya. By examining where it occurred; the nature of the threat and impact on environment and human beings; how the threat was revealed and tackled; the institutional responses and the normative prescriptions applied; and the final disposal of the case, certain patterns will emerge. As an acute environmental incident those discussions will, of necessity, suggest the patterns of environmental governance in Kenya.

The only publications on Owino-Uhuru, as we noted above, are newspaper reportage, which we piece together to find the facts for this chapter.[26] Owino-Uhuru is a slum area in Nyali, Mombasa. As is nearly always the case with such areas, it is densely populated, making it amenable to large-scale impact by any environmental disaster. The actual total population of residents in general, and in particular those that were impacted by the chemical pollution, is not definite. Health experts at the coast have suggested that 5,000 residents of Owino-Uhuru slums should relocate to decidedly safe grounds.[27]

The actual source of the disaster is exposure to lead effluent from a battery plant in the neighbourhood.[28]Prevention of ultra-hazardous emissions from the factory required the company, Metal Refinery Export Processing Zone (EPZ) Limited, to ensure a properly functioning expansion chamber, the cooling tower, the cyclone, a filter bag house, scrubbers and provision of adequate personal protective equipment. Otherwise, workers in the factory and immediate neighbourhood would get exposed to emissions from the industrial process of lead smelting and refinery. Over the years, the work increased in tempo as the firm received increasing supplies of raw materials from expired lead-acid batteries and from battery dealers, all of which were abundant and easily accessible. The batteries are cleaned and smelted before the lead is extracted and exported. Kenya Revenue Authority and EPZ abundantly facilitated the industry through tax exemption. Moreover, EPZ production is for the export market and, therefore, the bigger the volume the better.

As the industry flourished, so did the increase in what the National Environment Management Authority (NEMA) calls fugitive lead emissions.[29] And it is the impact of these emissions on the environment and people that became a source of grave concern. Alarmed by the growing number of health disorders, medical units in Mombasa commenced monitoring of residents of Owino-Uhuru slums for effects of lead poisoning. Doctors at Port Reitz Hospital found widespread exposure to lead in varying degrees.[30] They recom-

25 C Odote, *Regulating Property Rights to Ensure Sustainable Management of Wetlands in Kenya* (Unpublished PhD Thesis, University of Nairobi, 2010) (available with author).

26 N 4 .

27 The number is specifically mentioned in The Standard, 4 May 2015, p. 4.

28 Human Rights Watch, 'Kenya: Toxic Lead Threatening Lives' (HRC, June 24, 2014) <https://www.hrw.org/news/2014/06/24/kenya-toxic-lead-threatening-lives > accessed 20 February 2017.

29 National Environment Management Act No. 107 of 1998.

30 (N 4) above.

mended the relocation of 5,000 residents of the slum to safer grounds, indicating that the samples taken showed that the areas around Kenya Metal Refineries in Jomvu were still highly contaminated.[31]Medical complications associated with exposure would ultimately include kidney and brain disease.

According to media reports,[32] doctors have warned that in future those men who have suffered exposure to lead might develop low sperm counts while women are likely to become infertile. Further, children who are exposed have developmental problems. It is clear then that while these may be different health problems, there is a probability of unique health problems, which might entitle them to special legal remedies.

The widespread health problems caused by emissions from the factory impelled a former employee of the company, Ms Phyllis Omido, to mount a quit campaign.[33] Her concerns attracted the attention of investigative journalists working on the programmes, *Jicho Pevu* and *The Inside Story*[34] at the Kenya Television Network (KTN) in addition to leading to widespread public reactions. It seems that the negative impact of lead from battery manufacturers has gained broad notoriety. In Nakuru, a Chinese-run[35] battery factory, which in June 2015 was reported in *The Star* to be under investigation because several current and former workers have, on examination, been found to manifest general physical exhaustion and weakness of joints associated with lead poisoning. Some of those examined have showed lead levels of up to 75 per cent and have been forced by the employer to go home. Clearly, in such cases, the sooner legal action is taken by relevant agencies, the better.[36]

KTN also invited two people who were purportedly experts in environmental law to tell the public what, from experience, would be available as the juridical remedies. In essence, the media sought to know, from a juridical perspective, what options are available from a governance perspective to Kenyans in such situations. The two experts dwelt on two options, which this paper will explain and also illustrate the actual breadth that was missed. The first option is the court action highlighted by *Wangari Maathai v Kenya Times Media Trust,*[37] which was brought under the law of torts but failed. The court held that the good professor lacked *locus standi* – evidence that she had suffered harm over and above others. *Secondly*, the two experts submitted that the other juridical arrangement under which the people affected by lead emissions at Owino-Uhuru could seek a remedy was the Bill of Rights' provisions in the Constitution of Kenya, 2010. This would be by arguing that the constitutional right to a clean and healthy environment covered by Article 42 of the Constitution had been violated.

The four sections which follow in this chapter will demonstrate that the scope of

31 This specific point is published in *The Standard*, 4 May 2015 p. 4.

32 Laura Julstrom, 'Exposure to heavy metals and fertility: what a couple should know' National Centre for Health Research <http://center4research.org/medical-care-for-adults/other-reproductive-sexual-health/exposure-to-heavy-metals-and-fertility-what-a-couple-should-know/ > accessed 20 February 2017.

33 Ms Phyllis Omido was awarded the Goldman Environmental Prize for her valiant campaign, which led to closure of the factory. See *Daily Nation,* 29 April 2015 p. 6.

34 *Jicho Pevu* and *The Inside Story* are popular investigative television news programs in Kiswahili and English, respectively, that attempt to go beyond the scenes and establish a *prima facie* of official wrongdoing or expose malfeasance.

35 For this disturbing story, see *The Star* of Wednesday, 24 June 2015 p.16.

36 ibid.

37 Supra (n 5) above.

environmental governance which would be available to Owino-Uhuru residents are much wider than what the two experts told Kenyans through the KTN interview.

IV. THE PLACE OF COMMON LAW IN ENVIRONMENTAL GOVERNANCE

The question here is: How would common law respond to the Owino-Uhuru residents and, therefore, offer redress to their environmental problem?

At independence, Kenya was allowed to apply the common laws of England by adoption of section 3(1) (c) of the Judicature Act, Chapter 8 of the Laws of Kenya. That provision received into Kenya for application, the common law of England in force as of 12 August 1897. The big qualification was that the application of that provision was subject to there being no specific and relevant statutory enactment. The rule also applied only in suitable local circumstances.

Environmental law, as it exists today, was not known to common law. Analogous problems for law had to do with anything or any conduct that interfered with one's enjoyment of their rights over land. Such rights were, *ipso facto,* personal and therefore, courts of law required that whoever complained of any violation must demonstrate *locus standi* – that they had suffered harm over and above others. The courses of action, which might have been considered in respect of Owino-Uhuru include trespass, which would be disqualified because there was no actual physical entry on the premises.[38] That leaves negligence, nuisance and strict liability, which arguably, were relevant on account of actual physical injuries suffered by the population.

While the offence of trespass might not apply in the Owino-Uhuru incident, negligence would, because the company owed the residents the duty of care. At the same time, the quantum of liability on the part of the company would be strictly construed in the sense of *Rylands v Fletcher.*[39]

Nuisance is much more pervasive. There is public and private nuisance, where the former refers to instances in which a broad section of the public is affected, as was the case in Owino-Uhuru.

Acting under common law, the Attorney General would have taken up the case made as one of public nuisance and prosecuted accordingly. But where the Attorney General fails to act and the scope of harm to the environment or similar threat, then as we shall see later in the case of *Rev Christopher Mtikila*,[40] a public-spirited individual may bring action before court. But that would just underscore the failure of the department of the Attorney General or in the post-2010 era, the failure of the Directorate of Public Prosecutions.

But such was the case of Wangari Maathai to which the television experts in the Owino-Uhuru tragedy made reference. In *Wangari Maathai v Kenya Times Media Trust,*[41] the plaintiff, as the coordinator of the Green Belt Movement, a non-governmental move-

38 See detailed discussion in A Mumma, 'The Continuing Role of Common Law in Sustainable Development' in CO Okidi, P Kameri-Mbote and Migai Akech (eds), *Environmental Governance in Kenya: Implementing the Framework Environmental Law* (Nairobi: East African Educational Publishers, 2008) 90-109.

39 ibid.

40 *Wangari Maathai v Kenya Times Media Trust* HCCC No. 5403 1989 (Kenya).

41 *Maina Kamanda v Nairobi City Council* (HCCC No. 6153).

ment, sought intervention of the court to stop the planned construction of the Kenya Times Complex, a 60-storey skyscraper at Uhuru Park until determination of the suit or further orders from the court. Arguing on her own behalf, the plaintiff held that construction of the complex would spoil Uhuru Park. The court held that the plaintiff lacked *locus standi* in a case that has often been quoted as evidence that courts in Kenya were not sensitive to public interests, either directly or by analogy.

The KTN experts in the Owino-Uhuru incident should have gone further to point out that shortly after the Wangari Maathai case in 1989, there was the case of *Maina Kamanda and Another v Nairobi City Council and Another*[42] in 1992. Here, the plaintiffs, as rate-payers in the City of Nairobi, prayed to the court to restrain Nairobi City Council from allowing the former chairman of the Nairobi City Commission to continue enjoying facilities he had enjoyed when he was the chairman. The court found that the plaintiffs had *locus standi* in this instance.

The experts could have given pertinent examples of cases from East Africa where *locus standi* was found to exist. If the Wangari Maathai case portrayed Kenyan courts as notorious in determination of *locus standi* in public interest matters, then some encouraging examples may be learned from Tanzanian and Ugandan benches. The Ugandan bench offers useful jurisprudence in public interest cases.[43] Two cases from Tanzania are particularly instructive. The first one is *Rev Christopher Mtikila versus The Attorney General*[44] referred to above. The court held that:

> the notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law than public law. In matters of public interest litigation, this court will not deny standing to the genuine and *bona fide* litigant even where he has no personal interest in the matter."[45] In the view of the court, under such circumstances, "… if there should spring up a public-spirited individual … the court is under obligation to rise … to the occasion and grant him standing.[46]

The circumstance described by the court existed in the context of the Wangari Maathai case, and in the absence of any extenuating circumstances, the court should have granted *locus standi* to Prof Maathai. Again no doubt the conditions described by the Mtikila case existed in Owino-Uhuru. Therefore, it would only be unfortunate if no public-spirited individual goes to court on behalf of the Owino-Uhuru community. Such a suit can certainly rely, at least in part, on the statements by the Court in the Mtikila case.

The second case, also Tanzanian, is *Festo Belegele and 794 others v Dar es Salaam City*

42 See K Kakuru and Irene Ssekyana (eds), *Case Book on Environmental Law* (Greenwatch and Environmental Law Institute, 2009), particularly pages 1-96 for cases from Uganda.

43 The Civil Case No. 5 of 1993 in the High Court of Tanzania at Dodoma, see ibid 140. For a comprehensive discussion of jurisprudence from the courts in East Africa in the field of environment, see generally, P Kameri-Mbote and C Odote, 'Courts as Champions of Sustainable Development: Lessons from East Africa'(2009-2010) 10 Sustainable Development Law and Policy31.

44 ibid 146.

45 ibid.

46 ibid.

Council.[47] In this case, the applicant and his immediate neighbours requested the court to order the respondent, the City Council of Dar es salaam, to stop dumping an assortment of waste in their neighbourhood residential area. The refuse dumped in the area, the applicant submitted, became a health hazard and nuisance to the residents.

The respondent maintained that the City Council had authority from the central government to find a location for dumping the waste, even if temporarily and that the applicant lacked *locus standi* to bring the action. The court found that the applicant had *locus standi* and expressed astonishment that anyone would choose to dump waste in a residential area endangering health and welfare of the resident population. Thus, the Festo Belegele and Christopher Mtikila cases should have been used by the experts as examples of judicial decisions where courts' opinion allowed *locus standi* and issued orders protecting residents from environmental toxic injuries.

From the foregoing, it is apparent that there are precedents supporting possible successful suits against the lead smelting and refinery facility at Owino-Uhuru. By implication, it is confirmed that common law offers protection or remedies to cognate environmental problems. Even though the Judicature Act, as reviewed above, would be presumed to be effective where no statutes exist, Prof Albert Mumma has argued that there is a continuing role of the common law in promoting sustainable development.[48] His argument is that the common law has provided the framework within which modern environmental law has developed.[49] Secondly, common law is versatile and has adapted by taking on board new developments in environmental law, thus dealing with new concepts and principles.[50] It consequently plays a complementary role to provisions of environmental law.

V. ENVIRONMENT AND THE CONSTITUTION IN KENYA

Prior to adoption of the 2010 Constitution of Kenya, there were residual provisions on environmental governance which have been discussed adequately elsewhere.[51] It is quite apparent that in their recent constitutional reforms, East African countries took the subject of environment and sustainable development seriously. Uganda, which settled down to serious constitution-making after total misrule for over a decade, dedicated a whole chapter to "environment" in the report of the constitutional commission.[52] Tanzania's constitution-making process, although unable to reach its logical conclusion, contained provisions

47 ibid 192 - 198. See also *Joseph Kessy and Others v The City Council of Dar es Salaam,* ibid 186 - 191.

48 A Mumma, 'The Continuing Role of Common Law in Sustainable Development', in C Okidi, *et al* (eds), *Environmental Governance in Kenya: Implementing the Framework Law* (East African Educational Publishers, Nairobi, 2008) 90-109.

