Annexure N

Student number 17298645

STATE RECOGNITION OF CUSTOMARY LAND RIGHTS IN THE KENYAN RIFT VALLEY

by

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SUMMARY

STATE RECOGNITION OF CUSTOMARY LAND RIGHTS IN THE KENYAN RIFT VALLEY

This thesis is about the struggles of communities inhabiting the Kenyan Rift Valley to assert their customary land rights. I focus on the Rift Valley because its interface of dominance by the state statutory system over the community systems continues to pose an existential threat to the Kenyan state. I chose the Maasai, Kikuyu, Nandi and Kipsigis because the Maasai lost the largest amount of land to European settlement in the Rift Valley, the Kikuyu represent the latest community migrants to the region while the Nandi and Kipsigis claim the Rift Valley to be their ancestral land. I use theoretical concepts of systems theory, social dominance and legal pluralism to test whether the new interface model of recognition by the state of communal tenure will be effective in redressing the unhealthy competition for land resources, instabilities and conflict in the region.

The struggles of these Rift Valley communities against the state system date back to 1895 when the British established a protectorate over East Africa and implemented policies that disrupted the equilibrium between the communities and their environments. The colonial state and the neo-colonial state disrupted the customary practices of the Rift Valley communities by dispossessing them of their lands. As a result of this disruption, these communities, as systems, have been pushed to the fringes of the Kenyan socio-economic system.

The communities remained resilient and continued to resist the state's disruption by asserting their customary land rights. They organized local protests that grew so widespread and complex as to pose an existential threat to the state. The colonial state then decided to increase African participation in the integrated Kenyan socio-economic system through an assimilationist policy known as the Swynnerton Plan.

The Swynnerton Plan failed to adequately address the disruption because it favoured a progression in the direction of individual tenure and away from communal tenure. The first Kenyan Constitution of 1963 continued the trend toward individual tenure rights as it also failed to recognize communal tenure rights. Shortly after Kenyan independence, the state attempted to confer tenure rights to pastoral communities through the creation of group

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ranches. However, this effort also failed mainly because of a disconnect between the communities and the individuals that they entrusted with the management of their land.

State intervention concerning community land rights in South Africa, Australia, Tanzania and Canada have shown that effective recognition and enforcement of such rights is possible where there is political goodwill. Recent legal developments in Kenya are also encouraging steps in the effort to create a stable interface between the state and community systems. Kenya promulgated a new Constitution in 2010 that finally recognizes communal tenure. It subsequently enacted legislation in 2012 to initiate investigations into historical land injustices and to recommend appropriate redress. Significantly for customary land rights, Kenya enacted legislation in 2016 that defines community land to include customary land. I conclude with suggestions on remodelling and implementation of this new communal tenure framework to effectively recognize the customary land rights of communities inhabiting the Rift Valley.

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Annexure G

Declaration of originality

This document must be signed and submitted with every essay, report, project, assignment, mini-dissertation, dissertation and/or thesis

Full name of student: **George Fordam Otieno Wara**

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Name of supervisor: **Prof JFD Brand**

Signature of Supervisor | Date

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LIST OF ABBREVIATIONS

ODM	Orange Democratic Movement
KANU	Kenya African National Union
NLC	National Land Commission
PNU	Party of National Unity
AFC	Agricultural Finance Corporation
AU	African Union
IDPs	Internally Displaced Persons
KHRC	Kenya Human Rights Commission
KNBS	Kenya National Bureau of Statistics
KNCHR	Kenya National Commission on Human Rights
NGOs	Non-Governmental Organizations
PEV	Post Election Violence
SLDF	Sabaot Land Defence Forces
TJRC	Truth Justice and Reconciliation Commission
UNHCR	United Nations High Commission for Refugees
AIDS	Acquired Immune Deficiency Syndrome
AP	Administration Police
CIPEV	Commission of Inquiry Into Post Election Violence
DC	District Commissioner
DCIO	District Criminal Investigations Officer
DO	District Officer

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ECK	Electoral Commission of Kenya
GEMA	Gikuyu, Embu, Meru Association
GOK	Government of Kenya
GSU	General Service Unit
IPCA	Independent Police Conduct Authority
KADU	Kenya African Democratic Union
KAMATUSA	Kalenjin, Maasai, Turkana and Samburu.
MOU	Memorandum of Understanding
MP	Member of Parliament
NARC	National Rainbow Coalition
NCCK	National Council of Churches of Kenya
NCPB	National Cereals and Produce Board
NEPAD	New Partnership for Africa's Development
NSAC	National Security Advisory Committee
NSIS	National Security Intelligence Service
OCPD	Officer Commanding Police Division
OCS	Officer Commanding Station
PPO	Provincial Police Officer
PSIC	Provincial Security and Intelligence Committee

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CHAPTER 1 GENERAL INTRODUCTION

In this chapter, I introduce my research topic that is focused on African communities' struggles for land tenure rights in the Kenyan Rift Valley. Using systems theory, I model these communities as systems whose land rights were disrupted beginning in the early twentieth century when the colonial state appropriated a fifth of their productive land for European settlement. I describe the state's attempt to remodel its interface with the community systems in efforts to address the unhealthy competition over land resources, instabilities and conflict that resulted from its disruption of the African community systems. In the second part of my introduction, I acknowledge other studies that have examined the interface between the formal state legal system and traditional tenure systems in Kenya. However, my study also deals with changed circumstances in Kenya with the promulgation of a new constitution in 2010 that created a new communal tenure recognition framework. In the last part of my introduction, I describe my research methodologies and the theories and concepts that underlie my model of Rift Valley communities as systems whose very existence depends on the land that they inhabit.

1.1 BACKGROUND TO THE STUDY

This thesis is about the struggles by African communities inhabiting the Kenyan Rift Valley to assert their customary land rights.[1] I focus on the Rift Valley region because the

[1] In Chapter 4, I go into more detail on the terms "customary land rights" and "community land rights". The immediate former Kenyan Constitution of 1963 did not recognize community land so that community land rights that were based on the customary practices of a community were considered "overriding interests" or remained unregistered and were referred to as "customary land rights". See 'Constitution of Kenya, 1963' (10 December 1963) (as set out in The Kenya Independence Order in Council, 1963', Kenya Gazette Supplement No. 105). The new Kenyan Constitution of 2010 recognizes community land rights so that such rights that are based on the customary practices of a community now have equal footing in law as other land rights granted formally under Kenya's constitutional and statutory framework. See 'Constitution of Kenya, 2010, art. 63' http://www.kenyalaw.org (accessed 2 April 2020); See also Land Act, No. 6 of

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interface of dominance by the state statutory system over the communities inhabiting this region is more visible than in any other region in Kenya and continues to pose an existential threat to the Kenyan state itself. I chose the Maasai, Kikuyu, Nandi and Kipsigis to represent the Rift Valley communities because the Maasai, as a community, lost the largest amount of land to European settlement in the Rift Valley region, the Kikuyu represent the latest community migrants to the region, while the Nandi and Kipsigis represent the largest communities by population that claim the Rift Valley to be their ancestral land. The labels 'Maasai', 'Kikuyu', 'Nandi', and 'Kipsigis', however, conceal much more internal variations than the differences between the individuals that make them up and that live in the Rift Valley region.

The struggles of these Rift Valley communities date back to 1895 when the British established a protectorate over East Africa and implemented policies that disrupted the equilibrium between the communities and their environments, broadly defined to include the geography, climate, ecosystem, biodiversity and ontological totality of the territory that a community inhabits. The colonial state system and its successor, the independent Kenyan state, disrupted the customary practices of the Rift Valley communities by dispossessing them of, and displacing them from the areas that they traditionally inhabited.[2] As a result of

2012, section 2, available at www.kenyalaw.org (accessed 27 April 2020) (states: "customary land rights" refer to rights conferred by or derived from Kenyan customary law whether formally recognized by legislation or not").

[2] See Patricia Kameri-Mbote 'Righting Wrongs: Confronting Land Dispossession in Post-colonial Contexts' (2009) East African Law Review, pp. 103 - 124 (Professor Kameri-Mbote discusses the legal and political processes that were used by colonial-era settlers in Kenya to acquire land rights from African communities, including declaration of a protectorate, designation of the land as owned by the colonizer and use of legal instruments to legitimize their political acts. She further observes that the dispossession of peoples' land severed their connection with their physical environment and resulted in historical injustices that must be addressed); 'Report of the African Commission's Working Group on Indigenous Populations/Communities Research and Information Visit to Kenya' (1 - 19 March 2010) United Nations Human Rights Committee (UNHRC) pp. 37 - 46 (discussing the state's dispossession and displacement of the Maasai

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this disruption, members of these communities have been pushed to the fringes of the Kenyan socio-economic system.[3] However, the communities are resilient and have struggled to maintain their customary practices.[4] These struggles have been well documented in reports by commissions appointed by the state to inquire into land-based conflicts in the Rift Valley region.[5]

I use the description of communities as found in systems theory (as the sum of interactive and interdependent component parts) to model these communities as systems and to highlight the importance that they attach to their customary land rights.[6] Using systems

community in Kenya); 'Report of the Truth, Justice and Reconciliation Commission' (3 May 2013) Truth, Justice and Reconciliation Commission (TJRC), Kenya, Vol. IIB, sections 41 - 55 (discussing the origins of land-related problems in mainland Kenya); 'Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya (Akiwumi Commission)' (31 July 1999) The Government Printer, section 94 (discussing European settlements in the Rift Valley Province).

[3] In Chapter 4, section 4.2, I engage in more discussion of the economic disempowerment of these African communities.

[4] See Chapter 2, I discuss the Maasai community's landmark litigation against the European settlers, the Kikuyu community's armed resistance against the settlers and the Nandi and Kipsigis' tribal warfare to reclaim their land from other communities in the Rift Valley that they perceive to be foreign occupiers.

[5] See Akiwumi Commission Report (n 2); TJRC Report (n 2); 'Report of the Commission of Inquiry into Post-Election Violence (CIPEV)' (15 October 2008) Kenya National Commission on Human Rights, available at http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf) (accessed 2 April 2020); Paul N. Ndungu, et al 'Report Of The Commission Of Inquiry Into The Illegal/Irregular Allocation Of Public Land (Ndungu Land Report)' (2004) Government printer, Nairobi; '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 (Njonjo Land Commission)' (2002) Commission of Inquiry into the Land Law System of Kenya (National government publication).

[6] See section 1.4.1 of this chapter, where I discuss systems theory using the systemic characteristics

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theory, I highlight the importance of customary land rights for communities living in the Rift Valley region. I use the systemic descriptions of German Sociologist Professor Niklas Luhmann and the pragmatic approach to social grouping identity developed by McGill University's Professor John Galaty.[7] Luhmann describes systems theory as the idea that the system is different from, and greater than, the sum of its component parts.[8] Luhmann's description of systems theory, as criticized and analysed by others, results in the following characteristics of a system: (1) it is a body or group of interactive and interdependent elements; (2) it self-defines or self-identifies; (3) its elements are functionally differentiated or structured to self-produce and self-preserve; (4) it uses feedback loop mechanisms to maintain its integrity and stability; (5) it is autopoietic; and (6) it uses communication to reveal and structure its interactions and to perpetuate its identity.[9]

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described by German Sociologist Professor Niklas Luhmann. I also rely on the pragmatic approach to identifying social groupings suggested by McGill University's Professor John Galaty that focuses on identifying the social grouping as a whole without precisely and accurately describing their component parts or constituent elements.

[7] See Luhmann, N & Baecker, D (ed) 'Introduction to Systems Theory' trans Gilgen, P (2013) Polity Press (containing a collection of Prof. Niklas Luhmann's lectures); John Gillespie 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (Spring, 2008) 40 N.Y.U. J. Int'l L. & Pol. 657 (discussing Professor Niklas Luhmann's ideas); John Galaty 'Being "Maasai"; Being "People-of-Cattle": Ethnic Shifters in East Africa' (1982) 9 AM. ETHNOLOGIST 1, 3 (suggesting an approach to investigating Maasai identity).

[8] See John Gillespie (n 7 above); Anthony J. Colangelo 'A Systems Theory of Fragmentation and Harmonization' (2016) 49 N.Y.U. J. Int'l L. & Pol. 1.

[9] Anthony J. Colangelo (n 8 above); Hugh Baxter 'Autopoiesis and the "Relative Autonomy" of Law' (July, 1998) 19 Cardozo L. Rev. 1987; Richard Nobles & David Schiff 'Using Systems Theory to Study Legal Pluralism: What Could Be Gained?' (June, 2012) 46 Law & Soc'y Rev. 265; John Gillespie (n 7); David N. Cassuto 'The Law of Words: Standing, Environment, and Other Contested Terms' (2004) 28 Harv. Envtl. L. Rev. 79; Perry G. Horse 'The Sacred and the Profane: Second Annual Academic Symposium in Honor of the First Americans and Indigenous Peoples Around the World: Spirituality and New Science Since in Organizations: A Tribal Perspective' (Fall, 1996) 9 St. Thomas L. Rev. 49.