49 ibid 109.

50 ibid.

51 See, C Okidi, P Kameri-Mbote & M Akech (eds), *The Making of a Framework Environmental Law in Kenya,* (n 1) 30-32.

52 See, Benjamin J Odoki, *The Report of the Uganda Constitutional Commission: Analysis and Recommendation* (Entebbe: UPPC, 1993) 693 – 710. The Constitution of the Republic of Uganda, 1995, has several provisions on environment, as do several other countries. See CO Okidi, 'International Perspectives on the Environment and Constitutions'(1996) e (1) South African Journal of Environmental Law and Policy 39.

on the environment.

The making of the 2010 Constitution of Kenya extended over a period of 10 years, from the year 2000 to 2010. The process was largely acrimonious and sometimes it seemed hopeless. In his position as the vice chairman of the Constitutional Review Commission (CKRC) and chairman of the CKRC Research and Drafting Committee from the year 2000 to 2005, Prof Okoth-Ogendo handled the most technical task and issues. Okoth was, evidently, the best-suited person for the tasks of research and drafting. He had several scholarly works to his name, including being a member of both the International Association of Constitutional Law and the Advisory Board of the International Journal of Constitutional Law as well as a researcher on constitutionalism and governance between 2002 and 2007. He also participated at Harvard and Vermont universities' conferences on constitutional changes in Africa. Among his many publications on constitutions was the eternally provocative 'Constitutions without Constitutionalism: An African Paradox',[53]which he contributed as a chapter to a book by four distinguished scholars.[54] He had given so much thought to constitution-making that he was a fitting person to provide leadership to research and drafting for a new Constitution of Kenya.

An example of the views received and interrogated by the Research and Drafting Committee was a presentation entitled, 'Environment, Natural Resources and Sustainable Development in Kenya's Constitution-making', which was later published in full in Nairobi.[55] This presentation laid the basis for how the environment was handled in the Constitution, as we highlight below.

Environmental governance, under the Constitution, falls into three categories of provisions. The first category is in Article 42, which is under Chapter Four on the Bill of Rights, Part 2 -- Rights and Fundamental Freedoms. Paragraph (a) of that Article is crisp, simply stating that every person has the right to a clean and healthy environment, which includes having the environment protected for the benefit of present and future generations. These rights are, however, enforceable through legislative measures. There is cross-reference to legislative measures contemplated in Article 69. Further, the protection envisaged in Article 42 is enhanced by obligations under Article 70.

Secondly, Chapter Five on Land and Environment, Part 2, of the Constitution contains more extensive provisions for implementing Article 42. Article 69 stipulates obligations with express requirements that the states implement certain conditions that actually ensure protection of the environment. The Article provided for such key and modern thoughts on the environment as sustainable and equitable utilization of natural resources; preservation of 10 per cent of forest cover; protection of indigenous knowledge and intellectual property;

53 Okoth –Ogendo, 'Constitutions without Constitutionalism' in Douglas Greenberg, S.N. Kartz, B. Oliviero and S.C. Wheatley (Eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: OUP, 1993) Chap 4.

54 Douglas Greenberg, S.N. Kartz, B. Oliviero and S.C. Wheatley (Eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: OUP, 1993).

55 See CO Okidi, 'Environment, Natural Resources and Sustainable Development in Kenya's Constitution', Memorandum presented to the Constitution of Kenya Review Commission in February 2002 and again to the Audit and Review of the Draft Bill of the Constitution of Kenya Review Commission in October 2005. The second phase of the work of the commission did not do justice to the recommendation. The memorandum was later release as a joint publication of the Institute for Law and Environmental Governance and Kenya Land Alliance 2003.

and public participation in environmental decision making. It also makes provision for the action-forcing procedure of environmental audit and monitoring. In addition, the Article requires every person to cooperate with state organs in conserving the environment for intergenerational equity.

Implicitly, and as noted earlier, the Constitution expects the state, through legislative processes, to make laws and promulgate regulations for implementation of the provisions in the Articles such as environmental impact assessments, which require regulations and guidelines. Finally, the constitutional provisions explicitly state that anyone seeking redress or remedies in the enforcement of environment rights does not need to demonstrate personal loss. In effect, the Constitution dispenses with the requirement for *locus standi* as it was traditionally understood under common law in the days of the Wangari Maathai Case.

Constitutional provisions as instruments of environmental governance are rich. The experts interviewed for television on possible remedies to Owino-Uhuru problem could only remember the Bill of Rights, which is a very small portion of what we have discussed. Unfortunately, too, no one came forward to take advantage of the enforceable provisions in Article 70. As we shall see in the discussion on the Environmental Management and Coordination Act (EMCA) below, anyone is entitled under the Constitution, to bring action before court without demonstrating personal loss or injury. From the evidence in the media, the level of injuries was reprehensible. We shall interrogate the reasons institutions with statutory powers to intervene did not do so there were no public-spirited individuals who came forward to seek court redress through public interest litigation.

The final provisions under Part 2 on 'Environment and Natural Resources' are unique. Article 71 provides a procedure for the vetting of contracts relating to the exploitation of natural resources in Kenya. It requires that any contract or agreement relating to grant of a right or concession for exploitation must be vetted and ratified by Parliament in order for it to be validly executed. The provision, which is borrowed from Article 268 (1) of the Constitution of Ghana, is designed to control excesses and irregularities perpetrated by the executive arm of government, which negotiates and executes such agreements.

Paragraph (2) requires Parliament to enact laws to specify the classes of transactions which require ratification. Presumably, such laws will specify the institutions with the responsibility to guide the work of Parliament on ratification, including what issues are to be considered in the ratification.[56]

The Constitution also provides a framework for resolving disputes arising from environmental issues. Before the enactment of the 2010 Constitution, environmental matters were handled by ordinary courts, with only a specialized tribunal, the National Environment Tribunal, providing the other avenue for relief, albeit with a limited mandate restricted to appeals from decisions by the National Environment Management Authority (NEMA). Ordinary courts were, however, seen as being ill-suited to handle environmental matters due to the technical skills required and also as a result of delays. As Mumma argued:

56 In the submission to the Constitution of Kenya Review Commission this author provided such guidelines. See ibid 25-31. The views were further elaborated and published in CO Okidi, 'How Constitutional Entrenchment Could Mitigate Conflicts and Poverty in Resource-Rich African Countries'(2007) 37 (2) (3) Environmental Policy and Law 15.

> (T)he development of laws relating to sustainable environmental management is relatively recent. Consequently, the courts, as the principal avenues for resolving disputes are not quite prepared to deal with issues arising from them. Additionally, the court processes tend, typically, to be slow, costly, and complex.[57]

To address the above challenges, the Constitution provided for the creation of a specialized court of the same status as the High Court, called the Environment and Land Court, to hear and determine disputes "relating to the environment and use and occupation of, and title to, land."[58] This court would be the appropriate forum for those aggrieved by the pollution at Owino-Uhuru to take their matters for resolution.

VI. GOVERNANCE THROUGH STATUTE LAW

Environmental governance in Kenya through statute law is an exceedingly wide assignment and a bit beyond the scope of this paper. A similar review has been done elsewhere.[59]It should, therefore, suffice to limit the present assignment to the provisions and application of the framework environmental law, Environmental Management and Coordination Act, 1999, popularly referred to as EMCA.[60]

At the time this law was enacted, there were only two other countries in the eastern Africa region which had adopted framework environmental laws: Uganda, in 1995, and Malawi, in 1996. The rest were in other parts of Africa and beyond.

Writing on 'Juridical Framework of Environmental Law',[61] Okoth was highly skeptical about their efficacy as management instruments. In his view, "such statutes generally represent compromises hammered out by agencies or ministries unwilling to give up their discrete functions to any one of them.[62] He concluded on a contentious note:

> Consequently, such statutes often fail to establish [an] authoritative lead agency or to specify a clear hierarchy for information flows and management process as among them. Many environmental ministries or environmental councils set up on this model, therefore, end up marginalized and unable to develop.[63]

Unfortunately, he proceeded to illustrate his very sound argument with two examples of inherently defective institutional structures. The Tanzanian National Environment Management Council did not have attributes of a statute since it focused only on implementation of environmental impact assessments. Its narrowness as an overarching agency

57 A Mumma, 'The Role of Administrative Dispute Resolution Institutions and Processes in Sustainable Land Use Management: The Case of the National Environment Tribunal and The Public Complaints Committee' in N Chalifour, et al, *Land Use Law for Sustainable Development* (Cambridge University Press, 2007) 253-265, 253.

58 Constitution of Kenya (2010), Article 162 (2) (b).

59 See an analysis which sought to be exhaustive in C Okidi, P Kameri-Mbote & M Akech (Eds), *The Making of Framework Environmental Law in Kenya (n 52)* 32-75.

60 Act No. 8 of 1999 which received Presidential Assent on 6 January 2000. Its date of commencement was 14 January 2000.

61 See HWO Okoth-Ogendo, 'The Juridical Framework of Environmental Governance' in HWO Okoth-Ogendo and Godber W Tumushake (Eds), *Governing the Environment: Political Change and Natural Resources Management in Eastern and Southern Africa*. (Nairobi: ACTS Press, 1999) 41, 55-56.

62 ibid.

63 ibid 55.

led to it being ignored, as The Guru[64] had hypothesized. The second one, Kenya's National Environment Secretariat, was a powerless agency without any legislative authority.

The contention that the executive office of the framework agency could be ignored by other sectoral heads was, at the time of drafting of Kenyan law, resolved by proposing that it be set at cabinet level like the Administrator of the United States Environmental Protection Agency. This was, however, rejected by technical draftspersons in the Attorney General's office, who still insisted on the position being under a ministry responsible for the environment. As to whether Prof Okoth-Ogendo's fear would have been taken care of will remain a matter of debate.

Secondly, it was proposed that the statutory agency be located in the Office of the President so that it could enjoy a special status. That was, however, also rejected on the advice of the World Bank, which was of the view that the Office of the President was overloaded. Too many agencies were located there, some without very good reason.[65]

It was also argued that the effectiveness of the environmental agency depended on the political clout of the chief executive officer. The example of Uganda's National Environment Management Authority's Prof John Okedi was often cited. He stood up to the President and Vice President to resist use of a dangerous chemical to destroy water hyacinth.[66]

It can be argued, therefore, that the problems identified by Prof Okoth Ogendo are real, but they can be cured under different circumstances. Moreover, as will be demonstrated below, the manifestation of these problems may systemically emerge in a country. In the case of Kenya's EMCA, the drafters had expected that different semi-independent organs created under the statute would promote efficacy of the law if each of them operated according to its mandate.

We should point out that despite the fact that framework laws may have their genuine problems, the practice of promulgating them is widespread. Prof Okidi once compiled a total of 24 actual texts in as many African countries.[67] Time is clearly ripe for critical studies to appraise the efficacy of these laws, including addressing the difficulties, which Okoth hypothesised.

Recently, EMCA underwent a review -- not for its efficacy but to harmonize the 1999 law with the Constitution of Kenya, 2010.[68]EMCA was enacted with complete awareness of the fact that it would deal with issues that other statutes dealt with. The juridical status of its provisions intervenes where sectoral provisions and agencies fail in their performance. This is a deliberate attribute of EMCA and the organs adopted under it. Thus, section 3 de-

64 ibid.

65 For instance, the Office of the President at one time was directly involved in issuing directives relating to coordination of NGOs, see P Kameri-Mbote, 'The Operational Environment and Constraints for NGOs in Kenya: Strategies for Good Policy and Practice' IELRC Working Paper 2000-2, 4. <http://www.ielrc.org/content/w0002.pdf > accessed 25 February 2017.

66 See, Jeniffer Bakyawa, 'Uganda Vice President Attacks NEMA Over Chemicals' (All Africa, September 26, 1997) <http://allafrica.com/stories/199709260082.html> accessed 25 February 2017.

67 See United Nations, *Compendium of Environmental Laws of African Countries.* Volume 1, Framework Laws and EIA Regulation (United National Environment Programme – 1996). The compilation also exists in Volume II.

68 A review of EMCA was done by Anne N. Angwenyi in 'An Overview of the Environmental Management and Coordination Act' in CO Okidi, P Kameri-Mbote and Migai-Akech (eds), *Environmental Governance in Kenya in Implementing the Framework Law* (Nairobi: East African Educational Publishers, 2008).

clares that every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment. The most important provision following on that entitlement is that the right to a healthy environment goes beyond the individual right. A person can seek a court order protecting the environment without having demonstrated personal interest or injury. This again, dispenses with the *locus standi* requirement under common law. On the other hand, Section 3 (e) adopts, *inter alia*, the polluter-pays principle. Here, we find wide powers, which could have been invoked in the Owino-Uhuru case.

The Act creates a robust institutional framework. The 1999 Act had created a National Environment Council; a National Environmental Management Authority; Public Complaints Committee (PCC); National Environment Tribunal (NET); Standards and Enforcement Review Committee (SERC); and the Provincial and District Environment Committee. Changes made to the Act in 2015 sought to align the institutional architecture for environmental governance to the Constitution and the devolved system of governance.

The main institution still remains the National Environment Management Authority (NEMA). Established under section 7 of EMCA, this is the principal executive organ, with its Director General as the Chief Executive officer. NEMA has responsibility to supervise and coordinate all maters in the environment field. It is also charged with implementing all standards and enforcing all regulations in the environment sector. Perhaps the central and most powerful instrument it is entrusted with is environmental impact assessment (EIA). This action-forcing mechanism established under Part VI, is meant to protect the threshold of sustainability. Under EMCA, this procedure requires that any activity likely to have impacts on the environment be taken through a procedure whereby the proponent establishes that necessary measures have been taken to prevent harm and, where prevention is not possible, mitigating measures are taken. Environmental Impact Regulations spell out EIA procedures for publicity, such as public hearings or public participation to ensure environmental sustainability. When the relevant branch of NEMA is satisfied with protective measures, then the proponent of the project is issued with a licence to proceed. Where a licence is denied and the proponent is dissatisfied, he/she can register a complaint before the NET.

Ongoing projects must undergo environmental audit and monitoring as provided for under sections 68 and 69, respectively. An audit is like what is done for accounting books to ensure that the terms of the licence are being complied with. Monitoring, on the other hand, is more general, ensuring that every aspect of the environment is secure, whether or not those aspects had been the subject of EIA or audit.

The proponent may be cautioned over any unacceptable development. At worst, the licence may be cancelled and penal action taken. It is such decisive action that was required of the Director-General of NEMA at Owino-Uhuru. Instead, the Director-General issued a signed press statement blaming the Ministry of Health[69] and actually sounding helpless in spite of having extensive statutory powers.

The Director-General has powers under section 108-116 to issue orders where the threshold of sustainability has been breached. These may be issued at any time but princi-

69 See signed press statement in *The Standard,* 29 April 2015 p. 43 and narrative on p. 8.

pally following regular inspection and analysis. In exceptional circumstances, compensation may be awarded where a person has lost property.

The point here is that in environmental governance, EMCA gave extensive powers to NEMA under the leadership of the Director-General. The contention by Prof Okoth-Ogendo that the environmental authority lacks efficacy is true. But it arises from weaknesses of personalities, not the legal provisions. For instance, the public expected the Director-General to take action under the penal provisions of EMCA and to be prompt in cancelling the company's licence.

The general performance of NEMA, viewed against the backdrop of what is happening out there, has been dismal. The Director-General has performed far below expectation in not exercising the enormous powers granted by EMCA. The performance has been dismal also because the civil society has not utilized their enormous opportunities to push for environmental protection. One notes, for instance, that a booklet on *Public Interest Environmental Litigation* was published in Kenya but never used.[70]

The second institution is the NET, which was established to provide speedy and non-technical remedies to those aggrieved by administrative actions in the implementation of EMCA. Its functions include inquiring into matters arising from refusal to grant a licence; imposition of any condition, limitation or restriction on a licence; revocation, suspension or variation of a licence; amount of money required to be paid as fees; and imposition of an environmental restoration order or environmental improvement order by the Authority. Decisions from NET can be appealed to the Environment and Land Court.

In 1999, when EMCA was enacted, the Public Complaints Committee was established as an environmental ombudsman. It was designed as an investigative body, where anybody could lodge a complaint and, based on this, the committee could undertake an investigation and issue recommendations. It could also undertake these investigations on its own motion. However, as opposed to being an independent body, the law established the Committee of the Authority. This was compounded by the funding to the body, which was processed through NEMA, hence compromising its institutional and operational independence.

The amendment to the Act in 2015 changed the name of the institution from the PCC to the National Environment Department. The Department's powers have been expanded to include:

- investigating any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya, on its own motion, any suspected case of environmental degradation and making its report on findings plus recommendations to the National Environment Council;
- preparing and submitting to the Council periodic reports of its activities, which report shall form part of the annual report on the State of the Environment;

70 See Maurice Odhiambo Makoloo, Benson Owuor Ochieng and Collins Odote Oloo, 'Public Interest Environmental Litigation: Prospect and Challenges' (Nairobi: Institute of Law and Environmental Governance, 2007). Contrast that with Uganda: Even though the fervour of environmental litigation has lately declined.

- undertaking public interest litigation on behalf of citizens in environmental matters; and
- performing such other functions and exercising such powers as are assigned to it by the Council.

Despite the above changes, there remain four problems relating to the design and operations of the national environment department. *First,* it remains as a department of NEMA. Essentially, the unhealthy relationship between it and NEMA, which compromised its independence, has been carried over. Except for the change in name, the functioning of the institution has not improved. *Secondly,* the law required the department to report to the National Environment Council, yet the amendments in 2015 deleted the provisions of section 4 that created the Council. In its place, there is now the Cabinet Secretary for environment matters. There is actually no definition of Council in the definition section of the Act.

VII. THE PLACE OF THE ENVIRONMENT AND LAND COURT

When Kenya enacted the 2010 Constitution, it reformed the structure of the Judiciary to enhance access to justice.[71] One of the innovations was the creation of a specialized court with the status of the High Court to "hear and determine disputes relating to the environment and use and occupation of, and title to land."[72] With the establishment of this court, Kenya joined other countries that have adopted specialized courts and tribunals as mechanisms for responding to environmental challenges.

On 30 August 2011, the Environment and Land Court Act came into effect.[73] The Act provides for the jurisdiction, structure and operations of the court. One of the most problematic issues at the induction of the members of the ELC was the issue of jurisdiction.[74] While the Constitution stipulates broadly that the ELC will listen to and determine matters relating to the environment and use, occupation and title to land, unless properly delineated, this may result in these courts taking up the majority of matters brought before the High Court.[75]

This challenge of jurisdiction has dogged the court since establishment. The Judiciary tried to get around the problems that arose from the creation of the court through administrative action, legal notices and amendments to the law, including providing jurisdiction to magistrates, ordering relations between the High Court and the ELC, and administrative powers of the Chief Justice. The general view of the former Chief Justice was that he could administratively get over the provisions of Article 162 ousting the jurisdictions of the High Court in environment matters.

However, the correct position can only be that expounded in the case of *Karisa Chengo and others v Republic*.[76] This case discussed the relationship between the High

71 For a discussion of the Constitution and its implications on access to justice, see Migai Akech, *et al, Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution* (Nairobi: PACT, 2011); P Kameri Mbote and Migai Akech, *Kenya Justice Sector and Rule of Law* (Nairobi: OSF, 2011).

72 Constitution of Kenya, Article 162(2).

73 Act No. 19 of 2011.

74 C Odote, 'Country Report, Kenya: The New Environment and Land Court' 4 IUCN AEL EJournal 171,175.

75 ibid.

76 Criminal Appeals Numbers 44, 45 and 76 of 2014.

Court and the Environment and Land Court judges. The case involved people who had been charged with robbery with violence, tried and convicted by the trial court. They then appealed against their conviction to the High Court. A two-judge bench comprising a judge of the High Court and a judge of the Environment and Land Court Act heard their appeal. Their second appeal to the Court of Appeal argued that the High Court decision was granted without jurisdiction since one of the judges was an Environment and Land Court judge.

The Court of Appeal, in accepting this argument, made the following point:

> The scheme of the Constitution was to appoint specialized persons to deal with matters of land, environment and employment. Such judges would come with appropriate experience, which they would build on and trail-blaze jurisprudence for the new court. This objective may not be achieved if judges are not considered to be judges of the special courts they are appointed to but simply treated as just judges, who can then be moved across to the High Court and vice versa. The essence of building up a culture and jurisprudence for those courts may very well be lost forever.[77]

Consequently as the court argued, "… the Chief Justice cannot by his fiat confer on a Judge or judicial officer jurisdiction which in law he does not have. We think that the act of the Chief Justice in appointing Judges from the two specialized courts to hear matters specifically reserved for the High Court was conferring jurisdiction on these judges through Judicial craft and innovation, the very vice that the Supreme Court warned against."[78]

While this dispute is still before the Supreme Court, a decision that takes away the specialized powers of the ELC is one that tries to amend the express provisions of the Constitution and thus compromises environmental governance. However, even as we make this argument, the ELC will have to demonstrate through jurisprudence that it is living to its billing as a court of sound jurisprudence on environmental matters and not just one that addresses mundane issues of injunction on land cases and very little environmental governance issues.

VIII. CONCLUSION

This chapter has, using the Owino-Uhuru controversy, discussed the developments in the field of environmental governance since the adoption of the Constitution in 2010. These developments demonstrate the accuracy of Prof Okoth-Ogendo's stipulations that "the development of environmental law in national jurisdictions is thus now firmly established either in terms of constitutional principles or as a manifestation of political sovereignty".[79]

The country now has a robust juridical framework for governing the environment. However, the existence of laws and institutions on their own does not translate into sound environmental governance. The Owino-Uhuru problem arose under this robust framework. To ensure that the rules result in sound environmental management, it will be necessary

77 ibid.
78 ibid.
79 Okoth-Ogendo (n 1) 53.

first, for institutions charged with the responsibility to deliver on their mandate. This is more about the discharge of mandate as opposed to the mere existence of powers. *Secondly,* citizens also need to play their part. It will be largely about balancing between citizens' rights to a clean and healthy environment and the concomitant duties of ensuring that that environment is maintained in a clean state. This requires awareness and action on an informed basis. On this front, there is still a lot of work to be done in the country to ensure that incidents such as the Owino-Uhuru one do not occur and when they do, those responsible for them and the resultant pollution are made to pay as is expected under the modern and robust environmental architecture that Kenya's legislative enactments contemplate.

PART VI – FINAL MATTERS: OKOTH'S CURRICULUM VITAE AND SELECT PEOPLE'S MEMORIES OF HIM

CURRICULUM VITAE

CURRICULUM VITAE AND LIST OF PUBLISHED AND OTHER PAPERS (1969 –2006)

Professor H. W. O. Okoth-Ogendo Updated Curriculum Vitae, 2006

Resume

- A national of the Republic of Kenya by birth;
- Born on July 1, 1944, married with five children;
- Educated at the University of East Africa (LL.B – 1970)
- Oxford University (BCL – 1972) and Yale University (JSD – 1978);
- Fellow of the Kenya National Academy of Sciences, and a member of the International Association of Constitutional Law and of the Advisory Board of the International Journal of Constitutional Law (I.CON)
- Has taught and researched at the School of Law, University of Nairobi since 1970 where he has also served as Chair Department of Public Law, Dean, School of Law, member of University Council, Senate and College Academic Board;
- Has held visiting positions and/given specialist lectures in other Universities including the University of Dar-es-Salaam Zambia, Zaimbabwe, Swaziland, Paris I (The Soborne), Oxford, Yale, Harvard, Boston, New York, Florida(at Gainsville), Iowa (at Iowa City), Clark, Pensylvania, and Wisconsin (at Madison).
- Has published extensively on African constitutional history, constitutional theory and design, human rights, environmental governance, natural resources law, agrarian policy and legislation, and the law of property in land.
- Has consulted for major international organisations including the World Bank, UNDP, UNFAO, UNEP, UN – Habitat, The African Union (AU), the Economic Commission of Africa (ECA), the East African Community, UK's Department for International Development(DFID), Swedish International Development Agency (SIDA), Canadian International development Agency (CIDA), and for governments including Kenya, Uganda, Tanzania, Malawi, South Africa, Zimbabwe, Swaziland, Lesotho, Guyana(in South America) and Southern Sudan, and
- Has served on national and international missions, task forces and commissions on a wide range of issues including education, land policy development, constitution-making, reproductive health and population management.

Academic Career

Appointments:

- Professor of Public Law, University of Nairobi (since 1988)
- Global Visiting Professor of Law, School of Law, New York University (Spring 1997, Spring 2000)
- Visiting Professor of Law, College of Law, University of Florida, (Spring 1987)
- Visiting Associate Professor of Law, School of Law, Boston, University (Fall 1986)
- Associate Professor of Law, University of Nairobi (1984 – 1988)
- Assistant Lecturer/Lecturer/Senior Lecturer, Department of Public Law, University of Nairobi, Kenya (1970 – 1984)

Fellowship/Memberships/Honours:

- Named by the American Biographical Institute as Man of the Year 2005
- Fellow of the World Academy of Arts and Sciences
- Fellow of the Kenya National Academy of Sciences
- Member of the International Law Society (Headquarter's Branch)
- Member of the International Association of Constitutional Law
- Member of the Advisory Board of the International Journal of Constitutional Law (I.CON)
- Member of the World Association of the Law Professors
- Founding member of the Organisation for Social Science Research in Eastern Africa (OSSREA)

Areas of Teaching:

- Agrarian Law
- Constitutional Politics and Constitution-Making
- Development Policy and Law
- Democracy and the Legal Process
- Human Rights Law
- Environmental Law
- Jurisprudence and Legal Theory
- Labour Law and Labour Relations
- Land Use Law
- Natural Resources Law
- Population Policy and Law
- The Law of Property in Land

Current Research (2002/2007)

- Constitutionalism and Governance in Africa
- International Environmental Governance

- Land Policy Development in Africa
- Reproductive Rights and Choices in Sub-Saharan Africa

Student Supervision:

- Undergraduate Projects and Dissertations
- Master of Laws Theses
- Doctoral Theses/Dissertations

Examinations:

- Internal Examiner in all fields of law at the University of Nairobi
- External Examiner in Common Law, and Roman-Dutch Law courses in the Universities of Dar-es-Salaam, Zambia, Zimbabwe and Swaziland.