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I conclude that African communities are systems because they are made up of interactive and interdependent individuals, their laws and customs, cultures, ancestors, land, waters, and other essential elements focused on self-production and self-sustenance of the whole.[10] The inter-dependencies and interactions between these component parts of the community system revolve around the land that they inhabit and depend on for their livelihood.[11] As I discuss in section 1.4.2 of this chapter under 'autopoiesis', these community systems are also autopoietic, meaning that they tend to regenerate and transform their component parts to more effectively achieve their self-production and self-sustenance objective. With the passage of time, community systems develop customary practices that are more suitable for the environment that they inhabit. I illustrate this dynamic nature of systems in chapter 2 by describing the increasing adoption of sedentary agriculture by some of the pastoral communities living in the fertile and well-watered areas of the Rift Valley even before colonial disruption.

Analysing communities as systems leads to a better understanding of their struggles for survival and continuity as community systems. The communities' struggles for survival and continuity is at the root of their drive to assert their customary land rights as land is an essential component of the community system.[12] In comparing the experiences of African communities in the Rift Valley region with similar experiences in Tanzania and South Africa and of aboriginal communities in Australia and Canada, I conclude that the component parts

[10] See section 1.4.1 below.

[11] As above.

[12] In Chapter 2 below, I go into more details on the importance of land to communities. See *Love v Commonwealth of Australia* (11 February 2020) B43/2018; *Thoms v Commonwealth of Australia* (11 February 2020) B64/2018 (collectively, Love v Commonwealth) (High Court of Australia) (emphasizes the importance of land as a component part of the Australian Aboriginal community); Michael Dodson 'Statement on Behalf of the Northern Land Council' (July 1992) The Australian Contribution: UN Working Group on Indigenous Populations, Tenth Session, Geneva 35 (explaining that everything about Aboriginal society is inextricably interwoven with, and connected to, the land).

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of systems are "inextricably interwoven with, and connected to, the land".[13] The Australian High Court's ruling in Mabo v. Queensland, High Court of Australia, a landmark decision on formal state recognition of customary land rights captured the centrality of land to aboriginal communities by stating that "… the ancestral tie between the land, or 'mother nature', and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors…"[14] An analysis of communities as systems, therefore, leads to the understanding that communities consider land to be very important to them and that its loss would result in their disappearance as a people.

I also analyse this clash between the formal state legal system and traditional tenure systems through the lens of social dominance theory. This is the notion that "all human societies tend to be structured as systems of group-based social hierarchies."[15] When social systems interact, they tend to structure themselves hierarchically, thereby resulting in one system dominating and suppressing the other.[16] The interaction between the colonial state system and African community systems has resulted in the colonial state's domination and suppression of African communities.

The Kenyan state's dominance interface model with community systems in the Rift Valley has, therefore, been characterized by a perennial competition for land resources by the communities among themselves and also with state agents. This unhealthy competition over land resources has resulted in instabilities in the Rift Valley and conflicts, thereby

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[13] As above.

[14] *Mabo v Queensland* (1992) 107 A.L.R. 1 (High Court of Australia).

[15] See Erika K. Wilson 'Why Diversity Fails: Social Dominance Theory and the Entrenchment of Racial Inequality' (2017) 26 Nat'l Black L.J. 129 (for an explanation of social dominance theory); Felicia Pratto, Jim Sidanius & Shana Levin 'Social Dominance Theory and the Dynamics of Intergroup Relations: Taking Stock and Looking Forward' (2006) 17 Eur. Rev. Soc. Psychol. 271; Jim Sidanius et al. 'Social Dominance Theory: Its Agenda and Method' (2004) 25 Pol. Psychol. 845. I discuss the theory of social dominance in more detail in section 1.4.3 below.

[16] As above.

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posing an existential threat to the entire Kenyan state system.[17] Shortly after Kenya's independence in 1963, the Kenyan state unsuccessfully attempted to remodel this dominance interface by conferring tenure rights to pastoral communities through the creation of group ranches.[18] The latest interface model by the state is through the Constitution of Kenya of 2010, the Community Land Act of 2016 and its implementing regulations that provide for the recognition, protection and registration of community land rights and the management and administration of community land.[19] I use concepts of systems theory, social dominance and legal pluralism to test whether the state's recognition interface model will effectively redress the unhealthy competition for land resources, instabilities and conflict among community systems in the Rift Valley region.

1.2 LITERATURE REVIEW

In choosing this topic, I acknowledge other studies concerning customary land rights, legal pluralism and recognition of minority rights.[20] In this thesis, however, I deal with

[17] See Akiwumi Commission Report (n 2) (discussing tribal-based conflicts in the Rift Valley Province); CIPEV Report (n 5 above); TJRC Report (n 2) Vol. IIB (discussing land-related conflicts in the Rift Valley region).

[18] I discuss the introduction and failure of group ranches in chapter 4 below.

[19] Constitution of Kenya of 2010 (n 1) art. 63(5); The Community Land Act 27 of 2016, Kenya Gazette Supplement No. 148 § 39 (Published by the National Council for Law Reporting); The Community Land Regulations, 2017, Legislative Supplement No. 87, Kenya Gazette Supplement No. 178 (Published by the National Council for Law Reporting).

[20] See Kameri-Mbote, P 'Property Rights and Biodiversity Management in Kenya: the case of land tenure and Wildlife' (Dissertation) (1998) Stanford University, ProQuest's Dissertations & Theses database, available at https://about.proquest.com/libraries/academic/dissertations-theses/ (accessed 20 December 2020); Kameri-Mbote (n 2) 103 - 124; John Galaty (n 7) (suggesting an approach to investigating Maasai identity); TO Elias 'The Nature of African customary law' (1956) Manchester University Press 3 (citing C Dundas 'Native Laws of some Bantu Tribes of East Africa' (1921) 51 Journal of Royal Anthropological Institute 217 - 78; E Cotran 'The future of customary law in Kenya' in JB Ojwang & JNK Mugambi (eds) 'The S.M. Otieno Case: Death

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changed circumstances in Kenya with the promulgation of a new Kenyan Constitution in 2010 and the enactment of legislation in 2016 aimed at providing legally secure tenure to communities. This thesis adds to other studies which examine the interface between the Kenyan state legal system and customary land rights in the Rift Valley region from a legal pluralist perspective.[21] In chapter 5, I also explore different models of recognition that have been tried in other countries, especially the partnership-based model of recognition that may be suitable for the Rift Valley region.[22]

There are scholars that have dealt with customary land rights in the Rift Valley and in Africa, including those who have written articles on customary land rights in Kenya similar to the rights addressed by the Kenya Community Land Act No. 27 of 2016.[23] Professor Joseph Kieyah has also written on indigenous peoples' land rights in Kenya with a focus on

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and Burial in Modern Kenya' (1989) 149 - 164; J Kenyatta 'Facing Mount Kenya' (1979) Secker and Warburg (London) 21 (discussing the importance of African customary systems); Collins Odote 'The Legal And Policy Framework Regulating Community Land in Kenya, An Appraisal' (2013) Friedrich Ebert Stiftung Nairobi, Kenya.

[21] As above.

[22] See Chapter 5. See also Calder v. British Columbia (Attorney General), [1973] S.C.R. 313 (the Supreme Court of Canada recognized the Aboriginal rights of the Nishga people of northwestern British Columbia based on the fact that their ancestors had occupied and used the land from time immemorial.); Mabo & another vs. The state of Queensland and another (1989) HCA 69; 166 CLR 186 (for the proposition that there was a concept of native title at common law and that the source of native title was the traditional connection to or occupation of the land); Ian Peach 'Section 15 of the Canadian Charter of Rights and Freedoms and the Future of Federal Regulation of Indian Status' (2012) 45 U.B.C. L. Rev. 103 (for a discussion of the struggles for recognition by the Indian community in Canada) (for different recognition models used in other countries); Love v Commonwealth (n 12).

[23] See Kameri-Mbote Dissertation (n 20); Kameri-Mbote (n 2) 103 - 124; Odote, C (n 20); Kameri-Mbote, P & Odote, C (eds) 'The Gallant Academic: Essays in Honour of H.W.O. Okoth Ogendo' (2017) School of Law – University of Nairobi.

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the unjust land tenure policies targeting the Maasai and Ogiek.[24] The late Kenyan Professor HWO Okoth-Ogendo wrote about land tenure systems in Africa.[25] Dr. Liz Alden Wiley, another Kenyan scholar, and Professor Patricia Kameri-Mbote, a former dean of the law faculty at the University of Nairobi, have written on community land rights.[26] This thesis enriches the existing scholarship on customary land rights based on the promulgation of a new constitution in 2010 and enactment of a new statutory framework in 2016 that expressly recognize customary land rights.[27]

I am also aware of the emerging scholarship, particularly in Canada, rejecting recognition politics. For example, Glen Sean Coulthard,[28] Russell Diabo[29] and Taiaiake

[24] Joseph Kieyah 'Indigenous Peoples' Land Rights in Kenya: A Case Study of the Maasai and Ogiek People' (Spring, 2007) 15 Penn St. Envtl. L. Rev. 397.

[25] H.W.O. Okoth-Ogendo 'Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya' (1991) ACTS Press, African Centre for Technology Studies; H.W.O. Okoth-Ogendo 'Legislative Approaches to Customary Tenure and Tenure Reform in East Africa, in Evolving Land Rights, Policy and Tenure in Africa' (2000) Camilla Toulmin & Julian Quan eds.,123, 127.

[26] Liz Alden Wiley & Peter A. Dewees 'From Users to Custodians: Changing Relations Between People and the State in Forest Management in Tanzania' (2001) World Bank, Policy, Research working paper no. WPS 2569; Kameri-Mbote (n 2) 103 – 124; Kameri-Mbote Dissertation (n 20).

[27] For the new communal tenure legal framework, see Constitution of Kenya of 2010 (n 1) art. 63(1); Community Land Act (n 19); Community Land Regulations (n 19); The National Land Commission Act 5 of 2012. Revised Edition 2016 [2015] (Published by the National Council for Law Reporting).

[28] Glen Sean Coulthard 'Red Skin, White Masks: Rejecting the Colonial Politics of Recognition' (2014) Minneapolis: University of Minnesota Press (arguing that the politics of recognition does not create partnerships but continues the suppression and domination of indigenous community systems by the state).

[29] Russell Diabo 'Harper Launches Major First Nations Termination Plan as Negotiating Tables Legitimize Canada's Colonialism' (10 January 2012) The Bullet, Socialist Project E-Bulletin No 756 www.socialistproject.ca/bullet/756.php (accessed 2 April 2020).

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Alfred,[30] leading scholars on issues affecting members of the First Nations in Canada, have argued that recognition has been used by the Canadian state as a tool for reinforcing oppression.[31] These scholars argue that communities should assert their inalienable rights to self-determination as a people by any means necessary.[32] While I do agree that communities inhabiting the Rift Valley region have rights to self-define and self-identify,[33] I also recognize their limitations in carrying out armed struggles against the Kenyan state. In chapter 2, I discuss the most complicated and widespread armed resistance against colonial dispossession of land by the Kikuyu community that ended in their defeat by European settlers. Addressing the interface of dominance by the state through armed resistance is further complicated by the fact that the European settlers have been replaced by African elites who are themselves members of the African communities. Effective recognition of the African community systems by the formal state system is, therefore, not a tool of oppression, but the only viable path toward a sustainable nation.

This thesis also enriches existing scholarship on legal pluralism and customary land rights. Scholarship on legal pluralism also exists already. Alan Hunt,[34] David Howes[35] and

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[30] Taiaiake Alfred 'Peace, Power, Righteousness: An Indigenous Manifesto' (2009) Don Mills, ON: Oxford University Press, 2nd ed.

[31] Some of these authors base their rejection of recognition politics on the writings of Franz Fanon. See Franz Fanon 'The Wretched of the Earth' (1963) Grove Weidenfeld A division of Grove Press, Inc. http://abahlali.org/wp-content/uploads/2011/04/Frantz-Fanon-The-Wretched-of-the-Earth-1965.pdf (accessed 2 April 2020); Franz Fanon 'Black Skin, White Masks' (1952) Editions de Seuil, France (arguing basically that recognition is a tool used by the dominating social system to maintain its dominance and suppression of other social systems).

[32] As above.

[33] In section 1.4.1, I discuss the self-identification characteristic of community systems based on system theory as described by Professor Niklas Luhmann. See Niklas Luhmann lectures (n 7); John Gillespie (n 7) (discussing Professor Niklas Luhmann's ideas).

[34] See Allan Hunt 'Foucault's Expulsion of Law: Toward a Retrieval' (1992) 17 Law & Soc. Inquiry 1 - 38.

[35] See David Howes 'From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875

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Boaventura DeSousa Santos[36] have written extensively on the coexistence of two or more legal orders in the same time, space and context.[37] This thesis adds to the existing scholarship on legal pluralism by analyzing the difficult relationship between customary law and state law in Kenya, specifically. I adopt the legal anthropologist / naturalist approach to legal pluralism that demonstrates that the legitimacy of a community's customary legal system is backed by wide acceptance of the obligatory nature of the laws by members of the community. Most of the more widely-published books and articles on legal pluralism did not specifically address the relationship between African customary law systems and the state legal system[38] and, therefore, this thesis contributes to the scholarship on complex pluralistic societies in Africa.