Specialst/ Academic Presentations:

2006

- Kampala, Uganda, Keynote address on land tenure security at a workshop organised by IFAD and the Ministry of Lands Water and Environment June 27 – 30.
- Expert witness in community action in the High Court of South Africa (Transvaal Provincial Division) challenging the Communal Land Rights Act, 2004.

2005

- Nairobi, Kenya, Keynote address on the Report of the Commission of Inquiry into the Illegal / Irregular Allocation of Public Land (Ndungu Report) at the workshop organized by the Law Society of Kenya.

2004:

- Pretoria, South Africa, International Auditor for a roundtable on "Land and Democracy in South Africa" organised by IDASA.

2003

- Moi University, Kenya, Public lecture on the politics of Constitution-Making in Kenya (1990 – 2003).

2001

- Kampala, Uganda, Keynote address on land rights, food security, and poverty at the conference on Women and Land Rights in Eastern Africa.

2000

- Usa River, Tanzania; Keynote address on the African Commons, at the African Public interest law and community – base property rights workshop.

- University of Wisconsin; address on land policy development in Africa at the Land Tenure Centre.
- University of Wisconsin a presentation on the Constitution review debate in Kenya, at the School of Law.
- Entebbe, Uganda, Keynote address on the creation through procedural law, of democratic space for environment management, at the East African Workshop Environmental Rights.

1998:
- New York University, USA; on "Governaence Beyond Government:" a rejoinder to Justice Breyer of the United States Supreme Court and Prof. Frank Michelman of Harvard Law School on a roundtable on constitutionalism, privatisation and globalisation.

1997:
- Washington DC, USA; address on Land law and land registration at the World Bank, Legal Department.
- Harvard University; address on Constitutional Reconstruction in Africa at the Human Rights Program.
- Rice University; address on Reform of African Agrarian Systems at the History Department.
- Vermont; address on Constitution-Making in Africa on the eve of the 21st Century at Middlebury College.

1994:
- The European Parliament in Brussels before the Committee on Development and Cooperation; address on Population and Development in Africa.

1993:
- The University of Pennsylvania, Philadelphia USA; address on Kenya's fertility decline at the African Demography Programme.

1990:
- The Population Council, New York; address on the issue of abortion in Kenya a the Population Council.

1988:
- University of Florida, Gainesville, USA address on the African Charter on Human and People's Rights, at the College of Law.
- University of Florida, Gainesville, USA; address on constitutionalism in Africa at the African Demography Programme.

1987:
- University of Iowa, Iowa City USA; address on property relations and social organisation at the African Studies Program.

1986:
- Harvard University, USA; address on theories of land tenure in African agriculture, at the Centre for African Studies.
- Boston University, USA;. address on the African agrarian crisis at the African Studies Centre.
- Darmouth College, Hanover; address on environment and land use at the Environmental Studies Program.
- Clark University, USA; address on African Agrarian Systems at the International Development Program.
- Yale University USA; address on population and agriculture at the Law School.

1984:
- University of Swaziland; address on agrarian reform policies in Africa at the Faculty of Law.

1981:
- University of Paris I (The Sorbonne), France address on property theory and land use analysis; at the Department of Political Science.

1973:
- University of Wisconsin, Madison, USA; address on land tenure reform in Kenya. at the Land Tenure Centre.

International Assignments:
- Chairman, Board of Directors, African Population Advisory Council (from 1998 to date).
- Director, IPPF Centre for African Family Studies (CAFS) (1990-1994).
- Chairman, Ford Foundation-Funded Project on Governance in East Africa (1990-1995).
- Vice-Chairman of the Board of Directors of the IPPF Centre for African Family Studies.
- Member of the International Advisory Board of the Institute for international Education (IIE) International Human Rights Internship Program, Washington DC, USA (1986-1990).
- Member of the International Advisory Board of the Netherlands Institute of Human Rights (SIM from 1985).
- Member of the Core Project Planning Committee of the joint IGBP HDP on land use and global land cover changes (1993-1994).
- Member of the Sub-Committee for Africa and East Mediterranean of the Committee

on Resources for Research of the WHO Special Program of Research Development and Research Training in Human Reproduction (from 1990-1997).
- Member of the World Bank's Africa Technical Department's Africa Population Advisory Committee (APAC up to 1990 and again from 1994).
- Member of the International Advisory Committee of the Social Science Research Council's Project on African Agriculture, New York, USA (up to 1990).

National Assignments:

University Administration
- Director, Population Studies and Research Institute, University of Nairobi (1986-1993).
- Member of the University of Nairobi Council (with services to a number of its committees 1986 – 1993).
- Member of the Board of Postgraduate Studies, University of Nairobi (1986-1993).
- Member of University of Nairobi Senate (with service to numerous of its committees 1979-1993).
- Dean Faculty of Law, University of Nairobi (1979-1986).
- Chairman, Department of Public Law, University of Nairobi (1979 – 1986).

Public Service
- Rapporteur-General of the National Constitutional Conference (Kenya) (2003-2004).
- Member, Vice-Chairman, and Chair, Research and Drafting Committee, Constitution of Kenya Review Commission (2000-2005).
- Member, the Commission for Higher Education (Kenya) and Chairman of its Legislation Committee from 1986 to date).
- Member, the National Standing Committee on Human Rights (Kenya, from 1996-2004).
- Member, the Attorney General's Task Force on the Reform of Public Order and Public Security Law (from 1993 – 1998).
- Member, the Advisory Board of Worldview International (Kenya Program, 1993-1996).
- Member, the Advisory Board of the Kenya Energy and Environmental Organisation (1992-1994).
- Chairman, The Insurance Appeals Tribunal (Kenya, 1989-2002).
- Chairman, the National Council for Population and Development, (1993-2002).
- Chairman, Board of Directors of the Centre for the Study of Adolescence (Kenya, 1988-1994).
- Member, the Commission of Enquiry into the Education System of Kenya (1998-1999).
- Member, the Task Force on Land Law Reform (1997-1999).
- Member, the Management and National Committee and Chairman of the Law Panel of the Family Planning Association of Kenya (1990-1992).

Major Consultancies:

2004-2006
- Lead Consultant in the Drafting of the National Land Policy for Uganda
- Technical Advisor to Kenya's National Land Policy Formulation Process
- Consultant to Norwegian Peoples Aid on Land Policy Development in Southern Sudan.
- Consultant to the Futures Group International and Kenya National Commission for Human Rights on the project on Women's Property Rights.
- Consultant to the East African Community Committee on Fast Tracking East African Federation.

2000 – 2003:
- Consultant to the Commission of Enquiry into the Land Law Systems of Kenya. on land policy development.
- Consultant to the United Nations Development Programme (UNDP), New York and the Government of Zimbabwe on land reform in Zimbabwe.
- Consultant to the Government of Tanzania and GTZ on the development of a Rural Land Use Planning Law.
- Consultant to the Uganda Land Alliance on land policy.

1999:
Consultant on communal land rights to the Department of Land Affairs, Republic of South Africa.
- Consultant on critical issues on land in Kenya on the eve of the 21st Century to DFID (Eastern Africa).

1996-1998:
- Consultant to DFID (Uganda) on the implementation of Uganda's Land Act 1998.
- Legal Auditor to the Government of Tanzania on the privatisation of the Tanzania Telecommunications Company Ltd (TTCL) with Mkono & Co. Advocates and Clifford Chance.
- Land Policy Advisor to the Presidential Commission of Inquiry on Land Policy Reform, Government of Malawi, and Food Agriculture Organisation of the United Nations.
- Legal Auditor in the establishment of GSM land mobile telecommunications systems on Zanzibar Island, with Zantel, and Mkono & Company Advocates.

1993-1995:
- Consultant to the Food and Agriculture Organization of the UN and the Government of Tanzania, Dar-es-Salaam Tanzania on Land Policy and Legislation.
- Consultant (with W. Oluoch-Kosura),. to the Kenya Government and the Royal Netherlands Embassy (Nairobi, Kenya on Land Tenure and Agricultural Development.
- Consultant to the Stockholm Environment Institute and African Centre for Technology

Studies on the United Nations Framework Convention on Climate Change.
- Consultant to African Academy of Science, Nairobi, Kenya. on Legal instruments and modalities for the establishment of an African Foundation for Research and Development,

1990-1992:
- Consultant to the Kenya Government and the World Bank (Nairobi, Kenya) on Land Tenure and Land Policy.
- Consultant to Agriculture and Rural Development Department, The World Bank and the Danish International Development Agency (Washington D.C) on land tenure in Sub-Saharan Africa
- Consultant to the Commonwealth Fund for Technical Cooperation; Commonwealth Secretariat, (London, UK and Maseru Lesotho) on Land Acquisition. Compensation and water management in the Lesotho Highlands Water Management Project.
- Consultant to Food and Agriculture Organisation of the United Nations (Rome, Italy) on the Management of Irrigated Perimeters.

1983-1986:
- Consultant. to the Food and Agriculture Organisation of the United Nations (Rome, Italy and Georgetown, Guyana) on Agrarian Reform Planning and Water Management Legislation.
- Consultant to the Government of the Royal Kingdom of Swaziland (Mbabane, Swaziland) on Land tenure and Land Use Planning.

1979-1983:
- Consultant to the United Nations Centre for Human Settlements (Habitat Nairobi, Kenya) on Urban Land Resources.
- Consultant.to the World Bank (Nairobi, Kenya) on Urban Planning Legislation

1973:
- Consultant to the Government of Papua New Guinea (in a guest advisory capacity) on Land Tenure and Land Policy.

Personal Details:
- Born July 1, 1944
- National of the Republic of Kenya
- Married with five children
- Address: P.O. Box 30197-00100 Nairobi, Kenya
- Telephones (254) 020-340858 (Office), (254) 020 884919 (House), 0722-518319, 0722754420, 0734924110, or 0722364175(cell)
- Faxes: (254) 020 716508, 3743565 (office) (254) 020 884919 (House)
- Telex: 22095 Vasity KE

- Email: okothogendo@yahoo.com
- URL www.geocities.com/hwo-okoth

Updated Publications List, April 2006

Summary

• Work in progress:	3
• Books/ Monographs/ Theses:	9
• Consultancy Reports:	17
• Publications/Conference Papers/Presentations:	95
Total	124

Work in progress (2002-2007)

- A Textbook on the Law of Property in Land in Kenya.
- A Monograph on Land Policy Development in Africa.
- A Monograph on Constitutionalism and Governance in Africa.

Books/Monographs/Theses

- African Perspectives on Governance (Ed. with Goran Hyden and Dele Olowu) Africa World Press; London 2000.
- Governing the Environment: Political Change and Natural Resources Management in Eastern Africa (Ed. with Godber W. Tumushabe) ACTS Press 1999.
- A Climate for Development: Climate Change Options for Africa (Ed. with J. B. Ojwang) ACTS Press, Nairobi 1995.
- Tenants of the Crown: The Evolution of Agrarian Law and Institutions in Kenya ACTS Press, Nairobi 1991.
- A Teaching Manual on the Law Property in Kenya (in seven Volumes) 1985
- Approaches to Rural Transportation in Eastern Africa (Ed.) Bookwise, Nairobi, 1982.
- Reflections on Law and Development (Ed with C.O. Okidi) IDS Occasional paper NO. 29 1978.
- The Political Economy of Land Law: An Essay in the Legal Organisation of Underdevelopment in Kenya: 1987-1974, JSD Thesis, Yale University, 1978.
- The Frontiers of Self-Determination: An Analysis of Claims to Self-Determination in the Kenya-Somalia Dispute BCL Thesis, Oxford University, 1972.

Consultancy Reports

- Final Draft of the National Land Policy for Uganda, for the Government of Uganda.
- Final Draft of the Rural Land Use Planning Law for the National Land Use Planning Commission, Tanzania, 2002.

- Principles of a National Land Policy Framework for Kenya, for the Commission of Inquiry into the Land Law System of Kenya, Nairobi 2002.
- Principles of a National Land Policy Framework for Uganda, for the Uganda Land Alliance, Kampala, 2001.
- Assessment of the Land Reform in Zimbabwe (Mission Report under the chair of abdullahi Janneh, Assistant Secretary General of the UN and Director of UNDP's Africa Bureau, 2001 for UNDP and the Government of Zimbabwe.
- Assessment of Land Reform in Zimbabwe (Mission Report with other Consultants) 2000 for UNDP and the government of Zimbabwe.
- The Land Question in Kenya: Critical Issues on the Eve of the 21st Century,for DFID Eastern Africa December, 1999.
- Observations on the Land Rights Bill, 1999, for the Department of Land Affairs, Republic of South Africa.
- The Legal and Institutional Aspects of the Bujagali Hydropower Scheme, Uganda, for Nile Independent Power, 1998.
- The Development of Land Use Planning and Land Tenure Systems in Tanzania for FAO, Rome, 1995 and the Government of Tanzania.
- Agrarian Issues in Guyana, for FAO Rome, 1995.
- Land Tenure and Agricultural Development in Kenya (with Oluoch-Kosura) for the Government of Kenya, 1995.
- Land Policy in Kenya (with S. C. Wanjala and W. Oluoch-Kosura) for the Government of Kenya, 1991.
- Managing Irrigated Perimeters in Kenya for FAO, Rome, 1989.
- The Lesotho Highland Water Project for CFTC, London 1989 and the government of the Kingdom of Lesotho.
- Water Resources Legislation for Guyana FAO, Rome, 1985 and the government of Guyana.
- Agrarian Reform Legislation for Guyana for (FAO, Rome), 1984 and the Government of Guyana.