1.3 METHODOLOGY

In this section, I describe my research methodologies. I set out to model Rift Valley communities as systems so as to analyse them using the theoretical concepts of systems theory, legal pluralism, and social dominance theory. The limited scope of my study does not allow me to conduct my own detailed legal anthropological study of these communities, but I rely on customary practices that have been summarized in court cases and on other studies that have been published in articles and journals. I also sought information about the theoretical concepts that would be useful for my analysis. I focus on the customary land rights of the Maasai, Kikuyu, Nandi and Kipsigis. The Maasai community represent the Rift Valley communities because they lost the largest amount of land to European settlers in the Rift Valley region. The Kikuyu were the largest squatter or labour-tenant community in the Rift Valley region at the time of Kenya's independence in 1963 and therefore represent the latest migrants to the region. The Nandi and Kipsigis communities are the two largest sub-

- 1929" (1987) 32:3 McGill LJ 523.

[36] Boaventura deSousa Santos 'Law: A Map of Misreading' (1987) 14 J.L. & Soc'y 279.

[37] See also Mariano Croce 'A Practice Theory of Legal Pluralism: Hart's (inadvertent) defence of the indistinctiveness of law' (2014) 27 Can JL & Juris 27 - 47 (discussing Hart's approach to legal pluralism).

[38] As above. See also Howes, D (n 35); Hunt, A (n 34) 1 - 38.

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tribes of the Kalenjin community and therefore represent the largest communities by population that claim the Rift Valley to be their ancestral land.

I relied on doctrinal research and comparative research. I conducted doctrinal research from a variety of sources, including hardcopy books that I purchased and borrowed from libraries and also received as gifts from authors. I also purchased ebooks and accessed online journals and articles through the University of Pretoria Library Services. I subscribed to the LexisNexis digital library platform to obtain additional access to caselaw and journal articles on customary land rights from other jurisdictions. I also visited the University of Pretoria law library and the Kenya National Archives for additional doctrinal and comparative research.

Access to caselaw, journals and articles enabled me to compare Rift Valley community systems with other community systems in South Africa, Tanzania, the United States of America, Canada and Australia. I use the comparisons to test my theoretical concepts in analysing the African community systems.

I tested my use of the theoretical concepts to analyse community systems in front of live audiences at conferences focused on the interface between formal state laws and customary laws. In addition, I reviewed YouTube videos and conducted informal discussions with scholars on topics concerning customary land rights and the theoretical concepts that I chose for my analysis. Subjecting my theories to such scrutiny helped me to focus my doctrinal and comparative research on the search for an effective interface between the formal state legal system and traditional tenure systems in the Kenyan Rift Valley.

1.4 CONCEPTS AND THEORIES

In this section, I clarify the theoretical concepts of systems theory, autopoiesis, social dominance theory, legal pluralism and customary law that I use to test whether the state's recognition interface with Rift Valley communities will be effective in redressing the unhealthy competition for land resources, instabilities and conflict in the region. I rely on systems theory and the concept of autopoiesis to define community systems as whole entities made up of interactive and interdependent individuals, their laws and customs, cultures, ancestors, land, waters, and other essential elements focused on self-production and self-sustenance of the whole. Using the lens of social dominance theory or the tendency for

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human societies to hierarchize, I explain the state's dominance over the African community systems. To explain the internal variations and diversity that lie beneath the labels 'Maasai', 'Kikuyu', 'Nandi', and 'Kipsigis', I use legal pluralism or the theoretical framework for the existence of two or more legal systems within the same geographic space, time and context. I adopt the legal anthropologist / naturalist approach to legal pluralism that demonstrates that the legitimacy of customary law is backed by wide acceptance of the obligatory nature of the laws by members of the community.

1.4.1 SYSTEMS THEORY

In this section, I describe the theory underlying my model of Rift Valley communities as systems whose very existence depends on the land that they inhabit. I use systems theory to explain the struggles by communities in the Kenyan Rift Valley as efforts by these communities to construct and reconstruct themselves, so as to preserve their very existence.[39] Systems theory is premised upon the basic idea that systems evolve to secure their own continuity and survival.[40] Professor H. Patrick Glenn of McGill University's Faculty of Law and Institute of Comparative Law, traces the origin of the notion of "system" to the Greek "*sustema*", as "*assemblage*" or "*ensemble*".[41] He explains that the concept of "system" was brought into the mainstream of western intellectual life with the development of taxonomic

[39] Niklas Luhmann lectures (n 7 above); Arthur J. Jacobson, '1989 Survey of Books Relating to the Law; VII. Legal Theory and Philosophy: Autopoietic Law: The New Science of Niklas Luhmann. Autopoietic Law: A New Approach to Law and Society', edited by Gunther Teubner (1988) 87 Mich. L. Rev. 1647. (collectively, 'The New Science of Niklas Luhmann').

[40] Id.

[41] H. Patrick Glenn, 'Special Issue/Numero Special: Navigating the Transsystemic: Tracer le Transsystemique: Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50 McGill L.J. 863 - 898.

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biology in the eighteenth century, using systems as units of analysis.[42] Professor Russell L. Ackoff's definition of "system" is similar to Glenn's.[43] He defines a system as a whole being that contains inter-dependent component parts that can affect the properties or behaviour of the whole.[44]

According to Professor Luhmann, a system has the following six main characteristics: (1) it is a body or group of interactive and interdependent elements; (2) it self-defines or self-identifies; (3) its elements are functionally differentiated or structured to self-produce and self-preserve; (4) it uses feedback loop mechanisms to maintain its integrity and stability; (5) it is autopoietic; and (6) it uses communication to reveal and structure its interactions and to perpetuate its identity.[45]

The system is, therefore, different from, and greater than, the sum of its component parts. A system is able to use its own negative and positive feedback loop mechanisms to maintain equilibrium among its component parts.[46] A negative feedback loop is self-

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[42] Id.

[43] See, generally, Russell L. Ackoff & Fred E. Emery, 'On Purposeful Systems' (1972) London: Tavistock, 1972.

[44] Id.

[45] These characteristics are summarized from various articles discussing systems theory. See Niklas Luhmann lectures (n 7); John Gillespie (n 7) (discussing Professor Niklas Luhmann's ideas); Anthony J. Colangelo (n 8). See also Dimitris Michailakis 'Law as an Autopoietic System' (1995) 38 Acta Sociologica 323 - 337 (describing the characteristics of autopoietic systems and sub-systems). See Daniel Fitzpatrick and Andrew McWilliam 'Bright-Line Fever: Simple Legal Rules and Complex Property Customs among the Fataluku of East Timor' (June, 2013) 47 Law & Soc'y Rev. 311 (using the system theory notion of autopoiesis to find similar characteristics in the Fataluku community of East Timor).

[46] See Hugh Baxter 'Autopoiesis and the "Relative Autonomy" of Law' (July, 1998) 19 Cardozo L. Rev. 1987 (discussing a system's use of feedback loop mechanisms to re-generate itself to ensure its own survival as a system); Alan Calnan 'Torts as Systems' (Winter, 2019) 28 S. Cal. Interdis. L.J. 301, 315 (describing a feedback loop as a "circular chain of causal connections that link past, present, and future events in many possible locations").

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correcting and self-stabilizing; it can correct a systemic imbalance much like a thermostat rectifies a temperature imbalance.[47] A positive feedback loop is self-reinforcing; an initial perturbation to one component of the system is amplified as it propagates around the loop.[48] Unchecked by negative feedback, a positive loop will grow to the point of becoming unstable as will be seen in chapter 2 when discussing the Rift Valley communities' struggles to repossess their land.[49]

The first characteristic of a system is that it is a body or group of interactive or interdependent elements or component parts.[50] The system is, therefore, different from, and greater than, the sum of its component parts. The core image of a system is the human body, a biological system with component parts such as cells or organs.[51] The imagery of the body can be used to model a community as a system because the community also depends on the inter-dependence and interaction of individuals, laws, customs, land and other elements within it to survive as a community. The community, just like the body, cannot simply be reduced to its individual members in the same way that cutting a body in half does not produce two bodies. The notion of autopoiesis that I discuss in the next section is a response to the criticism often levelled against Professor Luhmann's systems theory that it leaves out the individual dimension.[52] Viewing the system's component parts as interactions and inter-dependencies, their collective behaviour is, therefore, more than the sum of their individual behaviours.

The constituent elements or component parts of community systems such as African communities in the Rift Valley, Aboriginals in Australasia or Indians in the Americas are individual members of the community, their laws and customs, cultures, ancestors, land,

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[47] As above.

[48] As above.

[49] As above.

[50] As above.

[51] See Michael King, 'The "Truth" About Autopoiesis' (Summer 1993) 20 Journal of Law and Society 2.

[52] See Niklas Luhmann lectures (n 7) p. 7 et seq. (where Luhmann discusses Max Weber's theories).

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waters, and other essential elements of the system.[53] Some elements or component parts of these community systems are essential to the system's survival and continuity.[54] An example of an essential component of African, Aboriginal and Indian community systems is land or territory.[55] Land is so important to the Maasai community in East Africa, for example, that the Maasai names, such as '*Masai*', '*Wakuifi*', '*Orloikob*,' ' *Loikob*,' '*loigob*,'

[53] See *Love v Commonwealth*, (n 12), pp. 124-125 (the Australian High Court recognized these constituent elements or component parts of a system when it stated that "the people, the ancestral spirits, the land and everything on it are 'organic parts of one indissoluble whole'").

[54] As above.

[55] Love v Commonwealth (n 12) pp. 124-125 (the Australian High Court in Love v. Commonwealth emphasized the importance of land as a component part of the Australian Aboriginal community when it stated that "[t]he very words "Aboriginal" and "indigenous", ab origine or "from the beginning", enunciate a historical, and original, connection with the land of Australia generally." The Court further observed: "Native title rights and interests require a continuing connection with particular land. However, underlying that particular connection is the general spiritual and cultural connection that Aboriginal people have had with the land of Australia for tens of thousands of years. In other words, underlying a connection to any particular land is a general, "fundamental truth ... an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole."). See also Dodson, M (n 12) (explaining as follows: "[e]verything about Aboriginal society is inextricably interwoven with, and connected to, the land. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land. You take that away and you take away our reason for existence. ... Removed from our lands, we are literally removed from ourselves). In the 1973 Canadian Supreme Court case of Calder v British Columbia (AG), see Calder v Attorney General (n 22), the Canadian Supreme Court recognized the Aboriginal rights of the Nishga people of northwestern British Columbia on the concept of prior occupation of lands; that their ancestors had occupied and used the land from time immemorial.

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all mean "*possessors of the land*".[56] The Māori, an Aboriginal community in New Zealand, have a saying that, just as the individual rises out of the placenta of the mother, so does the community rise out of the territory in which it lives.[57] The importance of land to the Māori is further emphasised by the Māori language in which the word for land - '*whenua*'- is also the word for placenta.[58]

In analysing the group or body of interactive and independent elements that make up a community system, I rely on Professor Galaty's pragmatic approach to identifying social groupings.[59] He focuses on identifying, generally, the body or group of interactive individuals that make up the system rather than engaging in an endless quest for an immutable, definite, bounded ethnic group.[60] He observes that there are inherent limitations that may impede efforts to identify any system.[61] Language is one such limitation.[62] The

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[56] John Galaty (n 7) at 3 (citing Dr. Ludwig Krapf, 'Notes written by German missionary (Krapf notes)' (c. 1860)).

[57] See Catherine Iorns Magallanes, 'Special Issue: Law and Language: The Use of Tangata Whenua and Mana Whenua in New Zealand Legislation: Attempts at Cultural Recognition' (August, 2011) 42 VUWLR 259; 'Report of the New Zealand Play Centre Federation from the Working Party on Cultural Issues (NZ Play Centre Report)' (1990); Ani Mikaere, Nin Tomas and Kerensa Johnston, 'Review: Treaty of Waitangi and Maori Land Law' (2003) 2003 NZ Law Review 447; J.G.A Pocock, 'Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi' (1998) 43 McGill L.J. 481.

[58] Id.

[59] John G. Galaty, 'Animal spirits and mimetic affinities: The semiotics of intimacy in African human/animal identities' (2014) 34(1) Critique of Anthropology 30 – 47; John Galaty (n 7).

[60] Id.

[61] Id.

[62] John Galaty (n 7) at 3 (observing that the term "Maasai" appears to have been applied

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terminology used to identify social groupings may generate uncertainty around social grouping identity because many of the key terms used in the identity exercise, such as "community", "system", "ethnic group", "Maasai", "Kikuyu", "Nandi", "Kipsigis", and other references to social groupings, lack consensus definitions and do not refer to consistent or coherent social groupings.[63] Language presents false choices if the exercise is reduced to an endless exercise of finding coherent and consistent definitions of these ambiguous and complicated terms.[64] The task of social grouping identification using language is further complicated by the existence of language barriers.[65] The language of identification may be different from the language used by the system itself in the same way that colonial powers sought to identify African, Aboriginal or Indian communities using the English language.[66]

A second limitation that may impede efforts to identify any system is context, because systems are generally defined by contrasting who or what a system is with that which it is not.[67] In this sense, identity is inherently contextual because a system acquires an ethnic label or identity marker as against non-elements of that system. To define "Maasai", for example, is as easy as pointing out those who are and those who are not "Maasai".[68] Professor Galaty gives other examples of the contextual nature of identity in using objects that often exemplify this play on selfhood and alterity: landscapes (we are part of and like our natural surroundings, but not theirs), the social order (our institutions, their institutions), and practices or customs (we are what we do, or do not do).[69] These examples show that

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inconsistently from the colonial period to represent alternative nomenclature for all sections of Maa-speaking people).