Publications/Conference Papers/Presentations

2006

- "Land Rights in Africa: Interrogating the tenure security discourse" paper for the IFAD MLWE UNOPS workshop on land tenure security. Kampala Uganda, June 26-30.
- "Reforming Land Rights Administration Systems in Africa: A preliminary presentation of issues" paper for the World Bank Institute/ UN-Habitat/University of Nairobi regional training course on land administration, May 22-25.
- "Land and Human Rights" paper submitted to the Kenya National Human Rights Commission for the 5th Edition of NGUZO ZA HAKI.
- "Land policies in Sub-Saharan Africa: An Overview " in Akinyi Nzioki, Land Policies in Sub-Saharan Africa, Centre for Land, Economy and Rights of Women, 2006.

2005

- "Overview of legal, regulatory and institutional reforms in agriculture: the global perspective", paper for the national conference on the revitalising of the agricultural sector" February 20 – 24, 2005.
- "Tenure issues in drylands development: tenue of land or tenure of ecological resources?" Paper for the UNDP working on Drylands Development, Nairobi, February 28 – 2 march.
- "Access to land in Africa: a fundamental human right", paper for the 14th Commonwealth Law Conference held in London, United Kingdom, September 11 – 15. 2005.

2004

- "Education in a globalising world "Paper for the First International Conference on the Right to Education organised by the European Association for Education Law and Policy in Amsterdam, the Netherlands, 26-30, November 2004.
- "Climate Change Adaptation and Mitigation: Exploring the Role of Land Reforms in Africa" paper for the second colloquium of the IUCN Academy of International Law, held in Nairobi, Kenya, 4 – 7 October 2004.
- "Integrating Climate Change Considerations in National Development Policies and Programmes" paper for a Workshop on dialogue with East African legislators on climate change and sustainable development, Safari Park Hotel, Nairobi, April 23 – 24, 2004.
- "Re-engineering land administration in Kenya: the case for a National Land Commission," Technical Paper for the Kenya Land Alliance.

2003:

- "The legal Framework for Education in Kenya" paper for the National Conference on Education and Training in Kenya, Nairobi, November 26-28, 2003.
- "The Role of Members of Parliament in law-making and representation" paper for the post-election seminar for Members of Parliament, Safari Park Hotel, Nairobi, July 25 – 26, 2003.

2002:

- "The Tragic African Commons: A century of expropriation, suppression, and subversion", in Amplifying Local Voices: Striving for Environmental Justice, Centre for International Environmental Law, et. al.
- "Land Tenure Reform in Africa: Lessons from East Africa", paper for the symposium on Communal Land Tenure Reform, held in Johannesburg, South Africa, August 12-13, 2002.
- "Land Administration: the Neglected factor in land reform in Africa", paper for the World Bank Regional Workshop on Land Issues in Africa and the Middle East, held in Kampala, Uganda, April 29 – May 2, 2002.

2001:

- "Land Rights, Food Security and Poverty", paper for the conference on Women and Land Rights in Eastern Africa held in Kampala, Uganda, October 28 – November 1, 2001.

2000:

- "Through the Interstices of Procedure: Creating democratic space for environmental management", paper for the East African Regional Workshop on environmental Procedural Rights, held in Entebbe, Uganda, November 23-24, 2000.
- "Present Concerns and Future Challenges in Land Policy Development in Africa", discussion issues at the Architectural Association of Kenya National Conference for the Building Industry, Safari Park Hotel, Nairobi, May 19 –21, 1999.
- "The Quest for Constitutional Government in Africa", Chapter 2, in African Perspectives on Governance (op. cit).

1999:

- "Land policy development in East Africa: a survey of recent trendes"; paper for DFID workshop on "Land Rights and Sustainable Development in Sub-Saharan Africa" Sunningdale, England , Feburary 16-19, 1999.
- "The juridical framework of environmental governance" Chapter 3 in Governing the Environment (op. cit) 1999.

1998:

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POEM: THE DANCING MANIAC[1] - H.W.OKOTH-OGENDO

Will you come with me my mistress?
We'll go to the market place
Amidst our sweating fishermen
Come with me to the village ground
Or to the mountain top
Where all can see us.
We'll stand in the blazing sun,
In the scorching heat of the noonday sun;
In the plain, plains of our neighbourhood
We shall stand.
Follow me to the fig tree
To the seat of my ancestors;
And there will I demonstrate the anger of my love;
With all my people there
Their heartbeats throbbing consent
I will let loose this caged spirit upon you.
Then I will be satisfied,
Whole,
Finished,
A being again.
It shall be my resurrection
Come!
For the drums of my calling
Are tight with greetings!
My mistress came to the village ground;
She was a dancing maniac;
The blessed virgin of the ancestors
Dancing to the tune of the tom-toms
Casting an evil spell over the yellow evening sky,
The village watched her fall into a trance
And were caught in a frenzy too;
The youth dance was whole;
'Twas sacred witchcraft
Unearthing the forgotten days of mystic fertility
And the potency of her womanhood.
As she swayed her chocolate hips
Her spear-pointed breasts

1 Jonathan Kariara and Ellen Kitonga, An introduction to East African Poetry, Oxford University Press (1976) p:13

Twitching with welcome
I touched the noose of my goatskin
And felt the music there.
My crude garments crumbled at my feet
And I stood before her,
Naked with truth.

She heaved a sigh;
And as I watched her dancing away
Malicious and wicked like an offended ancestor god
I, too, fell into a trance.

My loins bubbled with the desire of a malignant male
With violence unto death,
I wept after her.

At last I had found my maker
And to the shrine of my ancestors
I followed her.
That feeling of eternal restlessness,
That perpetual darkness, was spent
And the dawn of my new life was beginning to glow.
Then the sun went down to rest
The fire glows
The sacrifice is over.
The wind blows:
Spirits,
Heartbeat.
Silence;
And I was alone no more.

SELECT MESSAGES OF CONDOLENCES

Tributes made here are by Prof's. Extended family – the AU-ECA-AfDB LPI & Partners across the Continent

Note of LPG Colleagues:

Passing of Prof. Hastings W. O. Okoth-ogendo

Dear Friends and Colleagues of the AU-ECA-AfDB Land Policy Initiative (LPI),

We are extremely sad to report to you the untimely passing of Prof. Hastings Wilfred Opinya Okoth-Ogendo, on Friday 24, April 2009, in Addis Ababa Ethiopia.

As you all know, Prof. Okoth-Ogendo was chair of the African Task Force on Land, the team that has been providing advice to the LPI. He was also in charge of revisions and finalisation of the Framework and Guidelines (F &G) on Land Policy, since its first draft in September 2008.

Prof. Okoth-Ogendo was in Addis Ababa to participate in the Experts and Ministers meeting, where he made an excellent presentation to Experts (Permanent Secretaries) on the F&G, and participated in ensuing enthusiastic discussions by Experts on the document. On Thursday, Prof. Okoth-Ogendo was extremely happy, as he witnessed the adoption of the report of experts by the Ministers, which included, the endorsement of the F & G as a viable tool and guide for policy formulation and implementation in Africa.

We do not yet have concrete information regarding the cause of Prof. Okoth-Ogendo's death. We do know that he was taken to Hyatt hospital, Addis Ababa on Friday morning. He passed away later that evening.

We at the LPI are shocked and saddened by this sad news of Prof. Okoth-Ogendo's passing. This is indeed a huge and irreplaceable loss to the LPI and the work on land issues in Africa.

Our condolences go to his wife, Mrs. Ruth Okoth-Ogendo, who was with him at the time of his passing, his children, family and friends.

May the Almighty God rest his soul in eternal peace.

Dr. Abebe Haile Gabriel (AUC)
AbebeHG@africa-union.org

Dr. Joan Kagwanja (ECA)
kagwanja.uneca@un.org

Ms. Mary Monyau (AfDB)
M.MONYAU@afdb.org

Sunday, April 26, 2009 07:38PM

Tribute to a Great Scholar:

Prof. Hastings W. O. Okoth-Ogendo

Dear friends

That is shocking and very very sad news; it is a huge loss for the continent. My condolences to his family and to all his colleagues and friends.

Cherryl Walker (Prof.)
Land Expert, AU-ECA-AfDB LPI
Email: cjwallqer@sun.ac.za

Sunday, April 26, 2009 10:36PM

Dear Colleagues,

The passing away of Prof. Okoth Ogendo is indeed an irreplaceable loss to the land fraternity in Africa.

Our condolences to his family and May God rest his soul in peace.

L. Kironde (Prof.)
Land Expert, AU-ECA-AfDB LPI
Email: kironde@aru.ac.tz

Sunday, April 26, 2009 11:07PM

Africa has just lost its best brain on land issues, irreplaceable ... been working with him on Uganda's land policy, Oh my God!

Margaret A. Rugadya
Associates Research (Uganda)
Email: afdresearch@yahoo.com

Sunday, April 26, 2009 11:36PM

May His Soul Rest in Eternal Peace.

His passing is a big loss to his family, his country -Kenya, Africa as a whole and the body of knowledge on land issues in the continent. His central and passionate role played in the ongoing LPI is manifested in the landmark achievement - the endorsement of the F and G by the Ministers. Shall be greatly missed - RIP.

Brave Ndisale
Ambassador, Embassy of the Republic of Malawi
Brussels, Belgium
Email: bravendisale@yahoo.com

Monday, April 27, 2009 12:58AM

We have heard with sorrow about the death of Professor Okoth Ogendo, a leader in his field, who will be sorely missed by those working in the land sector in many African countries as well as at continent level.

Clarissa Augustinus
Chief, Land, Tenure and Property Administration Section
UN-HABITAT
Email: clarissa.augustinus@unhabitat.org

Monday, April 27, 2009 08:43AM

Dear all,

For those of you who may have known the Prof, this is a very sad loss to Africa. I was with him at the meeting and I think he can be very proud of what he achieved. Prof Okoth-Ogendo has made a significant contribution to land policy development in Africa over the past few decades.

He will be missed.

Harold Liversage
Land Tenure Advisor, IFAD
Email: h.liversage@ifad.org

Monday, April 27, 2009 09:40AM

This is sad news.

Prof. Ogendo was the intellectual conscience of land policies in Africa that protected the interests of the poor. His firm commitment to realizing this leaves a great legacy, not least of which is the Framework and Guidelines for Land Policy in Africa, adopted by Ministers the day before he passed away.

We will be passing on the message to all of our members and partners in the region, and posting an announcement on our website.

We hope that the use of the Framework and Guidelines towards pro-poor land policy in over the coming years will be one of the many lasting tributes to Prof. Ogendo.

Mike Taylor, 1LC
Email: m.taylor@landcoalition.org

Monday, April 27, 2009 10:33AM

Please accept our most heartfelt condolences from Eastern Africa Farmers Federation. May he rest in Peace.

Eastern Africa Farmers Federation
Email: info@eaffu.org

Monday, April 27, 2009 11:18AM

Dear all:
I am extremely depressed to hear such a sad news of Prof. Okoth-Ogendo death. My sincere condolences to his wife, whole family and all his friends.

Lokman Zaibet
Land Expert, AU-ECA-AfDB LPI
Email: Izaibet@yahoo.fr

Monday, April 27, 2009 11:19AM

This is indeed very shocking and sad news! May God rest Prof. Okoth-Ogendo's soul, and keep strong his family! Prof. Okoth-Ogendo's contribution in relation to land issues in Rwanda will always be remembered!

Annie Kairaba
Director, RISD - Rwanda
Email: kairabaa@risd.org.rw

Monday, April 27, 2009 11:20AM

Very Sad indeed. May his soul rest in peace and his family gain comfort in the knowledge that he is now safe with the Lord.

TUMI SEBOKA, South Africa
Email: SISEBORA@dla.gov.za

Monday, April 27, 2009 11:27AM

Dear All,

Your second message announced to us the death of the Prof Okoth-Ogendo during very the behaviour as of the these meetings. God rest his soul eternal peace.

Malam Kandine Adam
Universite de Niamey, Niger
Email: akandine@yahoo.fr

Monday, April 27, 2009 11:30AM

This is shocking news. We will greatly miss him and his expertise. He has been a pillar on land issues right from 1999 when discussions started on Land issues which eventually culminated in the Land Net Africa initiative. Our condolences to his wife and children.

Odame Larbi
Land Expert
AU-ECA-AfDB LPI
Email: odamekay@gmail.com

Monday, April 27, 2009 11:38AM

Allahou Akbar - kakoye koul yekoye- De Dieu nous venons et á LUI nous retournons. radresse mes condoléances les plus attristées á la famille de l'Illustre disparu et á tous les membres de la TASK FORCE de LPI. Que Dieu accueille son áme dans son Paradis Eternel –AMEN

Mahalmoudou Hamadoun
CILSS
Email: mahalmoudou.hamadoun@cilss.bf

Monday, April 27, 2009 12:28PM

Dear All,

Indeed, this is a big loss for the process. All my condolences to all of you

Tidiane Hgaido
IFPRI-Senegal
Email: t.ngaido@CGIAR.ORG

Monday, April 27, 2009 1:56PM

Bonjour,

C'est avec tristesse que nous apprenons le décés du Professeur Hasting W.O.Okoth-Ogendo á Addis Abbéba dés suite de maladie.C'est une grande perte pour l'équipe de la Charte fonciére africaine. Cependant nous avons foi que sa contribution sera nous guidera á finaliser la dite charte. transmettez á son épouse et á ses enfants les condoléances les plus attristées d'un collaborateur á Ouagadougou au Burkina Faso.

Salomon DILEMA
Chargé de Mission, Chef du Depattement du Développement Durable Premier Ministére
Email: sdilema@yahoo.fr

Monday, April 27, 2009 01:36PM

Dear all,

On behalf of our organization IWCC Nigeria , as member of Hauiro commission and WILLA project coodinator in Nigeria , I write to express our deep south over the dealth of our amiable professor. We shall miss him always. May his soul rest in perfect peace.

Mailya Goroso giwa Limota
for IWCC and women land link Africa Nigeria
Email: gorosogiwa@yahoo.com

Monday, April 27, 2009 01:53PM

This is truly tragic news! I would like to offer my deepest and sincerest condolences to his wife and family. Kindly forward my message to them.

Prof. Okoth-Ogendo was a phenomenal intellectual and Land Policy Expert in his own right. I am grateful for the opportunities I had to interact with him during last year's consultations. I was blessed to hear him speak and impart his insight and timely contextual references. I will always remember not only what he contributed to the LPI but, more importantly, how he contributed to elevating the relevance of land issues across Africa.

Rachel Aron
Socio-Economist, African Development Bank
Email: R.ARON@AFDB.ORG

Monday, April 27, 2009 02:13PM

Hello Everyone,

As you said this is a very sad news. I'd like to express my sincere condolences to Prof Okoth Ogendo's family.

God bless all of you!

Sibia Jean Zoundi
OECD
Email: Sibiri)ean.ZOUNDI@oecd.org

Monday, April 27, 2009 02:18PM

This is very sad news indeed. I had the honour of working with Prof. Okoth-Ogendo during the preparation of the AU-ECA-AfDB Framework and Guidelines for Land Policy in Africa. He will be missed. He certainly leaves a great legacy.

Esther Kasalu-Coffin
IFAD
Former Focal Point of LPI — AfDB
Email: e.kasalu-coffin@ifad.org

Monday, April 27, 2009 02:29PM

Dear Colleagues,

I just received the sad news concerning the passing away of Okoth Ogendo. His passing is a great loss, not only to his family, but to the African community of scholars and land experts. Please convey my condolences to his family, friends and colleagues.

Sam Moyo (Prof)
Land Policy Expert
Task Force Member, AU-ECA-AfDB LPI
Email: sammoyo@ecoweb.co.zw

Monday, April 27, 2009 03:49PM

This is a big loss and sad news indeed, May his soul rest in peace

Jolly Josiah Kenan
LandNet Malawi National Coordinator
Emails: landnet@africa-online.net or jollykenan@africa-online.net

Monday, April 27, 2009 07:35 PM

Sad News Indeed. It Is Unfortunate I Did Not The Get The Opportunity To Meet Him This Time Around. May His Soul Rest In Peace. Africa And The Word Has Lost A Great Scholar And Practitioner.

Kwame Gyan (Dr.)
Land Expert, AU-ECA-AfDB LPI
Email: gyan63@hotmail.com

Monday, April 27, 2009 08:03 PM

Although it is a very sad news, thank you so much to let us informed about the passing away of a Great and Very Respectful Man:

Late Prof. Okoth-Ogendo that I had to call "Professor" without saying his name as a sign of Respect. He was for sure One of the most Respected Person in Academia Circle in Kenya and in the whole Region. He was worldwide renowned. He was admired by all of us who have had a privilege to approach him, to meet him and discuss. A huge light source of knowledge. My God, this is a terrible lost. As you say, this is indeed a huge and irreplaceable loss to the LPI and the work on land issues in Africa. In Kinyarwanda, we say about passing away of a Great Person like Late Prof. Okoth:" ARATABARUTSE". This means simply that He triumphantly finished the race and has been promoted to Glory. We will never forget Him and He will always inspires us.

May God rest His Soul.

Dear All, Take care and God bless you.

Eugene Rurangwa
Former Registrar of Land Titles and DG, National Land Centre in Rwanda
Email: erburabyo@yahoo.fr

Monday, April 27, 2009 09:09 PM

Zambia Land Alliance learns with deep sorrow the untimely death of Prof. Okoth Ogendo. We will greatly miss him. May the Lord comfort his family and all that we mourning. In this light it is our role to carry on from where he left on the land question in Africa.

Henry Machina
Executive Director
Zambia Land Alliance
Email: land@coppernet.zm

Tuesday, April 28, 2009 10:07AM

Merci pour !Information, toutes mes sinceres condoleances a la families du professeur et a toute requipe de wa_Iandnet. Qu'il repose en paix.

Bernard Ouedraogo
Member of WA Land Net
Email: bernard.ouedraogo@ymail.com

Tuesday, April 28, 2009, 10:26 AM

Dear All,

It was with heavy heart that some of us received the news about the death of Prof Ogendo but with gratitude to God for his life. Indeed Prof is a great loss not only to LPI but to some of us were learning a lot from him. Prof will be greatly missed. May his soul and the souls of all the departed rest in perfect peace. Amen.

Priscilla M Achabpa
Executive Director
Women Environmental Programme (WEP)
Email: wepkaduna@yahoo.com

Tuesday, April 28, 2009 10:32AM

Dear All,

What a blow to the African people to loose a man like Prof. Okoth at a time when we needed him most. May God rest his soul in eternal peace.

Robert Lades Luki
Chairperson-Southern Sudan Land Commission,
Government of Southern Sudan-Juba
Email: robertluki@yahoo.com

Tuesday, April 28, 2009 12:46PM

Dear All,

Yes indeed, the passing on of Prof. is a sad loss to us all, and indeed, us here in Kenya too where Prof was a much helpful patron to matters relating to our local land policy formulation process to which he was a technical advisor.

We shall greatly miss him. Let's give him a befitting honour by ensuring that matters relating to land reform and sustainable management around Africa receive our respective attention and coordination in our various capacities and constituencies. Let his spirit and passion show and live through us.

Ibrahim Mwathane
Landscape Land Surveyors
Email: info@landsca.co.ke

Tuesday, April 28, 2009 01:41PM

Dear colleagues,

I have learnt with deep sorrow about the news of passing of Prof. Okoth-Ogendo. I have previously worked with Ogendo including working together on a book (Governing the Environment: Political Change and Natural Resources Management) which was published in 1999. Okoth-Ogendo has been a giant of, and therefore an African talent that can't be easily replaced. I share everybody's and send my condolences to the family and friends.

May His Soul rest in peace.

Godber Tumushabe
Stanford Law School, Stanford University
Email: godber.tumushabe@gmail.com

Tuesday, April 28, 2009 04:19PM

I am very very sorry about of Pro. Hastings Wilfred Opinya Okoth-Ogendo and I share my feelings with you.

Antje Ilberg
Email: antje.ilberg@gmail.com

Tuesday, April 28, 2009 05:54PM

First of all I would like to offer my deepest condolences to you as organizers, who are close to our dear professor Hastings W.O. Okoth-Ogendo. And I also want to express my deep sadness and shock due to the sudden death of our dear professor.

Professor Hastings W.O. Okoth-Ogendo passed away in a time when he was strongly transmitting his wise fortune of knowledge and experience to next generations of African scientists, experts, and Politicians.

Inspite of his delicate health, Professor Hastings W.O. Okoth-Ogendo spared no efforts and pain for actively making use of all his available potentials in order to foster the development of our African continent.

For us as Africans, Professor Hastings W.O. Okoth-Ogendo will be alive in our memory as an ideal of professionalism, integrity, seriousness, but also as brave activist for the case of Africa. I hope that everybody who knew him will keep him with this image in heart. Professor Hastings W.O. Okoth-Ogendo, for us the Africans you was a unique source of pride. May you rest in peace.

Sincerely yours

Mabrouba Game
ENDA Inter Arabe
Email: mabgasmi@yahoo.fr

Wednesday, April 29, 2009 01:52 AM

This is a very shocking news. We wish him to be received by the Almighty God.

Muvara Pothin
National Land Centre/Rwanda
Email: muvara.pothin@gmail.com

Wednesday, April 29, 2009 04:18PM

MESSAGE OF CONDOLENCE TO THE FAMILY OF THE LATE PROF. HASTINGS WILFRED OPINYA OKOTH OGENDO

I am deeply saddened by the death of Prof. Hastings Okoth Ogendo that occurred on Friday April 24th in Addis Ababa Ethiopia.

Today we mourn the loss of a talented lawyer who played a tremendous role in mentoring young law students not only in our country, but also in several other countries the late Professor often toured to deliver talks on a subject he was well versed in and passionate about.

Undoubtedly, the late Prof Okoth Ogendo was a brilliant scholar who enjoyed his teaching profession and helped to mould many young minds under his care at the country's institutions of higher learning.

Many Kenyans recall the enormous time and tireless effort the late Prof Okoth Ogendo dedicated towards the country's constitution making process during the Constitution of Kenya Review Process (CKRC) meetings held then at the Bomas of Kenya. His guidance and wise counsel during the deliberations was invaluable.

As a country, we are grateful for the selfless service Prof Okoth Ogendo dedicated to the country as he chaired the technical committee of that process.

As we mourn his passing on, let us also celebrate his contribution to our nation and thank God for the time we shared with him.

My prayer is that God will give the family, relatives and friends the fortitude and grace to bear the loss.

Mwai Kibaki, C.G.H., M.P.
President of the Republic of Kenya

To: Mrs. Ruth Ogendo & Family
NAIROBI
Dear Madam,

RE: CONDOLENCE MESSAGE
It is with deep shock and disbelief that I learned of the untimely demise of the late Prof. Hastings Wiston Opinya Okoth-Ogendo in Addis Ababa, Ethiopia on 24th April, 2009 after a sudden illness. Death caught up with the late Prof. Ogendo doing what he has spent his entire adult life doing; consulting and giving invaluable scholarly advice to UN Economic Commission for Africa on the framework for setting up uniform land Law for the African Continent.,

The late Prof. Ogendo will be remembered as an exceptionally brilliant, legal scholar who taught generations of law students at the University of Nairobi, most of whom rose to prominent positions in the public service. His exemplary grasp of Land Law and policy easily earned him the title of 'guru' of Land Law by his many students. I happen to have been one of them!

As the Vice-Chairman of the Yash Ghai led Constitution of Kenya Review Commission (CKRC), Prof. Ogendo displayed clarity of mind and a rare ability of grasping and distilling complex legal, constitutional and social issues and then communicating the same to ordinary Kenyans in the most appropriate and simple way which could be easily understood. His immense contribution to scholarship in Kenya, Africa and indeed the whole world is his most enduring legacy.

At this time of grief and sorrow, I wish to extend to Mrs. Ruth Ogendo and the Ogendo family, the entire University of Nairobi Community, my heartfelt condolences for the sad loss of this great Kenyan legal scholar.

May the Almighty God rest his soul in Eternal Peace.

Stephen Kalonzo Musyoka
Vice President and Minister For Home Affairs
Republic of Kenya

May, 2009

TRIBUTE FOR THE DEATH OF PROF. H.W.O OKOTH-OGENDO, ADVOCATE

We gather in this great sanctuary to send off our beloved "Guru of law" but continue to mourn and to give thanks to a life well lived by a great man who shall be missed by all. As his sons and daughters of law, the Law Society of Kenya and the entire legal fraternity is orphaned. Like the sun, he bathed us in his warm glow. Now that the sun has set and the cool of the evening has come, some of the warmth we absorbed is flowing back towards him.

It is with a greatest sense of loss and heartfelt grief that we are gathered here in honour of the life of the great Prof. Hastings Wilfred Okoth-Ogendo. As we sit here we reminisce upon life of a great man, a man that we all cherished but that God saw fit to call to His side.

To his dear wife Ruth and the children, please accept our sympathy and most heartfelt condolences as colleagues who have lost a learned friend, not only and just a professor of law but a great legal mind, a tutor and a mentor. To borrow words sung at a funeral of a former Israeli Prime Minister:

"It is a shame that such a great man lies in such a small coffin." So is Prof. Okoth Ogendo.

When we are eventually hit by death; it still shocks us and reminds us about the vanity of life. Death is the ultimate price to pay for living. Death is perhaps, legally speaking, the only general rule without an exception.

So today brethren! We congregate here to give a colleague and a friend his last send off. Yet all the wisdom he gave us still remains; so we say, we still have him because we are; we also thank God for his life.

We lost Prof. Okoth- Ogendo only days ago, but we have missed him for a long time. We have missed his kindly presence that reassuring voice and the happy ending we had wished for him. It is not possible to condense such a great person's achievement and his life in so few words.

As an Advocate of the High Court of Kenya. Prof. Okoth Ogendo was admitted to the bar on 29th July 2004. His admission was preceded by a term of service as a Professor of Public Law at the University Of Nairobi since 1988. He had taught and researched at the School of Law, University of Nairobi since 1970 It is therefore as true as it is remarkable that in the period since 1970. The majority of the Kenyan legal practitioners passed through Prof. Okoth-Ogendo's hands and to many in legal practice and academia he shall forever remain etched in their memory as one of the great teachers of land law and Proprietary rights and Constitutional law and constitutionalism.

He had a long and illustrious career of teaching law at the University of Nairobi and a visiting professor of various universities globally. He has published extensively on African Constitutional history, constitutional theory, Human Rights and law of Property in Land. He served in the Constitution of Kenya Review Commission as the vice- Chair for constitution review reforms.