[63] Id.

[64] See Cassuto, (n 9) (explaining that the false choices presented by language can be due to linguistic subjectivity and ideological differences).

[65] Id.

[66] John Galaty (n 7) at 3.

[67] Galaty, JG (n 59).

[68] John Galaty (n 7).

[69] Galaty, JG (n 59) pp. 30-47.

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constituent elements of' a system that also embody its core characteristics are vital in its identification and distinction from the elements of other systems. In the face of the other, therefore, systems are able to see and come to self-define and self-identify. Identification of a social grouping is thus carved out of the "intricate interplay of differences and affinities, whether in the landscapes humans inhabit, social structures they enact", or practices and customs that divide and exemplify them.[70] This contextual nature of identity dispels any assumption of a unitary meaning behind ethnic labels or identity markers.

Despite these linguistic uncertainties and the contextual nature of identity, Professor Galaty suggests a pragmatic approach to identity by focusing on the body or group of persons that we seek to identify.[71] This body or group of persons still exists and persists despite our linguistic uncertainties or contextual limitations. Much the same way we discover an individual's characteristics independently of their name, we can also discover a social grouping's characteristics independently of the terminology used to identify it.[72] In discovering an individual, the focus should be on the individual and not the profile associated with a certain name or label.[73] The individual's identity with a community system is based on a sufficient and substantial connection to the community plus the community's acceptance of that individual's membership.[74] For example, "Aboriginal status" or "Indian status" or "Maasai status" is a conclusion about the relationship that the individual has with the social grouping or body of persons known by the identity-marker "Aboriginal", "Indian", or "Maasai", as the case may be.

Professor Galaty suggests that our social grouping identity task should not focus on precisely describing the individuals or constituent elements of the system, but on accurately

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[70] Id.

[71] John Galaty (n 7) p. 3.

[72] Id.

[73] Id.

[74] See Pamela D. Palmater, 'Forum on R. v Marshall: An Empty Shell of a Treaty Promise: *R. v. Marshall* and the Rights of Non-Status Indians' (Spring, 2000) 23 Dalhousie L.J. 102.

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describing the social grouping as a whole.[75] This group of individuals that constitute a community system can be identified using an identity marker or ethnic label for the whole system. For example, a tribal name like the "Maasai", "Kikuyu", "Nandi" or "Kipsigis" allows us to refer to the community system without being forced to come to a consensus as to which descriptive characteristics precisely constitute its elements or constituent parts. The ethnic labels or identity markers thus assist us in condensing a system's characteristics into a single symbol of generalized or collective identity for the whole. These ethnic labels or identity markers are, essentially, pegs upon which we hang a description of the community system so that we can have a coherent and consistent discussion about it.[76] Such identity markers or ethnic labels help us to avoid the endless search for a consensus on the identities of constituent elements or component parts of the system before having a discussion about the system as a whole. According to Galaty, the social groupings referred to by the identity markers or ethnic labels "Maasai", "Kikuyu", "Nandi" or "Kipsigis", are, therefore, not immutable or unsusceptible to human modification, but constitute mythical unities concealing underlying symbolic constituents.[77]

The other characteristics of a system are tied to its identity in that this body or group of interactive and interdependent elements or component parts is self-referential and tends to self-define and self-identify. Luhmann describes the self-replicating or self-referential feature of systems as "autopoiesis", a notion borrowed from biological systems that are essentially units which repeatedly self-produce and thus become independent of their

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[75] See Sol Tax [Professor Emeritus, University of Chicago's Department of Anthropology], 'Can World Views Mix?' (1990) 49 Human Organization 3 (appears to agree with Professor Galaty's pragmatic approach when he argues that customs and practices of social groupings refer to the deeper values, or structures that are not expressed but remain firmly embedded and relatively unchanging).

[76] Professor Galaty's metaphor of an ethnic label or identity marker as a "peg" upon which to hang a description of the social grouping, is borrowed from John R. Searle, 'Speech Acts: An Essay in the Philosophy of Language' (1970) 167 – 172.

[77] Galaty, JG (n 59) pp. 30-47.

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environment.[78] This self-definition characteristic of systems is the reason why a community system's self-identification should be the first among equals in describing the community system.[79] As the United States Supreme Court stated in *Santa Clara Pueblo v. Martinez*, "a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."[80] The group or body of persons known as the "Maasai", for example, have essential characteristics defined by the Maasai themselves and that have led to this social grouping being referred to as the "Maasai". The Maasai people should, therefore, be the first among equals in pointing out those who are and those who are not "Maasai" so long as such customary practices are exercised in a manner that is not repugnant to the Kenyan constitution.[81] The same logic should apply to the Kikuyu, Nandi, Kipsigis and other Rift Valley communities.

The boundaries of this self-identification characteristic of community systems tend to stretch only as far as state sovereignty permits.[82] For example, the United States and Canada have exercised their sovereignty to require, generally, (1) blood quantum and (2) acceptance by the community, for an individual to claim Indian status.[83] In Australia, an Aboriginal

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[78] See John Paterson & Gunther Teubner, 'Changing Maps: Empirical Legal Autopoiesis' (1998) 7 Soc. & Legal Stud. 451 (explaining the notion of autopoiesis).

[79] See Robert A. Williams, Jr., 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' (1990) DUKE L.J. 660, 663 n. 4 (describing the right of "indigenous peoples" to self-define).

[80] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, FN 32, 98 S. Ct. 1670, 56 L. Ed. 2d 106, 1978 U.S. LEXIS 8 (U.S. May 15, 1978).

[81] Christine Metteer, 'The Trust Doctrine, Sovereignty, and Membership Determining who is Indian' (2003) 5 Rutgers Race & L. Rev. 53 (advocating for community self-identification).

[82] Love v Commonwealth, (n 12) pp. 124-125 (discussing the state sovereignty limitations of community self-identification and self-definition).

[83] Ralph W. Johnson, 'Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians' (July, 1991) 66 Wash. L. Rev. 643.

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community's determination of the Aboriginal status of an individual is subject to the Australian state's discretion to recognize or not to recognize that status determination.[84] The systemic characteristic of self-definition and self-identification is thus in inherent conflict with the principle of state sovereignty; if a community system is able to assert its right of self-definition and self-identification against the state, that community would be sovereign and hence become a state. If an individual's status determination by a community in exercise of its right of self-definition or self-identification is at variance with the same individual's status determination by a state in exercise of its sovereign power, the community must, therefore, yield out of a sense of self-preservation. A community system's characteristic of self-identification or self-determination is, therefore, subject to state validation through recognition.

Both Professor Luhman's outline of systemic characteristics and Professor Galaty's pragmatic approach to identity are helpful in identifying community systems in the Rift Valley region.[85] A community meets the definition of a system, because it has the six main characteristics identified by Professor Luhmann and discussed above. First, a community is a system because it is made up of individual human beings, their laws and customs, cultures, ancestors, land, waters, and other essential elements of a system. As discussed, there are individuals who identify themselves as members of the Maasai, Nandi, Kipsigis and Kikuyu communities in the Rift Valley. Second, a community tends to self-identify as a community and to pass on that identity from generation to generation. Members of the communities inhabiting the Rift Valley, for example, are not required to register with any entity or to take any formal legal steps to obtain such membership. Instead, the communities have their own membership criteria that they have been applying to their members for thousands of years. The third systemic characteristic identified by Professor Luhmann is the functional differentiation or structure of a system's elements with the goal of self-production and self-

[84] Love v Commonwealth, (n 12) pp. 124-125.

[85] For a summary of Luhmann's systems theory and Galaty's pragmatic approach, see Michael King 'The "Truth" About Autopoiesis' (Summer 1993) 20 Journal of Law and Society 2 (explaining that "Autopoiesis is, then, a theoretical approach to the operations of social systems and their relationships with each other and with the general social environment") and John Galaty (n 7) 3.

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preservation. The functional differentiation and structuring characteristic of systems is also tied to the fourth systemic characteristic in which systems use feedback loop mechanisms to maintain their integrity and stability. I illustrate these systemic characteristics in Chapter 2 where I describe the Rift Valley communities' traditional land tenure systems and the self-help tactics that some of them continue to employ in their struggle to assert their customary land rights.

1.4.2 AUTOPOIESIS

Professor Luhmann also describes a system as being autopoietic, meaning that a system forms its elements from itself.[86] The notion of autopoiesis captures the tendency of systems to regenerate and transform their component parts to perpetuate themselves.[87] According to Professor Niklas Luhmann, "autopoiesis" means "self-production" or "self-referential".[88] The notion of autopoiesis helps to explain how the system is self-referential, self-sustaining and self-proliferating in a way that uniquely serves and symbiotically defines it.[89] Professor Luhman borrows the term "autopoiesis" from biological research, where it is

[86] Autopoiesis is one of the characteristics of a system that is described in this chapter. Professor Luhman borrows the term "autopoiesis" from biological research, where it is used to describe self-replicating organic sub-systems. See Paterson, J & Teubner, G (n 78) (explaining Professor Luhmann's systems theory notion of autopoiesis); See also King, M (n 85) (explaining that "Autopoiesis is, then, a theoretical approach to the operations of social systems and their relationships with each other and with the general social environment"); Anthony J. Colangelo (n 8); Hugh Baxter (n 46). See also Michailakis, D (n 45) 323 - 337 (using Luhmann's notion of autopoiesis to analyse law).

[87] As above.

[88] As above. See also Arthur J. Jacobson '1989 Survey of Books Relating to the Law; VII. Legal Theory and Philosophy: Autopoietic Law: The New Science of Niklas Luhmann. Autopoietic Law: A New Approach to Law and Society', edited by Gunther Teubner (1988) 87 Mich. L. Rev. 1647. (collectively, 'The New Science of Niklas Luhman').

[89] As above.

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used to describe self-replicating organic sub-systems.[90] The core image of autopoiesis in biology is the individual organism, such as a human cell, that continuously regenerates and transforms its elements from a complex base of energy and matter.[91] Similarly, autopoiesis can be used to model the community as a system that continuously regenerates and transforms itself to survive.[92] The opposite of autopoiesis is allopoiesis, meaning "other-produced" or a system whose elements do not generate their own network of production.[93] The core image of allopoiesis is a machine.[94] Just as human beings are not machines, communities are also not allopoietic.[95]

The customary practices of Rift Valley communities are thus autopoietic subsystems of these communities and may be considered "autopoietic law" because they are used to guide each community's process of self-definition as I illustrate in chapter 2.[96] These customary practises also embody the core characteristics that the community relies on for self-definition, self-production and self-preservation.[97] Just as individuals are biological systems comprised of many functional subsystems, so does a complex society develop functional specializations of their component parts that form themselves into autopoietic sub-systems.[98] These subsystems are autopoietic as part of the autopoietic system in the

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[90] See King, M (n 85) (explaining the core image of systems as biological units); See Paterson, J & Teubner, G (n 78) (explaining Professor Luhmann's systems theory notion of autopoiesis).

[91] As above.

[92] As above.

[93] See The New Science of Niklas Luhmann (n 39).

[94] As above.

[95] As above.

[96] The New Science of Niklas Luhmann (n 39).

[97] See also The New Science of Niklas Luhmann (n 39) (recognizing that law constitutes a self-referential, self-generating system because law defines what is, and what is not, law). See also King, M (n 85) (explaining that the systems theory notion of autopoiesis is borrowed from biological research).

[98] This is consistent with Professor Luhmann's third systemic characteristic of systems being

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same way that the cell forms an organism within the larger organism also made up of cells.[99] For example, the economic, legal, medical systems and other functional subdivisions of the community are all subsystems that are themselves autopoietic in that they are self-referential and self-generating subsystems of the larger community system.[100] The customary practices of the communities of the Rift Valley that are part of the legal systems of those communities are therefore autopoietic subsystems generated by the autopoietic communities to ensure the survival and continuity of those communities.[101] In sections 1.4.4 and 1.4.5, I explain that when a critical mass of community members accepts to follow a customary practice out of a sense of legal obligation, then the practice forms part of the customary laws of that community.

Professor Luhmann's notion of autopoiesis has been criticized for leaving out the individual dimension contrary to Max Weber's definition of social action as being oriented to the past, present, or expected future behaviour of other individuals.[102] The criticism does not have to be addressed in this thesis, as the individual members of the communities in the Rift Valley will be examined only to the extent that they form part of the community system known by the label or identity marker 'Maasai', 'Kikuyu', 'Nandi', or 'Kipsigis'.[103] The inter-dependencies and interactions of individual community members can be separated from the individual members themselves in the same way that individuals come and go, but

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functionally differentiated or structured to achieve the system's aims of self-production and self-preservation. See Cassuto, DN (n 9).

[99] As above.

[100] See John Gillespie (n 7) (describing law as a system of communications). See also The New Science of Niklas Luhmann (n 39) (recognizing that law constitutes a self-referential, self-generating system because law defines what is, and what is not, law).

[101] As above.

[102] See King, M (n 85) (stating some of the criticisms against Professor Luhmann's systems theory of autopoiesis). See also The New Science of Niklas Luhmann (n 39).

[103] This is also consistent with the reasoning in Love v Commonwealth of Australia, that the component parts of a community system, i.e. individual Aboriginals, are "organic parts of one indissoluble whole". Love v Commonwealth (n 12).

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their communities remain.[104] Accordingly, to avoid "false choices"[105] that may arise if this discussion is reduced to an endless exercise of finding coherent and consistent definitions of 'Maasai', 'Kikuyu', 'Nandi', or 'Kipsigis', I do not delve deeply into the reasons why the individual community members consider themselves to be part of these communities. The notion of autopoiesis can thus help us to explore the ways in which communities of the Kenyan Rift Valley region, as systems, have maintained their customary practices across generations.

1.4.3 SOCIAL DOMINANCE THEORY

The interface between the state statutory system and African customary systems can be analysed through the lens of social dominance theory.[106] Social dominance theory is inextricably intertwined with the basic assumption of systems theory that systems evolve to

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[104] As above.

[105] Cassuto, DN (n 9) (explaining that the false choices presented by language can be due to linguistic subjectivity and ideological differences).

[106] See Wilson, EK (n 15) pp. 133 - 134 (describes social dominance theory as a "theory of intergroup relations" that suggests that social groupings have the same basic human predisposition to form group-based social hierarchies); Michelle Adams 'Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action' (December, 2002) 82 B.U.L. Rev. 1089, 1107 (describing social dominance theory as starting with the notion that "all human societies tend to be structured as systems of group-based social hierarchies"); Devon W. Carbado and Patrick Rock 'What Exposes African Americans to Police Violence?' (Winter, 2016) 51 Harv. C.R. - C.L. L. Rev. 159, 175 (focuses on the strategies used by systems to maintain hierarchy by describing social dominance theory as the 'idea that stability in hierarchical societies … is sustained through the normative endorsement of ideologies that reinforce and even promote the status quo'). See also David Simpson 'Fool me once, Shame on You; Fool me twice, Shame on you again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy' (Spring, 2019) 56 Hous. L. Rev. 1033, 1040 – 1041 (stating that social dominance theory is a social psychology theory that is yet to fully permeate the legal field).

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secure their own continuity and survival.[107] When these systems combine and form societies, self-preservation then becomes an inherent trait of the societies.[108] A society composed of multiple social systems may itself reflect the formative stages of a new integrated social system, hence the link between systems theory and social dominance theory.[109] Social dominance theory posits an integrated theory of intergroup relations, competition among groups and contests for power and resources, to explain the social inequality that is inherent in complex societies.[110]

Social dominance theory begins with the notion that "all human societies tend to be structured as systems of group-based social hierarchies."[111] In other words, human societies, consisting of a multiplicity of social systems, are structured such that some social systems are dominant, and others are subordinate.[112] These social structures arise when systems interact so that the group-based social hierarchies can ensure the provision of prestige, social power and privilege for individual members of the hierarchical society in a stable and sustainable manner that ensures its self-preservation. According to social dominance theory, this group-based hierarchical structure may be based on arbitrary-set systems which implement social hierarchy along socially constructed group categories of class, race, ethnicity, tribe, and other immutable characteristics.[113] Stability in hierarchical societies is sustained through the normative endorsement of forms and ideologies that preserve,

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[107] As above. See also Hugh Baxter (n 46) (using the systems theory notion of autopoiesis to explain a community system's ability to self-generate and self-perpetuate).

[108] As above.

[109] As above. See also Jim Sidanius & Felicia Pratto 'Social Dominance: An Intergroup Theory of Social Hierarchy and Oppression' (1999) Cambridge University Press, Chapter 2 (discussing social dominance theory generally).

[110] Adams, M (n 106) p. 1107 (December, 2002) (describing social dominance theory as starting with the notion that "all human societies tend to be structured as systems of group-based social hierarchies").

[111] Wilson, EK (n 15) pp. 133 - 134.

[112] As above.

[113] See Sidanius & Pratto (n 109) pp. 3 - 30 (analyzing various intergroup relations theories).

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perpetuate and promote the hierarchical structures.[114] Education and training are examples of vehicles used by hierarchical societies to perpetuate hierarchy-enhancing forms and ideologies. These hierarchy-enhancing forms and ideologies dictate how resources and social status ought to be distributed in the hierarchical society.[115] Social dominance theory emphasizes the individual-level forces of discrimination that contribute to these hierarchy-enhancing forms and ideologies.[116] Individual-level forces comprise a combination of aggregated institutional and individual discrimination and behavioural asymmetry.[117] Aggregated institutional and individual discrimination occur when institutions and individuals adopt rules or practices that result in the disproportionate allocation of positive and negative social value across the social status hierarchy.[118] Behavioural asymmetry suggests that the hierarchical society promotes behaviour in which the dominant group remains on top and the subordinate group at the bottom.[119]

By applying these individual-level forces of discrimination and asymmetrical behaviours, dominant social systems within the hierarchical society end up hoarding a disproportionate share of instruments that have positive social value, such as political authority and power, areas of high agricultural potential, labour, capital and other instruments of power and authority.[120] The subordinate social systems, on the other hand, absorb a disproportionate share of items that have negative social value, such as limited use and possession rights in areas of low agricultural potential, low status occupations and other attributes of an inferior social status.[121] The end result is a hierarchical arrangement in which the dominant group is on top and the subordinate group at the bottom.[122] The dominant

[114] As above.

[115] As above.

[116] Carbado & Rock (n 106) p. 175.

[117] As above. See also Simpson, D (n 106) p. 1040-1041.

[118] Carbado & Rock (n 106) p. 175.

[119] Simpson, D (n 106) p. 1040-1041.

[120] As above.

[121] As above.

[122] Carbado & Rock (n 106) p. 175.

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social systems then use instruments such as education and training to preserve, perpetuate and promote this hierarchical arrangement.[123]

The tendency for group-based hierarchies to form when systems clash is not unique to the African continent. In Canada, Aboriginal communities continue to suffer similar suppression and domination in their interface with European settlers. Taiaiake Alfred, in his seminal work, *'Peace, Power, and Righteousness: An Indigenous Manifesto'*, details the settler system's domination and suppression of Aboriginal community systems in Canada as follows:

> "Aboriginal identity and culture were at first systematically and zealously suppressed. Aboriginal culture was derided and vilified as inhumane… This often entailed the forced separation of parents and children, the suppression of their languages, and the indoctrination of Aboriginal children with the exoteric trappings of religions and customs alien to their own esoteric spiritual, cultural traditions."[124]

In Canada, the British Crown thus abandoned its nation-to-nation treaty partnership with Aboriginal peoples in favour of domination, exploitation, and expropriation of Aboriginal land. The successor state has continued this asymmetrical power relationship with the Aboriginal peoples in Canada to this day.[125] Similarly, the interface between the state statutory system and African customary systems in Kenya has been characterized by

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[123] As above. See also Sidanius & Pratto (n 109) pp. 3 – 30.

[124] Alfred, T (n 30).

[125] The Canadian state has acknowledged this asymmetrical relationship with the Indian community in Canada. See Indian Act Amendment and Replacement Act, S.C. 2014, c. 38 (Assented to 16 December 2014) (available through the Canadian government's Justice Laws Website: https://laws.justice.gc.ca/) (states in its preamble that "[w]hereas the Indian Act is an outdated colonial statute, the application of which results in the people of Canada's First Nations being subjected to differential treatment; Whereas the Indian Act does not provide an adequate legislative framework for the development of self-sufficient and prosperous First Nations' communities").

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domination and suppression of African communities by the colonial state and its successor, the Kenyan state system as I discuss in chapters 3 and 4.

1.4.4 LEGAL PLURALISM

To explain the existence and validity of diverse African customary systems alongside the state legal system in the Rift Valley region, we turn to legal pluralism. Legal pluralism is useful to explain how African customary legal systems in the Rift Valley region have existed alongside the formal state legal system from the advent of colonialism in 1895.[126] Legal pluralist theory, generally, recognizes the existence of two or more legal systems within the same geographic space, time and context.[127] It holds that systems and subsystems within the same public space can produce their own rules, possess their own mechanisms for coercing compliance, and develop internal procedures for settling disputes.[128] Legal pluralism conceives of law and society as being inextricably intertwined and challenges the prescriptive, statist, monist and formalist theories of law.[129] According to Allan Hunt, "legal pluralism … posits a plurality of legal forms over which state law persistently, but never with complete success, seeks to impose a unity".[130] Legal pluralist theory, therefore, views

[126] See YP Ghai & JPWB McAuslan 'Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present' (1970) Nairobi: Oxford University Press, pp. 25 - 30.

[127] Jamie C.Y. Liew 'Finding Order in Calgary's Cash Corner: Using Legal Pluralism to Craft Legal Remedies for Conflicts Involving Marginalized Persons in Public Spaces' (2015) 52:3 Alta L Rev 605-634

[128] As above.

[129] See Matthew V.W. Moulton 'Framing Aboriginal Title as the (Mis)Recognition of Indigenous Law' (2016) 67 UNBLJ 336 - 368 (discussing the place of indigenous laws in a pluralist society)

[130] Allan Hunt 'Foucault's Expulsion of Law: Toward a Retrieval' (1992) 17 Law & Soc. Inquiry 1 - 38. See also Mariano Croce 'A Practice Theory of Legal Pluralism: Hart's (inadvertent) defence of the indistinctiveness of law' (2014) 27 Can JL & Juris 27 - 47 (discussing Hart's approach to legal pluralism).

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society as consisting of a plurality of normative orders.[131] Under this theory, different legal systems, such as customary law, common law and the state system, are part of the dialogue of ideas that exist in society.[132] According to this theory, communities living in the Rift Valley region of Kenya each have their own customary legal systems that coexist alongside the formal state legal system. Naturally, a balance must be found between the normative orders of these African communities and what can properly be defined as law. Legal pluralist theory, therefore, attempts to define criteria that would help to determine whether or not a given body of social norms could be defined as legal.[133]

A bright line boundary between social norms and legal norms can be drawn using legitimate coercion or acceptance of the obligatory nature of a norm, depending on the type of legal theorist analysing the norm. Both critics and advocates of legal pluralist theory agree that social normativity is a social fact, meaning all societies have unwritten rules, called norms, that govern social behaviour.[134] Similarly, there is widespread consensus that some rules that govern social behaviour also have common features of legal systems, such as obedience and sanctions or threats of sanctions for noncompliance.[135] The contention, therefore, lies in the location of the boundary between social norms and law. Such a boundary would help legal pluralists to determine the proper definition of a legal norm as opposed to mere usage, behaviour or other types of social norms. In their quest for a

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[131] As above.

[132] As above.

[133] For a discussion of legal pluralism theory, see Moulton, MVW (n 129) 368 (discussing the place of indigenous laws in a pluralist society); Hunt, A (n 130) 38. See also Croce, M (n 37) 47 (discussing Hart's approach to legal pluralism).

[134] See Lawrence E. Mitchell 'Understanding Norms' (Spring, 1999) 49 Univ. of Toronto L.J. 177 (acknowledging social normativity while discussing the bright line between norms and laws); Keith Culver 'Leaving the Hart-Dworkin debate' (Fall, 2001) 51 Univ. of Toronto L.J. 367 (explains the differing views on the nature of law while acknowledging the existence social norms); Croce, M (n 37) 47 (also acknowledges social normativity).

[135] For authors that agree that social norms may have the same features as laws, see Mitchell, LE (n 134) and Croce, M (n 37) 47.

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boundary between legal norms and social norms, legal pluralists can be divided into positivists,[136] naturalists[137] and legal anthropologists,[138] depending on where and how they set their boundaries.

Positivists, generally, use legitimate coercion to mark the boundary between legal norms and social norms.[139] Legitimate coercion refers, generally, to the use (or threat) of force or sanctions by the state authority or agents of the state.[140] According to the positivist school of thought, the existence of the state simplifies the distinction between social norms and law, because law then becomes a special set of enforceable rules issued by a law-giver and administered by a group of officials.[141] The positivist view is, therefore, that the law is the law because it has been generated by the individual or group of individuals recognized by the community as having the privilege to generate law.[142] However, legal anthropology

[136] See J.L. Austin 'The Province of Jurisprudence Determined' (1954) Hackett Publishing [1998 edition]; H.L.A. Hart 'The Concept of Law' (1961) Clarendon Law Series; John Austin 'Lectures on Jurisprudence or the Philosophy of Positive Law' (1885) vol. I, 5th ed. R. Campbell. London: John Murray 316 - 317 (for more information on legal positivism).

[137] See Ronald Dworkin 'Taking Rights Seriously' (1978) Harvard University Press 30 - 43 (Dworkin's natural law theory demonstrates the incapacity of positivism and pragmatism to account for common law, or, for purposes of this thesis, customary law, reasoning). See also Kevin T. Jackson 'Rethinking Economic Governance: A Naturalistic Cosmopolitan Jurisprudence' (Winter, 2013) 36 B.C. Int'l & Comp. L. Rev. 39 (discusses Dworkin's natural law theory).

[138] For a summary of legal anthropologists' approach to legal pluralism, see Bronislaw Malinowski 'Crime and Custom in Savage Society' (1926) Littlefield, Adams & Co. [1967 edition]; Bronislaw Malinowski 'The Functional Theory, in A Scientific Theory of Culture and Other Essays' (1939) University of N.C. Press [1944 edition] 145, 145 - 176 (collected essays of Malinowski). See also Croce, M (n 37) 47 (discussing both Hart's positivist approach to legal pluralism and Malinowski legal anthropological approach).