As we celebrate his life, we are feeling a deep loss as the Law Society of Kenya, for losing a teacher, who has had tremendous input and knowledge to the legal fraternity in

Kenya. A teacher who taught us to be prepared to pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, to assure the survival and the success of our profession and its pivotal role in Kenya's development.

The Law Society of Kenya stands with his family, relatives and friends at this time of loss. We pray that the Almighty God will be with you to strengthen you and give you peace at this most trying of times.

RUTH, the Law Society of Kenya salutes you for the loyalty and the love you gave this man on a wonderful journey, and to that journey's end. Today, our Society grieves with you and your family.

God speed to him and may God bless Prof. Okoth-Ogendo and the country he loved. The legal fraternity has indeed lost one of its own! And indeed a critical part of it. May Prof. Okoth-Ogendo's soul rest in eternal peace!

The Law Society of Kenya

The family of the late Prof H.W.O. Okoth-Ogendo

CONDOLENCE

The University of Nairobi, Council, Senate, Staff and Students joins the family, and the entire nation in mourning and paying tribute to the late Prof. Hastings Wilfred Opinya Okoth-Ogendo, who until his death was a Professor of Public Law, School of Law, College of Humanities and Social Sciences.

Prof. Ogendo first joined the University of Nairobi as a Tutorial Fellow in 1970 and for the next 39 years, served the University in different positions and rose through the ranks to become a full Professor in the Department of Public Law - A position he held till he met his death-. During his spell, he successfully mentored many professionals in the country and left an indelible mark in the legal profession.

Prof. Ogendo was an active scholar with overwhelming success in teaching and research. He has widely published and edited numerous articles and chapters especially on agrarian law and Constitutional politics. He was also an external examiner and visiting professor in numerous universities.

The late Prof. Ogendo's contribution was also felt in the management of the School of Law and the entire University. He once served as the Director, Population Studies and Research Institute, member of the University Council and member of the Board of Postgraduate Studies; Dean, Faculty of law; Chairman, Department of Law among others. Even after his tenure, he was available for consultations on many aspects.

On the national front, he served as Vice-Chairman of the defunct Constitution of Kenya Review Commission (CKRC) 2000 - 2006, member, Board of commission for Higher Education, member, National Standing Committee on Human Rights among others.

The demise of Prof. Ogendo has robbed the University of Nairobi a great scholar who

made selfless contribution to the institution, the country and the world at large. During these trying moments, we pray to God to give the family strength to overcome the loss of a husband, a father, a role model and a bread winner.

On my behalf and that of the entire University fraternity, I wish to convey our heart-felt condolences to you, relatives, friends and colleagues of the late Prof. Hastings Wilfred Opinya Okoth-Ogendo. May God the Almighty rest his soul in eternal peace

GEORGE A.O. MAGOHA, EBS. MBS
VICE-CHANCELLOR
AND PROFESSOR OF SURGERY

May 9, 2009

The Family of the late
Prof. Hastings Wilfred Opinya Okoth-Ogendo

MESSAGE OF CONDOLENCE

I learnt of the sudden death of Prof. Hastings Wilfred Opinya Okoth-Ogendo with shock and disbelief.

The late Prof. Okoth-Ogendo who passed away on April 24, 2009 in Addis Ababa, Ethiopia was a distinguished scholar and Professor of Public law at the School of Law, College of Humanities and Social Sciences where he had taught for more than 39 years.

Prof. Okoth-Ogendo joined the University of Nairobi in 1970 after graduating from the University of Dar-es-Salaam with a Bachelor of Laws degree. I knew Prof. Okoth-Ogendo at the University of Dar-es-Salaam where he was my senior at the Faculty of Law.

Because of his hard work and exceptional intellectual talent, he quickly rose through the academic ranks to become a full Professor of Public Law, Chairman, Department of Public Law, Dean, Faculty of Law, Member of Senate and Board of Postgraduate Studies, Director, Population Studies and Research Institute and Member of the University Council.

The late Prof. Okoth-Ogendo also took up many other senior public service appointments. He was among others: Rapporteur-General of the National Constitutional Conference (Kenya) (2003 - 2004); Member, Vice-Chairman, and Chair, Research and drafting Committee, Constitution of Kenya Review Commission (2000 -2005); Member, Commission for Higher Education and Chairman of its Legislation Committee; Member of the National Standing Committee on Human Rights; Member, the Attorney General's Task Force on the Reform of Public Order and Public Security Law (1993-1998); Chairman, The Insurance Appeals Tribunal (1989 - 2002); Chairman, National Council for Population and Development (1993-2002); Member, the Commission oil Enquiry into the Education System of Kenya (1998-1999) and Member, the Task Force on Land Law Reform (1997-1999).

A renowned scholar, the late Prof. Okoth-Ogendo taught, supervised and mentored many young lawyers who have gone on to pursue successful careers. He has published extensively in his area of specialization. His works are widely used by both academicians and policy makers.

The late Prof. Okoth-Ogendo retired from the University in 2004 after attaining the mandatory retirement age of 60 and continued to serve on contract until the time of his death.

The untimely death of Prof. Okoth-Ogendo has robbed the University of Nairobi of a brilliant scholar, mentor and role model whose contribution will be sorely missed. Although today we mourn the passing on of this brilliant scholar, we do so taking consolation in the knowledge that forever he lives through his writings, students and many whose lives he positively touched.

On behalf of the University of Nairobi Council, Senate, staff, students and my own behalf, I wish to take this opportunity to convey our heartfelt condolences to Ruth and the children, relatives, colleagues and friends of the late Prof. Hastings Wilfred Opinya Okoth-Ogendo.

May God the Almighty rest his soul in eternal peace.

JOHN P.N. SIMBA MBS. OGW. LLB
CHAIRMAN OF COUNCIL
UNIVERSITY OF NAIROBI

May 6, 2009

TRIBUTE TO A FALLEN HERO BY ONE OF HIS OWN PRODUCTS

I came to know Professor Okoth Ogendo when I joined the University of Nairobi to do my LLB Programme, way back in 1973. By then the late Professor was teaching Land Law. His lectures were of great interest to us students because he was in the habit of lecturing without lecture notes in front of him and most of time kept on glancing through the window to his left in the lecture rooms in Gadhi wing and we wondered whether he was being fed the information super naturally. Any question fielded by students using information from text books under our desks were answered appropriately as per content of the same text book off head.

I was among students who admired his brilliance, but without envy. Although I never envied him, I promised myself to try and be as thorough as possible in my work. Whether I have lived up to the expectation or not, it is not for me to judge but consumers of my services.

The late Professor has put two beacons on my lite title deed, in that, he supervised my LLB. Dissertation which enabled me sail through LLB final exams without a refer. He also recently supervised my LLM dissertation, which also enabled me sail through my LLM final exams without a refer. He once surprised me when he read out off head the remarks he had made for correction on one of my LLM dissertation chapters. He was away in Kampala then attending a conference. He read the remarks to me on phone.

After which I sought guidance on a few pages on the copy I had. He advised me, he did not have my papers with him. When I saw him later, I noted that the remarks dictated to me on phone, were in the same sequence as they had been remarked on the chapter which was not with in Kampala, but in his of Parklands.
This goes to show how brilliant the late professor was. I was looking forward to him supervising my PHD. Work.
Let him rest in peace.

Lady Justice Roselyn Naliaka Nambuye
Judge

8th May 2009

The Family of the Late Prof. Okoth-Ogendo

MESSAGE OF CONDOLENCE

We at Kenyatta University join other Kenyans to pay tribute to one of Kenya's most brilliant scholars, the late Prof. Hastings Wilfred Opinya Okoth-Ogendo who passed away on 24th April, 2009 in Addis Ababa, Ethiopia.

As Kenyatta University, we will remember the late Professor as a great scholar whose works have formed the basis for significant further research and policy in areas of Land and Constitutional Law. Prof. Okoth-Ogendo taught the majority of the lecturers at our nascent School of Law. In addition, he continued to interact with them beyond the classroom in many ways thus challenging and sharpening them further. For this, our School of Law is much richer and well grounded given the caliber of the late Professor's teachings and advice to our staff. Indeed, Professor was a great inspiration to our Law students where he graciously granted most of them audience in their bid to enrich their studies.

Kenyatta University applauds the spirit of collegiality and generosity the late Professor exhibited in sharing his time with our students. We celebrate Professor's life and cherish his contribution to not only Kenya but Africa as a whole especially in the legal world. We honour him in his absence. He will always be alive in our hearts.

May the Almighty Lord rest Professor's soul in eternal peace and bind the broken hearts of all those who knew, loved and respected him.
Yours sincerely,

PROF: OLIVE M. MUGENDA, Ph.D, EBS
VICE-CHANCELLOR
KENYATTA UNIVERSITY

7th May, 2009

It is with profound sorrow that we have learnt of the passing on of Prof. Hastings Okoth-Ogendo, your husband, father and leading light to many.

Prof. Ogendo was a board member of the Commission for Higher Education since its inception in 1985 and served as Chairman of the Legislation Committee, as well as Chairman of the Commission Pension Fund.

On behalf of members of the Commission for Higher Education, the entire staff and on my own behalf , I wish to extend our heartfelt condolences to the family of the late Prof. Hastings Okoth - Ogendo who until the time of his death was involved in steering all legal matters pertaining to the Commission for Higher Education. The services that he rendered so selflessly and tirelessly will be sorely missed.

During his 24-year tenure at the Commission, Professor Okoth-Ogendo erected the legal pillars which have to date propped up the Commission in the realization of its mandate.

He will be remembered as one of the pioneers of the Commission for Higher Education. He put in place the legal instruments to operationalise its mandate. He was the brainchild behind the enactment of the Universities Act, 210B which caused the establishment of the Commission in 1985, the Universities Rules, 1989 and other concomitant legal instruments which effected the functions of the Commission.

Prof. Ogendo was in the process of overseeing matters pertaining to the harmonization of the legal instruments governing higher education regulatory agencies in the region.

Prof. Ogendo's tireless dedication to duty and strict adherence to the rule of Law will forever remain in the minds and hearts of those who interacted with him.

We at the Commission wish to assure the bereaved family that you are in our thoughts and prayers as you face these trying moments of the loss of your beloved one. It's our prayer the Almighty God grants vou courage and strength as you face the years ahead.

May God rest his soul in eternal peace.

PROF. EVERETT M. STANDA
COMMISSION SECRETARY/CHIEF EXECUTIVE OF THE COMMISSION FOR HIGHER EDUCATION

7TH MAY 2009

Mrs Ruth Okoth Ogendo Kwakungu
Gem Rae Nyakach
Nyanza Province
Kenya

Dear Ruth,

HEART-FELT CONDOLENCES

I hope you are well.

We, at IDC, were sorely grief-stricken to learn, of the sudden passing away of your beloved husband, the late Prof. Hastings Okoth Ogendo, which occurred at Hyatt Hospital in Addis Ababa, Ethiopia on Friday 24th April 2009.

The signatory to this letter has known the late Prof. Okoth Ogendo since the turn of the century, and first met him when he turned up in Arusha, on a brief notice, to advise the Committee for Fast-Tracking the East African Federation on Constitutional issues. His performance, as always, was professionally immaculate.

More recently, since 2005, we at IDC has gotten to know Prof Okoth Ogendo very closely and admired him as people-oriented person by nature, working as a Team Leader for a Team of Consultants Drafting the National Land Policy for Uganda. We know him not only for his sublimely distilled sense of humour and amicability, but also for his dedicated professionalism and meticulous self-organization. At the time of his death, he was working on Draft 4 of the Uganda National Land Policy to quickly lead to the Final Draft (Draft 5).

For IDC, this is a sudden and most unmanageable loss of a diligent, able and dedicated senior Consultant on a very complex assignment. Thus, death has robbed IDC, Kenya, and East Africa; Africa has also lost; the whole world has lost a great lawyer, advocate of human and constitutional rights, constitutionalist, land policy specialist, a friend of all peoples.

Please accept my heartfelt condolences, those of my family, those of the entire International Development Consultants staff at this time of your grievous bereavement.

But as we all know: The Lord gives and the Lord takes away. We pray that God may comfort you, stand by you and family, and make you strong at this material time while resting the soul of Prof Hastings Okoth Ogendo in eternal peace.

Yours sincerely
For INTERNATIONAL DEVELOPMENT CONSULTANTS

Sam Tulya-Muhika (Prof.)
Chairman/Managing Director

8 May, 2009

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Minister of Finance and Another v Van Heerden 2004 (11) BCLR 1125 (CC).

Modder East Squatters v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA);

Mohamed Nyakioze v Sofia d/o Musa (1971) HCD n. 413.

Mtoro bin Mwamba v Attorney General (1953-1957) 2 TLR 327,341 (per Sir Newnham Worley, Vice-President). CA(T)

Muguthu v Muguthu (Civil Case No. 377 of 1968) (Unreported)

Mwalimu Omari and Ahmed Baguo v Omari Bilali [1999] TLR 432 C A;

Obiero v Opiyo (1972) East African Law Reports 227.

Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v the City of Johannesburg and others 2008 (3) SA 208 (CC) (Olivia Road);

Patman Garments Industries Ltd v Tanzania Manufacturers Ltd [1981] TLR 304. CA.

Patman Garments Industries Ltd v Tanzania Manufacturers Ltd [1981] TLR103 CAT.

Peter Thio Kairu v Kuria Gacheru (1988) 2 KAR 111 CA (K).

Peter Wanyoike Gathure v A. Beverly [1965] EA 514;

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC);

R v Kimanga [1973] E.A. 42.

Ramadhani Kambi Mkinga v Ramadhani Saidi [1985] TLR 140.

Rates Action Group v City of Cape Town 2004 (12) BCLR 1328 (C), para 100.

Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others 2010 (3) SA 454 (CC);

Rono v Rono & Another (2008) KLR G&F 803.

S v Makwanyane 1995 (6) BCLR 665 (CC), para 262 (per Mahomed J).

Scolastica Benedict v Martin Benedict [1993] TLR 1.

Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co. [1901] AC 373.PC(K).

Shirin Rajabali Jessa v Alipio Zorilla [1973] EA 506.

SNK V MSK & Others [2015] C.A. No 139 of 2010.

Souza Figueiredo and Co v Moorings Hotel Co. Ltd [1960] EA 926 CA (UG).

Speaker of the Senate and **Another v.** *The Attorney General & 4 Others,* In the Advisory Opinion No. 2 of 2013.

Tongoane and others v Minister of Agriculture and Land Affairs, Case No. 11678/2006, Gauteng High Court, Pretoria.

United Australia Ltd. v. Barclays Bank Ltd [1941] A.C. 1, 29 (House of Lords, UK).

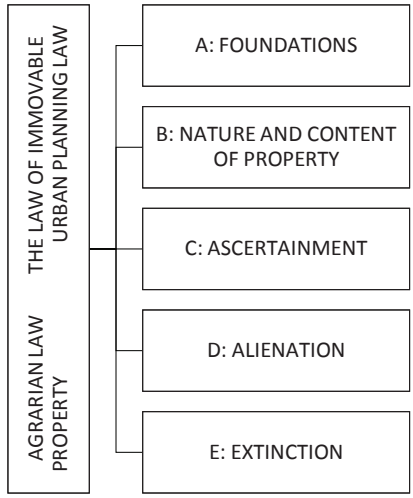
Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another (1987) eKLR.

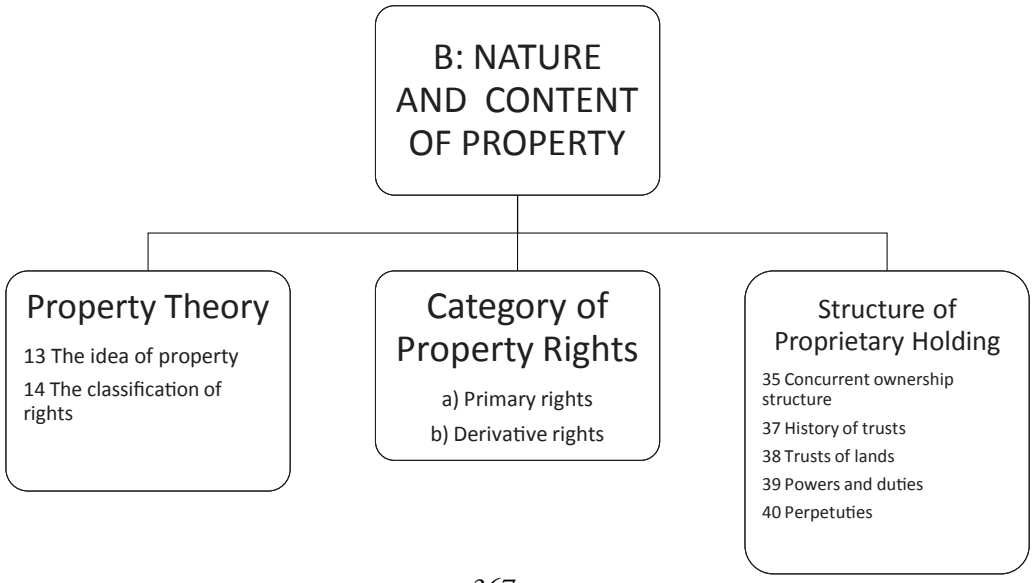
*Vivian Cherono v Maria Chelangat Kerich***,** *Civil Case No. 84 of 2012 (eKLR).*

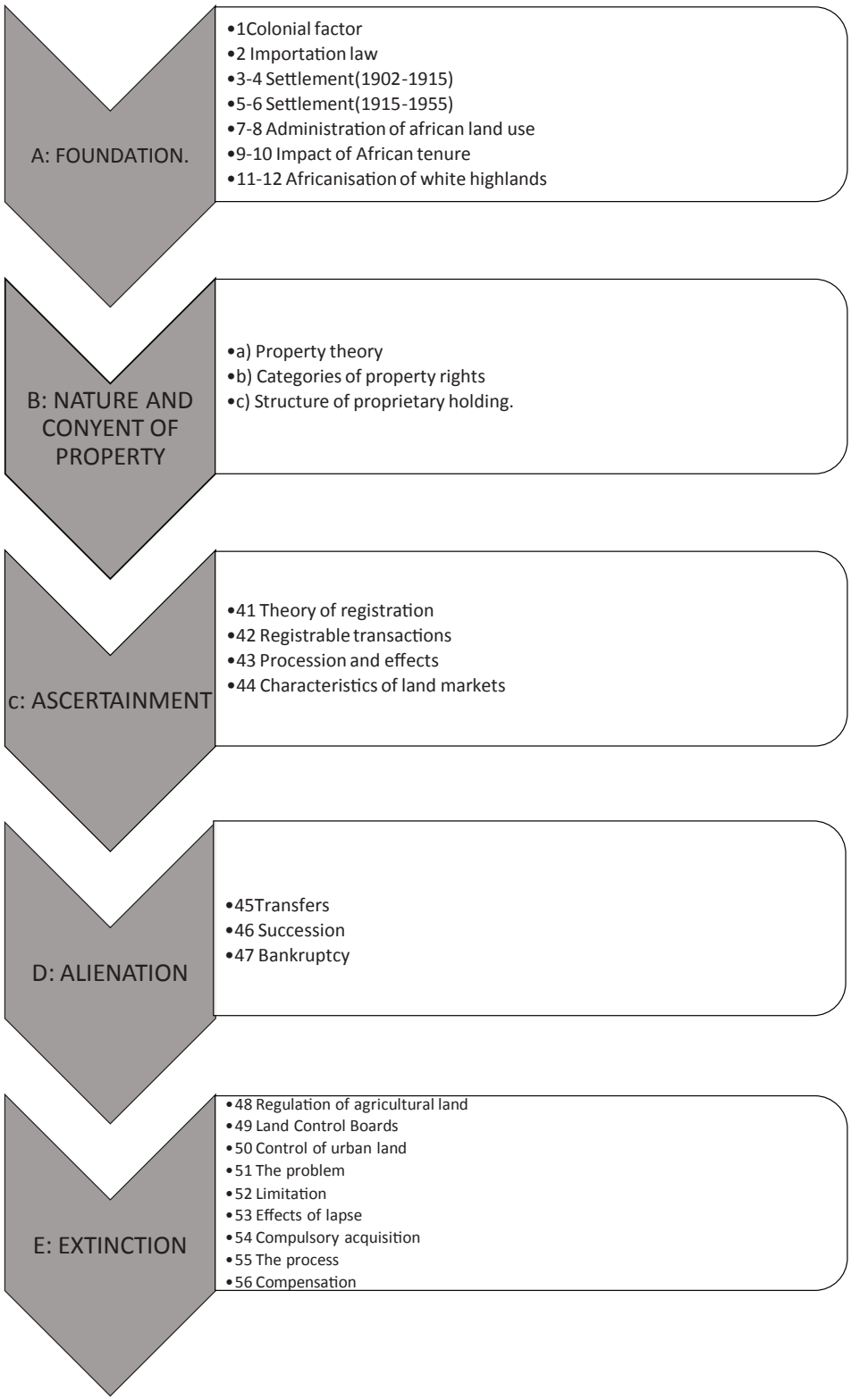
Wainaina v R [1973] EA 238.

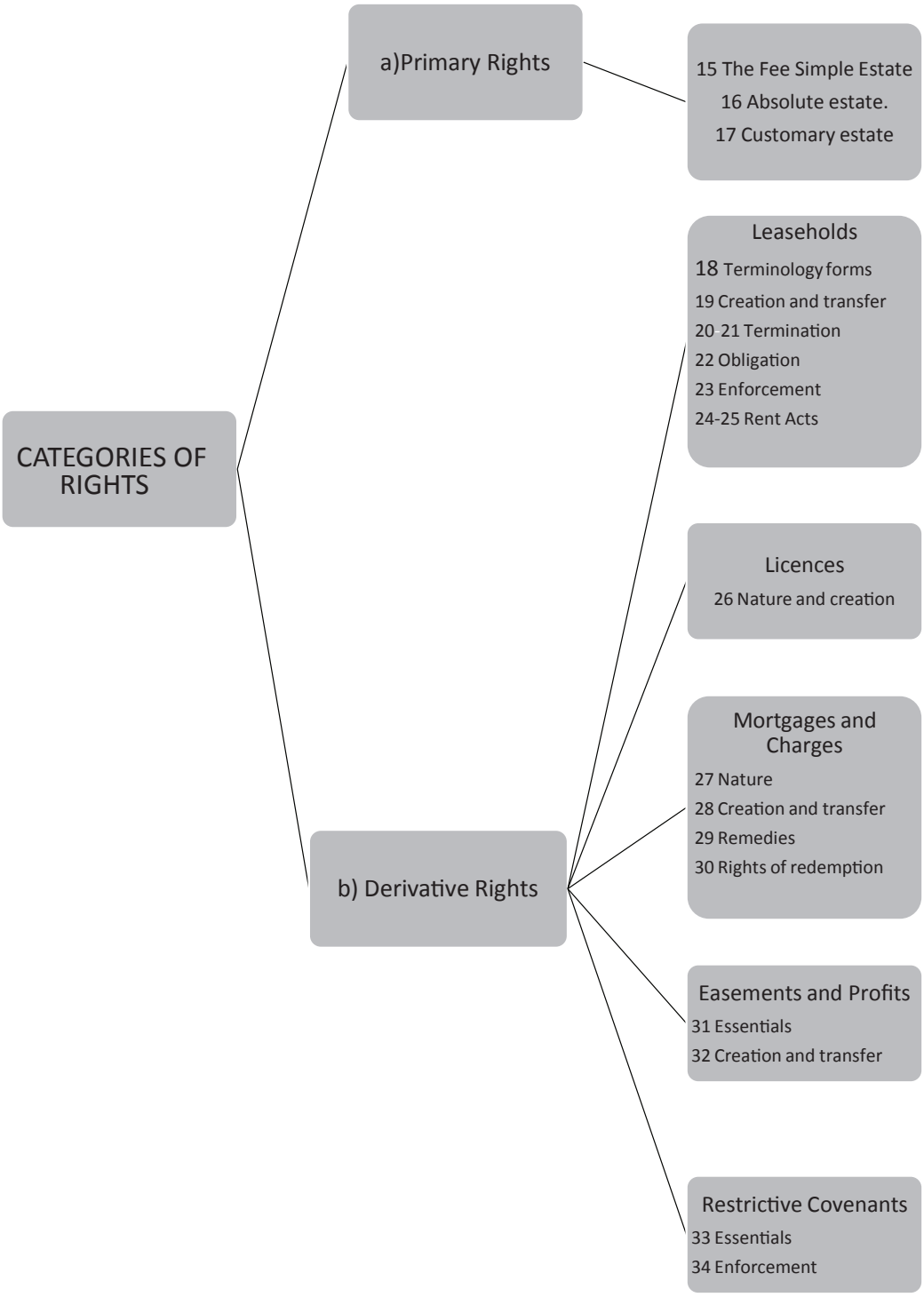
ANNEX

LAND LAW FLOW CHART. Adapted from Okoth Ogendo's flow chart on p.65 for this publication for ease of understanding by Titus Muriuki Muriungi, School of Law, University of Nairobi (March 2017)






A: FOUNDATION.
•1Colonial factor
•2 Importation law
•3-4 Settlement(1902-1915)
•5-6 Settlement(1915-1955)
•7-8 Administration of african land use
•9-10 Impact of African tenure
•11-12 Africanisation of white highlands
B: NATURE AND CONYENT OF PROPERTY
•a) Property theory
•b) Categories of property rights
•c) Structure of proprietary holding.
c: ASCERTAINMENT
•41 Theory of registration
•42 Registrable transactions
•43 Procession and effects
•44 Characteristics of land markets
D: ALIENATION
•45Transfers
•46 Succession
•47 Bankruptcy
E: EXTINCTION
•48 Regulation of agricultural land
•49 Land Control Boards
•50 Control of urban land
•51 The problem
•52 Limitation
•53 Effects of lapse
•54 Compulsory acquisition
•55 The process
•56 Compensation


CATEGORIES OF RIGHTS
a)Primary Rights
15 The Fee Simple Estate
16 Absolute estate.
17 Customary estate
b) Derivative Rights
Leaseholds
18 Terminology forms
19 Creation and transfer
20 -21 Termination
22 Obligation
23 Enforcement
24-25 Rent Acts
Licences
26 Nature and creation
Mortgages and Charges
27 Nature
28 Creation and transfer
29 Remedies
30 Rights of redemption
Easements and Profits
31 Essentials
32 Creation and transfer
Restrictive Covenants
33 Essentials
34 Enforcement