[139] See Austin, JL (n 136) pp. 316-7 (for more information on legal positivism).; Hart, HLA (n 136).

[140] As above.

[141] As above.

[142] As above.

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shattered the notion that only states can exercise legitimate coercion and extended such privileges to non-state actors as well.[143] According to them, formal state law is just one legal system among many others.[144] They argue that state law does not exhibit any special distinguishing feature from other systems of rules.[145] To buttress this view, legal anthropologists point to courts that have expanded the definition of "state" to include non-state authorities, such as the community or tribal authorities.[146] For example, the Court of Appeal of East Africa in the *Ole Nchoko Court of Appeal case*, held that the Maasai community was a sovereign entity with the capacity to make treaties with the British Crown.[147] Some legal anthropologists have even argued that state law is a species or type of "customary law".[148]

Natural law theory appears to agree with legal anthropologists on the lack of a clear distinction between state and non-state actors in the creation of legal norms.[149] Naturalists point to the failure of positivists to account for policy, justice and morality in their definition of law.[150] The positivist view does not account for laws that relate to nature (natural law), individuals' value systems, policies, ideologies, ideas of justice, morality and other

[143] Croce, M (n 37) p. 47. See also Malinowski, B (n 138) (collected essays of Malinowski).

[144] As above.

[145] As above.

[146] See Christopher Tomlins and John Comaroff "Symposium Issue: 'Law as …' Theory and Method" in "Legal History: 'Law as …': Theory and Practice in Legal History" (September, 2011) 1 U.C. Irvine L. Rev. 1039 (taking issue with the narrow interpretation of state power).

[147] Ole Nchoko and others v. The Attorney-General and others, 7/1913 (East Africa Court of Appeal, December, 1913) (hereinafter "Ole Nchoko Court of Appeal case").

[148] Croce, M (n 37).

[149] See Dworkin, R (n 137) pp. 30 - 43 (Dworkin's natural law theory demonstrates the incapacity of positivism and pragmatism to account for common law, or, for purposes of this thesis, customary law, reasoning). See also Kevin T. Jackson 'Rethinking Economic Governance: A Naturalistic Cosmopolitan Jurisprudence' (Winter, 2013) 36 B.C. Int'l & Comp. L. Rev. 39 (discusses Dworkin's natural law theory).

[150] As above.

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conditions of validity of laws.[151] For example, human beings have a natural inclination toward self-preservation and may accept rules restricting violence to ensure their collective survival.[152] Human beings may also accept rules out of a sense of moral obligation, meaning that they agree to be bound by a rule simply because it is the right thing to do.[153] This introduces the notion of consent to be bound or acceptance of a legal norm as the basis of its validity.[154]

Whereas positivists use legitimate coercion to draw a bright line boundary between social norms and legal norms, therefore, legal anthropologists and naturalists use wide acceptance of the obligatory nature of the norm to achieve the same goal.[155] Such acceptance is evidenced by the repeated or widespread practice of a custom.[156] If a critical mass of community members practice the custom out of a sense of legal obligation, a new customary law is created.[157] This nascent custom is seen by the community, generally, as better serving its needs and interests, as being more convenient, just, or fair.[158] In other words, the community accepts the new legal norm because it rhymes with the community's value

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[151] As above.

[152] This is a conclusion based on the third systemic characteristic described by Professor Luhmann by which systems are composed of functionally differentiated or structured elements all aimed at self-production and self-preservation. See Cassuto, DN (n 9) (stating that "[a]ll systems, including the social system, share the twin imperatives of self-reproduction and self-preservation").

[153] See Dworkin, R (n 137); Jackson, KT (n 149) (discusses Dworkin's natural law theory).

[154] As above.

[155] For more information on positivism, see Austin, JL (n 136) and Hart, HLA (n 136). For a summary of legal anthropologists' approach to legal pluralism, see Malinowski, B (n 138). For legal naturalist thought, see Dworkin, R (n 137) (Dworkin's natural law theory demonstrates the incapacity of positivism and pragmatism to account for common law or customary law because these types of laws do not emanate from an anointed law giver or authority figure).

[156] Croce, M (n 37) (summarizing the position taken by legal anthropologists and naturalists).

[157] As above.

[158] As above.

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system, policies, ideologies, ideas of justice, morality and other conditions of validity of laws.[159] These sources of legitimacy cited by legal anthropologists and naturalists do not depend on the positivists' anointed law-giver, but on the community's value system that leads its members to accept a custom or practice as law.[160] In this thesis, I adopt the legal anthropologist / naturalist approach to legal pluralism that demonstrates that the legitimacy of customary law is backed by wide acceptance of the obligatory nature of the laws by members of the community. This approach is also consistent with different legal definitions of customary law, such as Roman law and international law as discussed below.

1.4.5 CUSTOMARY LAW

Roman law and international law both define customary law as general practice widely accepted as law. Book 1, title 2.9 of Justinian's Institutes (promulgated 533 AD) defines law as follows: "[l]aw comes into being without writing when a rule is approved by use. Longstanding custom founded on the consent of those who follow it is just like statute law."[161] The same definition of customary law based on custom and usage can also be found in customary international law. Article 38(1) (b) of the Statute of the International Court of Justice ("ICJ Statute") describes the law to be applied by the International Court of Justice when deciding cases within its jurisdiction. It states that the Court shall apply "...international custom, as evidence of a general practice accepted as law."[162]

Under Roman law and international law, therefore, a rule of customary law can be determined from a widely accepted state practice that is adhered to out of a subjective belief by the state that it is obligatory (opinio juris). Belief in the obligatory nature of the practice is implied from its wide acceptance or practice. Proof of the wide acceptance of a state practice can be found in the writings of learned international lawyers, judicial decisions of

[159] As above.

[160] As above.

[161] See Thomas Cooper 'The Institutes of Justinian, With Notes' (1812) Philadelphia: P. Byrne.

[162] 'Statute of the International Court of Justice (ICJ)' art. 38(1)(b) https://www.icj-cij.org/en/statute (accessed 2 April 2020).

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national and international courts and Resolutions of the United Nations General Assembly (UNGA).[163] English courts also rely on past judicial decisions in similar cases to determine rules and doctrines of common law, which is a legal system similar to customary law.[164]

Drawing from the definitions of customary law under Roman law and international law, I conclude that rules of customary law within states also require the same elements that were cited under Roman law and in international law: (1) a custom or practice (2) that is widely accepted by individuals within the community as being obligatory.

Kenyan Professor J. B. Ojwang agrees with this definition of customary law based on custom and usage when he describes the formation process for customary law.[165] According to Professor Ojwang, customary law begins to form when individual members of the community practice certain values, which guide their behaviour in the community. When these values gain widespread acceptance by community members, they become the customs of the community. A collection of customs practiced over time form the community's social norms and when the community's social norms are followed out of a sense of legal obligation by a critical mass of individuals in the community, they form the customary laws of that community.[166]

Communities use customary laws as channels for self-perpetuation.[167] In this chapter, I identify autopoiesis as one of the systemic characteristics that communities use to self-perpetuate.[168] The concept of autopoietic law is also useful for understanding the dynamism

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[163] William Thomas Worster 'The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (Winter, 2014) 45 Geo. J. Int'l L. 445.

[164] *Duport Steels Ltd v Sirs* [1980] 1 All ER 529, [1980] 1 WLR 142, [1980] IRLR 116, [1980] ICR 161 (House of Lords) (explaining the doctrine of precedent or stare decisis).

[165] See C Juma and JB Ojwang (eds) 'In land we trust: Environment, private property and constitutional changes' (1996) Initiatives Publishers, Nairobi.

[166] As above.

[167] Use of communication for self-production and self-perpetuation is the last systemic characteristic described in this chapter. See The New Science of Niklas Luhmann (n 39).

[168] See Viktor Winkler 'Immoral Law, Illegal Morals? NS Forced Labor Compensation and the Law'

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of legal systems and their resistance to outside forces.[169] Professor Luhmann embeds the inter-dependencies and interactions of autopoietic systems in communication.[170] In order to communicate its essential characteristics or components internally and externally, the system first distils them into a code or mode of communication that is unique to it.[171] This code or mode of communication can be conceived of as communicative acts. The legal system, for example, has a code of legal or illegal, such that norms, precepts, and practices from its environment are integrated into the legal system according to this legal or illegal criterion.[172] This code of legal or illegal or communicative acts can then interact with the system's environment, thus guiding the behaviour of the system's constituent elements.[173] Autopoietic legal systems generate legal norms and have the dynamic capacity to transform communities or to resist their transformation when those communities interact with other systems.[174] The legal norms that are generated by the communities and accepted by members of the communities as binding are therefore autopoietic subsystems of those communities and can be described, generally, as customary legal systems.[175]

(2002) 3 German Law Journal 1, 3 (describing this characteristic as the system's ability "to produce communications from within again and again, in order to "keep going""); John Gillespie (n 7); Nobles et al (n 9); Cassuto, DN (n 9) (discussing communication as a systemic characteristic).

[169] This is consistent with a system's self-definition and self-identification characteristic described in The New Science of Niklas Luhmann (n 39).

[170] As above.

[171] See Paterson, J & Teubner, G (n 97) (citing Professor Luhmann's discussion of the binary coding characteristic of law).

[172] As above. See also Karl-Heinz Ladeur 'The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern law' (1999) EUI Working paper LAW No. 99/3 (discusses the systems theory notion of autopoiesis as creating a better understanding of postmodern law).

[173] As above.

[174] As above.

[175] Cassuto, DN (n 9) (making references to Prof. Luhmann's systems theory notion of autopoiesis and discussing law as a system of communication).

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The customary practices of Rift Valley communities that I describe in chapter 2 are therefore the means through which the community system communicates its constituent elements from generation to generation.[176] These customary practices enable the community to adapt to its environment by continuously changing to maintain itself while maintaining its core essence.[177]

Using the imagery of the waters of a river, customary legal systems are similar to the channels of the river that help the waters to keep flowing continuously.[178] With the passage of time, these river channels become well defined and can keep the waters of the river flowing for generations.[179] Similarly, the customary legal systems of the communities ensure those communities' continuity and survival through generations.[180] Just as rivers flow through different tributaries and channels, customary legal systems exist alongside other sub-systems of the community that all ensure the continuity and survival of the larger community system.[181]

Even if scholars find consensus on the definition of customary law, they will still face the challenge of proving widely accepted customary practices in the Rift Valley region in the same way that such proof continues to bedevil Roman law, English law and international law scholars. There are no recognized monographs on African customary law and courts

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[176] See Paterson, J & Teubner, G (n 78) (citing Professor Luhmann's discussion of the binary coding characteristic of law).

[177] As above.

[178] Imagery of a river used to keep a community's values flowing from generation to generation is borrowed from African folklore from among the Luo community of Kenya who are described as River-Lake Nilotes. See Virginia Edith Wamboi Otieno vs Joash Ochieng Ougo and Omolo Siranga, Civil Case No. 4873 of 1986 (SM Otieno case) (describing the Luo people of Kenya).

[179] As above.

[180] See Winkler, V (n 168) 3 (describing this characteristic as the system's ability "to produce communications from within again and again, in order to 'keep going'").

[181] See Winkler, V (n 168) 3 (read together with the imagery of a river used to keep a community's values flowing from generation to generation).

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generally place the burden of proving customary law on the party alleging it.[182] This is similar to Australian and Canadian aboriginal law and indigenous law in South Africa and Tanzania, which are also not written.[183] Instead, these customary laws are passed on from generation to generation through oral traditions and practices and are always evolving to meet the needs of the community.

Courts in Australia, Canada, South Africa and Tanzania, like in Kenya, rely on expert testimony to prove the existence and validity of the community's customary practices. In *Richtersveld Community v Alexkor Ltd* (2003) 6 SA 104 (SCA) and *Alexkor Ltd v Richtersveld Community* (2004) 5 SA 460 (CC), the South African courts relied on witness testimony that the Richtersveld community "had mined and used copper for purposes of adornment" long before 1913.[184] The community smelted copper and mixed it with molten metal to make rings, beads, and ornaments.[185] The witnesses also demonstrated exclusivity of use and possession of the land through testimony that outsiders were not allowed to prospect for or mine minerals on the Richtersveld community's land.[186] Similarly, the Kenyan High Court case of *Virginia Edith Wamboi Otieno vs Joash Ochieng Ougo and Omolo Siranga*, Civil Case No. 4873 of 1986 (*SM Otieno case*), involved questions of Kikuyu and Luo burial customs in Kenya. The Luo are another community living in Kenya. The Court in the *SM Otieno case* relied on an expert witness to determine that Luo custom required a deceased adult male to be buried in his homestead or next to his father to avoid

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[182] See Eugene Cotran 'Casebook on Kenya Customary Law' (1987) Professional Books Limited and Nairobi University Press (summarizing customary law cases in Kenya); SM Otieno case (n 178).

[183] Brian Z. Tamanaha 'Understanding Legal Pluralism: Past to Present, Local to Global' (September, 2008) 30 Sydney L. Rev. 375 (stating that customary practices are usually unwritten in a fashion analogous to the common law).

[184] See Richtersveld Community v Alexkor Ltd (2003) 6 SA 104 (SCA) and Alexkor Ltd v Richtersveld Community (2004) 5 SA 460 (CC) (Richtersveld Community case) (discussing the struggles for recognition of communal tenure by the Richtersveld Community in South Africa).

[185] As above.

[186] As above.

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calamity falling upon the whole clan.[187] Although there is little written evidence of the customary laws of the communities living in the Rift Valley, the customary practices that I describe in chapter 2 where I discuss the communities traditional tenure systems, have been gathered from case summaries, similar studies, journal and media articles and general literature.[188]

1.5 OUTLINE OF THESIS

I divide the thesis into six chapters, with the first chapter being an introduction to my area of study and the last chapter concluding the study. As part of my introduction, I describe the background to my research on African communities' struggles for land tenure rights in the Kenyan Rift Valley. I also acknowledge other studies that have examined the interface between the formal state legal system and traditional tenure systems in Kenya. In the last part of my introduction, I describe my research methodologies and the theoretical concepts of systems theory, autopoiesis, social dominance theory, legal pluralism and customary law that underlie my model of Rift Valley communities as systems. The second chapter is focused on the traditional land tenure systems of Rift Valley communities that form the basis

[187] SM Otieno case (n 178).

[188] See Cotran, E (n 182); Chris Peers & Raffaele Ruggeri (illustrator) 'Warrior Peoples of East Africa 1840-1900' (2005) Osprey Publishing Ltd., (discussing the customs and traditions of the Maasai and the Nandi relating to militarization); See Dr. Ludwig Krapf 'Notes written by German missionary (Krapf notes)' (c. 1860) (accessed at the Kenya National Archives, Nairobi, in August 2017) (writing about the Maasai). See also John Galaty (n 7) (citing Dr. Krapf's descriptions of the Maasai); *Munyao Ndolo & 3 others v Mary Nduku Mutisya* [2018] eKLR (describing customary practices of Kenyan communities); Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Endorois case) (2003) 276 / 2003 (discussing customary practices of Kenyan communities); Various reports, letters and other correspondence between government officials before and after Kenya's independence in 1963 (Archived Documents)' (accessed at the Kenya National Archives, Nairobi, in August 2017) (writing about all Kenyan communities).

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of their customary land rights.[189] The communities that I have selected for this study have continued to maintain their diverse customary practices despite attempts by the colonial state and the neo-colonial state to suppress and eventually supplant these customary practices using the state statutory system. I chose the Maasai, Kikuyu, Nandi and Kipsigis because the Maasai lost the largest amount of land to European settlement in the Rift Valley[190], the Kikuyu represent the latest community migrants to the region,[191] while the Nandi and Kipsigis claim the Rift Valley to be their ancestral.[192] I examine cases, studies, articles and literature to understand the four communities' historical practices concerning their ownership, possession, occupation, use and enjoyment of their land.[193]

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[189] See Chapter 2.

[190] See Kameri-Mbote Dissertation (n 20); Kameri-Mbote (n 2) 103 - 124 (discussing the dispossession and displacement of the Maasai community in Kenya); UNHCR Report (n 2) 37 - 46 (discussing the state's dispossession and displacement of the Maasai community in Kenya); TJRC Report (n 2) Vol. IIB, sections 41 - 55 (discussing the origins of land-related problems in mainland Kenya); Akiwumi Commission Report (n 2) section 94 (discussing European settlements in the Rift Valley Province).

[191] As above.

[192] TJRC Report (n 2) Vol. IIB, sections 41 - 55 (discussing the origins of land-related problems in mainland Kenya); Akiwumi Commission Report (n 2) section 94 (discussing European settlements in the Rift Valley Province); CIPEV Report (n 5).

[193] I engage primarily with the following in this respect: Various reports, letters and other correspondence between government officials before and after Kenya's independence in 1963 (Archived Documents)' (accessed at the Kenya National Archives, Nairobi, in August 2017); *Ole Nchoko and Others, on behalf of themselves personally and on behalf of the Masai of Laikipia and on behalf of the Masai Tribe generally v. The Attorney General on behalf of the East Africa Protectorate Government and Others* ('Ole Nchoko High Court case'), High Court of East Africa at Mombasa, Civil Case No. 91 of 1912, (1914) 5 EALR 70; Macdonald, JRL (JRL Macdonald notes) 'Notes on the Ethnology of tribes met with during progress of the Juba Expedition, by Lt.-Col. (now General Sir) J. R. L. Macdonald' (1899) Journal of the Anthropological Institute for Great Britain and Ireland; A. C. Hollis (Text); Sir Charles Eliot (Introduction) 'The Nandi, Their

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The third chapter of this thesis is about the colonial and neo-colonial state's disruption of traditional property rights regimes in the Rift Valley region that continues to pose an existential threat to the state due to unhealthy competition over land resources, instabilities and conflicts in the region. The disruption interfered with the stability and hence integrity of the community systems thus forcing them to take corrective measures in search of that stability. In this chapter, I generally analyse the interface between the state legal system and traditional tenure systems from the perspective of the colonial state and its successor Kenyan state. The state disruption of the traditional tenure systems started in the 1890s after the colonial regime decided to construct the Kenya-Uganda railway and recognized Kenya's rich agricultural potential, particularly in the Rift Valley region. The colonial regime then used various tactics, including, without limitation, predatory legislation, compulsory acquisition of land, agreements or treaties and forced eviction, to create a European reserve, known as the 'White Highlands' or 'Scheduled Areas'.[194] The actions of the colonial state and the subsequent Kenyan state effectively dispossessed the communities of their land.[195] In section 3.4, I describe the disruptive effect of land dispossession on the power ingredients that each African community system has traditionally deployed to better interact with its environment, broadly defined to include the geography, climate, ecosystem, biodiversity and ontological totality of the territory that a community inhabits.

The fourth chapter of the thesis is about the clash between the formal state statutory system and the informal African customary system.[196] I use the lens of social dominance theory, or the tendency for human societies to hierarchize, to understand the colonial state's dominance over, and disregard of, traditional tenure rights in the Rift Valley region through

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Language and Folk-Lore' (1909) Oxford: Clarendon Press; G. R. Sandford 'An Administrative and Political History of the Masai Reserve' (1919) London: Waterlow & Sons Limited, London Wall.

[194] See J Lonsdale 'The conquest state 1895-1904' in WR Ochieng (ed) 'A modern history of Kenya 1895-1980' (1989) Cambridge University Press, 12.

[195] As above.

[196] See Chapter 4.

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state action.[197] Case law and general literature demonstrate the tendency of the state to recognize and enforce rights to land based on title deeds issued by the state itself, while disregarding rights and interests based on African customary law.[198] Some of the case law and literature point to a discriminatory view of African customs and traditions on the part of state officials, whereby the state considers such customs and traditions to be primitive or uncivilized and proceeds to disregard them altogether.[199]

In the fourth chapter, I also describe Kenya's new communal tenure framework. The Constitution of Kenya of 2010 ('the Constitution') recognizes community land that "shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest".[200] The Constitution then provides for the enactment of legislation to give effect to its provisions that recognize community land.[201] The Community Land Act No. 27 of 2016 entered into force on 7 September 2016 and provides for the recognition, protection and registration of community land rights and the management and administration of community land.[202] Kenya also enacted the National Land Commission Act No. 5 of 2012,[203] which outlines the functions and powers of the National Land Commission,

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[197] See section 1.4.3 for a discussion of social dominance theory.

[198] See, in general, the following: PL Onalo 'Land Law and Conveyancing in Kenya' (1986) Heinemann Kenya 190 - 191 (discussing the extinguishment of customary land rights through registration); *Popatlal v. Reichand* (1963) EA 69 (voiding a loan transaction because of failure to register a memorandum of equitable mortgage as per the Money Lenders Act); *Sela Obiero v. Orego Opiyo and Others* (1970) (High Court Civil Case no. 44 of 1970) (also confirming the extinguishment of rights through registration).

[199] As above. In Chapter 4, I discuss in more detail how the government used registration to disregard customary land rights. See also J Kenyatta 'Facing Mount Kenya' (1979) Secker and Warburg (London) 21 (discussing the importance of African customary systems).

[200] Constitution of Kenya of 2010 (n 1) art. 63(1).

[201] Constitution of Kenya of 2010 (n 1) art. 63(5).

[202] The Community Land Act 27 of 2016, Kenya Gazette Supplement No. 148 § 39 (Published by the National Council for Law Reporting).

[203] The National Land Commission Act 5 of 2012. Revised Edition 2016 [2015] (Published by the

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established under article 67 of the Kenya Constitution of 2010.[204] This National Land Commission is a state organ with the mandate to investigate present or historical land injustices like those perpetuated by previous state officials.[205] Kenya's new communal tenure framework, therefore, recognizes community land and provides a mechanism for communities to seek redress for their dispossession and displacement through the National Land Commission.

In the fifth chapter, I propose reforms to Kenya's new communal tenure framework to allow for more effective recognition and enforcement of customary land rights in the Rift Valley region of Kenya.[206] Other communities involved in similar struggles in Tanzania, South Africa, Canada and Australia offer useful lessons for Kenya in its quest to successfully implement its new communal tenure framework.[207] Court cases relating to customary land rights that have been brought before Kenyan courts, the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights, together with literature on inter-ethnic conflicts in the Rift Valley, are also helpful in determining whether the new legal framework is a step in the right direction.[208] The direction that I suggest in the

National Council for Law Reporting).

[204] Constitution of Kenya of 2010 (n 1) art. 67.

[205] Constitution of Kenya of 2010 (n 1) art. 67(2)(e).

[206] See Chapter 5.

[207] I discuss the recognition frameworks of other countries in Chapters 4 and 5. See also Moses M. Kusiluka and Dorice M. Chiwambo 'Acceptability of residential licences as quasi-land ownership documents: Evidence from Tanzania' (2019) 85 ELAUSP 176 - 182 (for a discussion of MKURABITA); Richtersveld Community case (n 184) (discussing the struggles for recognition of communal tenure by the Richtersveld Community in South Africa); Mabo v Queensland (n 22); Love v Commonwealth (n 12) (recognizing an Aboriginal status as creating a right to stay in Australia); Calder v Attorney General (n 22) (the Supreme Court of Canada recognized the Aboriginal rights of the Nishga people of northwestern British Columbia); Ian Peach (n 22) (for a discussion of the struggles for recognition by the Indians community in Canada).

[208] See In the Matter of the Ogiek Community Living in East Mau Forest (Joseph Letuya & 21 others v Attorney General & 5 others) [2014] eKLR http://www.kenyalaw.org (accessed 2 April 2020)

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fifth chapter is for the new communal tenure system to address the challenges that the Rift Valley communities have faced in seeking to enforce their customary land rights since annexation of Kenyan territory.[209] I conclude that recent legal developments in Kenya are steps in the right direction and their implementation may lead to effective recognition of customary land rights.[210] Nevertheless, I propose changes to the current implementation framework for the Community Land Act to help the African communities with their transition from the periphery to the core of the integrated Kenyan socio-economic system.[211]

1.6 OVERVIEW

This study is about creating a path for African communities to transition from the fringes to the centre of the integrated Kenyan socio-economic system through formal state recognition of their customary land rights. Kenya can learn from communities in Tanzania, South Africa, Australia and Canada that have faced similar struggles. Scholars have done similar studies concerning legal pluralism and recognition of minority rights.[212] However,

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(discussing the international conventions that emphasize the importance of recognizing and enforcing indigenous rights); Endorois case (n 188); CIPEV Report (n 5); TJRC Report (n 2) vol. IIB (discussing land-related conflicts in the Rift Valley region); Akiwumi Commission Report (n 2) (discussing tribal-based conflicts in the Rift Valley Province).

[209] Chapter 5.

[210] By recent legal developments in Kenya, I refer to the promulgation of the Kenya Constitution of 2010 recognizing communal tenure and the legislation and regulations enacted to implement it. See Constitution of Kenya of 2010 (n 1) art. 63(5), art. 63(1)(c); Community Land Act (n 19); Community Land Regulations (n 19); National Land Commission Act (n 205).

[211] See Chapter 5.

[212] See, for example, Taiaiake Alfred 'Peace, Power, Righteousness: An Indigenous Manifesto' (2009) Don Mills, ON: Oxford University Press, 2nd ed. (discussing Aboriginal self-determination in Canada); Bronislaw Malinowski 'Crime and Custom in Savage Society' (1926) Littlefield, Adams & Co. [1967 edition] (dealing with the concept of 'primitive jurisprudence'); Larry Chartrand 'Indigenous Peoples: Caught In a Perpetual Human Rights Prison' (2016) 67 UNBLJ 167 - 186 / (2016) 67 R.D. U.N.-B. 167 (dealing with indigenous rights versus state

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this study is timely because of Kenya's recent enactment of a new communal tenure legal framework. Proper implementation of this new communal tenure framework presents a viable path toward socio-economic integration of African communities in Kenya.

sovereignty); Dr. Morad Elsana 'Legal Pluralism and Indigenous Peoples Rights: Challenges in Litigation and Recognition of Indigenous Peoples Rights' (2019) 87 U. Cin. L. Rev. 1043; Jamie C.Y. Liew 'Finding Order in Calgary's Cash Corner: Using Legal Pluralism to Craft Legal Remedies for Conflicts Involving Marginalized Persons in Public Spaces' (2015) 52:3 Alta L Rev 605; Brian Z. Tamanaha 'Understanding Legal Pluralism: Past to Present, Local to Global' (September, 2008) 30 Sydney L. Rev. 375.

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CHAPTER 2 TRADITIONAL TENURE SYSTEMS IN THE RIFT VALLEY

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2.1 INTRODUCTION

Land tenure is a description of the "bundle of rights" that a person may possess over a parcel of land at a given time.[213] The bundle of rights includes rights of sale, possession, usufructus (use and enjoyment), lease and the rights to charge and to create easements over the parcel of land.[214] These rights denote a form of ownership of the parcel of land. Section 5 of the Kenya Land Act, No. 6 of 2012, names the following forms of land tenure: (a) freehold; (b) leasehold; (c) other forms defined by law, including easements; and (d) customary land rights, where consistent with the Constitution.[215] These land tenure rights can be held, generally, by individuals, groups and the Kenyan state. More recently, Kenya enacted a statutory framework for communities to hold these tenure rights as well under the Kenya Community Land Act of 2016 and its implementing regulations of 2017 and that I discuss in more detail in chapter 4.

In Kenya, the freehold, leasehold and easement forms of land tenure can be acquired through registration pursuant to the Land Registration Act No. 3 of 2012, the current statutory framework for registration of land rights in Kenya. Registration refers to the entry of established rights onto the land register and issuing a title deed, which confers absolute and indefeasible property rights on the holder of the certificate of registration of title.

However, the customary land rights form of tenure is conferred by or derived from African customary law, customs or practices, provided that such rights are not inconsistent with the Constitution or any written law.[216] Such customary land tenure rights are, therefore, "traditional" in the sense that they are based on the communities' customary practices. The customary practices of Rift Valley communities are useful in understanding the communities as systems. As discussed in the previous chapter on concepts and theories, a community's customary practices are influenced by its social, economic and political context and are transmitted from generation to generation as a self-preservation mechanism for the

[213] Kameri-Mbote Dissertation (n 20) Ch. II, p. 40.

[214] Onalo, PL (n 198) p. 19.

[215] See Land Act (n 1) section 5.

[216] Community Land Act (n 19) section 2.

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community system. These customary practices develop with the passage of time and are a product of the community system's interaction with its environment, broadly defined to include the geography, climate, ecosystem, biodiversity and ontological totality of the territory that a community inhabits.

In this chapter, I describe the customary practices of Rift Valley communities that form the basis of their customary land tenure rights. I analyse the interface between these traditional tenure systems and the formal state legal system from the perspective of the Rift Valley communities. The communities that I have selected for this study - the Pastoral Maasai, Kikuyu, Nandi, and Kipsigis (collectively, the Rift Valley communities) have continued to maintain their diverse customary practices despite attempts by the colonial state and the neo-colonial state to suppress and eventually supplant these customary practices using the state statutory system.[217]

Rift Valley communities differ greatly in their land use practices, economic specialization, social complexity, political organization, and material products, related to differences in population size and density, related in turn to differences in the areas they previously occupied, their fragmentation, and in opportunities for subsistence and for intensifying food production. The most glaring difference between food production practices among the pastoral Maasai, Kikuyu, Nandi and Kipsigis is the pastoral lifestyle of the pastoral Maasai, the crop cultivation of the Kikuyu and mixed pastoralism and crop cultivation of the Nandi and Kipsigis. These differences in food production constitute a major cause of the disparities between the Rift Valley communities that I discuss in this chapter. The Rift Valley communities, generally, also had major differences with the European settler community in the Rift Valley stemming from the European's much longer history of densely populated, economically specialized, politically centralized, interacting and competing social systems dependent on food production.

In describing the customary practices of the Rift Valley communities, I view them metaphorically as an onion with the practices that we can observe today constituting only the surface that, when peeled, leads to an understanding of older customary practices that

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[217] See as above. See also Robert L. Tignor, The Colonial Transformation of Kenya: The Kamba, Kikuyu, and Maasai from 1900 to 1939 (1976) Princeton University Press (discussing the colonization process from the perspective of three different African tribes).

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themselves need to be peeled back in search for a better historical understanding of the communities' customs and traditions.

I begin the chapter with a discussion of the dual nature of property rights regimes that we can observe in Kenya today. Whereas the act of registration confers freehold and leasehold tenure rights on the holder of a certificate of registration of title, customary land rights exist through customary practices subject to their recognition by the state. This dual tenure system is the metaphorical onion that we must peel to better understand the underlying customary practices.

I then outline the observable constellations of power that the communities have developed with the passage of time to effectively and efficiently interact with the environment that they live in. These power factors include intensive food production, high population density, economic specialization, social stratification, political organization, information, and technological advancements.[218] The power factors enable the communities that possess them to nourish themselves better, reproduce better and, generally, dominate other communities that inhabit the same area.

I end the chapter with illustrative descriptions of property rights regimes among the pastoral Maasai, the Kikuyu, Nandi and Kipsigis communities, including concrete examples of the competition over land resources by these communities. These Rift Valley communities continue to demonstrate resilience and to resist the disruption caused by the colonial state system and its successor Kenyan state system. Resilience is the ability of the community to persist, recover and thrive in the face of disruption.[219] It is the capacity of a system to avoid disturbance and reorganize while undergoing change, in order to retain

[218] See Diamond, J 'Guns, Germs, and Steel: The Fates of Human Societies' (1999) W. W. Norton & Company, Inc., New York, NY 15-16 (describing the power factors that systems use to attain and maintain dominance over others).

[219] B.E. Aguirre 'Dialectics of Vulnerability and Resilience' (Winter, 2007) 14 Geo. J. Poverty Law & Pol'y 39, 41 (describing resilience as "an example of morphostasis--that is, a process directed to preserve the social system"); J. B. Ruhl 'Adaptation and Resiliency in Legal Systems: General Design Principles for Resilience and Adaptive Capacity in Legal Systems – With Applications to Climate Change Adaptation' (June, 2011) 89 N.C.L.Rev. 1373 (describing resilience in legal systems).

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essentially the same function, structure, identity, and feedback loop mechanisms.[220] It is these negative and positive feedback loop mechanisms that help to maintain the system within a homeostatic range or equilibrium that ensures its survival or long-term stability despite disruption.[221] This resilience was evidenced by the communities' demands for repossession of their land and was one of the factors that led to Kenya's independence from colonial rule.[222] The communities' struggles for tenure rights have continued and state mitigation strategies through resettlement programs have been ineffective.[223] I discuss the state resettlement programs in my discussion of Kikuyu land tenure systems because the programs resulted, generally, in mostly members of the Kikuyu community being settled in land that was formerly owned by European settlers.[224] I also discuss the tribal clashes of 1991-1998 and post-election violence of 2007-2008 as self-help tactics by majority Nandi

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[220] As above. See also King, M (n 51) (explaining the operations of social systems in language similar to the self-preservation process or resilience).

[221] In chapter 2, I explained that a state of equilibrium between a system's component parts is known as homeostasis. See also Calnan, A (n 46) p. 325 (explains that social systems maintain social homeostasis in the same way that the human body maintains biological homeostasis).

[222] This will be discussed in more detail in section 2.4.2.2. 'Mau Mau' is a play on the words: 'Mzungu Arudi Ulaya, Mwafrika Apate Uhuru', meaning 'white man return to Europe, African get freedom'. See Wunyabari O. Maloba 'Mau Mau and Kenya, An Analysis of a Peasant Revolt' (1993) East African Educational Publishers Ltd., p. 144; Kimathi and Others v Foreign & Commonwealth Office (Mau Mau litigation - Kimathi) [2018] EWHC 2066 (QB), [2018] All ER (D) 145 (Aug).

[223] The struggles for repossession of community land by Rift Valley communities is captured in various reports following ethnic violence in the Rift Valley. See CIPEV Report (n 5); TJRC Report (n 2); Akiwumi Commission Report (n 2).

[224] As above. See also 'The Nakuru County Peace Accord' (19 August 2012) available at https://peacemaker.un.org/sites/peacemaker.un.org/files/KE_120819_NakuruPeaceAccord.pdf (accessed on March 28, 2020) (a peace agreement between the Kikuyu community and, primarily, the Nandi and Kipsigis communities, to address the longstanding dispute over land ownership in the Rift Valley region).

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and Kipsigis community members to forcefully evict other communities from their alleged ancestral land.[225]

The descriptions of property rights regimes that I give in this section are not based on my own legal anthropological study of these communities but on customary practices that have been summarized in landmark court cases such as the *Ole Nchoko case* by the Maasai community[226] and the case against Chief Kioi by members of the Kikuyu community[227], articles and journals.[228] Furthermore, I focus my descriptions on the constellations of power factors that have enabled these communities to better interact with their environments and to develop the resilience necessary to persist and thrive as systems despite colonial and neo-colonial disruption.

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[225] See also TJRC Report (n 2) Vol. IIB; Akiwumi Commission Report (n 2); CIPEV Report (n 5) (discussing continuous ethnic-based violence in the Rift Valley region that typically coincides with national elections).

[226] Ole Nchoko and Others, on behalf of themselves personally and on behalf of the Masai of Laikipia and on behalf of the Masai Tribe generally v. The Attorney General on behalf of the East Africa Protectorate Government and Others, High Court of East Africa at Mombasa, Civil Case No. 91 of 1912 (hereainafter "Ole Nchoko High Court case").

[227] Kimani wa Kanoto and Kitosho wa Kanoto vs Kioi wa Nagi (c. 1920) (hereinafter "Landmark land case against Chief Kioi", reviewed as part of the Various reports, letters and other correspondence between government officials before and after Kenya's independence in 1963 (Archived Documents)' (accessed at the Kenya National Archives, Nairobi, in August 2017)).

[228] See Peers, C et al (n 188) (writing about the Maasai and Nandi); Cotran, E (n 20) (contains case summaries of cases relating to customs and traditions of the Rift Valley communities and other Kenyan communitites); Krapf notes (n 188) (writing about the Maasai). See also John Galaty (n 7) (citing Dr. Krapf's descriptions of the Maasai); Munyao Ndolo & 3 others v Mary Nduku Mutisya [2018] eKLR (describing customary practices of Kenyan communities) (describing customary practices of Kenyan communities); Endorois case (n 188) (discussing customary practices of Kenyan communities); Archived Documents (n 227) (writing about all Kenyan communities).

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2.2 THE DUAL NATURE OF PROPERTY RIGHTS REGIMES IN KENYA

The possibility of individuals, groups and communities acquiring tenure rights through registration and titling, on the one hand, and through state recognition of customary land rights, on the other, is a result of the dual nature of property rights regimes in Kenya that started during colonial rule. The colonial state's policy of dispossession of African land without compensation created a dual tenure system in the East African territory; a colonial tenure system for expropriated land and customary tenure systems for lands that continued to be inhabited by African communities. According to section 2.2.3 (23) of the National Land Policy, 2009, the net effect of these tenure systems on land administration was to perpetuate a dual system of economic relationships consisting of an export enclave controlled by a small number of European settlers and a subsistence periphery operated by a large number of African peasantry.[229] Whereas the colonial tenure system existed formally by statute, customary tenure systems existed by default in areas occupied by Africans and which had not been expropriated by the colonial state. Even today, customary tenure systems still exist by default over unregistered land awaiting confirmation through registration.

The colonial and neo-colonial state policy preference was to privatize property rights through registration and titling, but this process of consolidation, adjudication and registration of land rights is yet to be completed fifty-seven (57) years after Kenya gained its independence from British colonial rule. As a result, pre-colonial notions of property continue to prevail among African communities, especially those living in unregistered land. According to a study by the National Land Commission, a majority of Kenyan land remains unregistered and will continue to be owned, used and managed according to the customary practices of the African communities that inhabit the unregistered land.[230] The African

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[229] Republic of Kenya (Ministry of Lands) 'Sessional Paper No. 3 of 2009 on National Land Policy (National Land Policy of 2009)' (August, 2009) National Legislative Bodies / National Authorities, chapter 2, section 2.2.3 (23), available at http://extwprlegs1.fao.org/docs/pdf/ken163862.pdf (accessed 25 April 2020).

[230] Patricia Kameri-Mbote (Kenya Country Coordinator) 'Kenya Land Governance Assessment Report' (27 June 2016) World Bank Document, p. 21, available at http://documents.worldbank.org/ (accessed 27 April 2020).

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communities that depend on these unregistered lands for their livelihoods continue to operate under customary tenure in an epic struggle to unshackle their customary tenure system from the shackles of inequality that the colonial state and neo-colonial state meted on it.

A discussion of the customary practices under both tenure systems is helpful to identify the power ingredients that each community system has deployed to better interact with its environment so that its members can still feed themselves, reproduce, and remain connected to each other. An understanding of these power ingredients may also shed more light on why the communities consider such practices or norms to be consistent with their value systems, their policies, their ideologies, ideas of justice, morality and other conditions of validity of laws. Identifying these power ingredients is also helpful in understanding the interaction between the diverse communities inhabiting the Rift Valley that also form part of each other's environment.

As I stated in the previous chapter on social dominance theory, when different community systems interact, they tend to create hierarchical social structures to ensure the provision of prestige, social power and privilege for individual members of the hierarchical society. Stability in hierarchical societies is then sustained through the normative endorsement of forms and ideologies that preserve, perpetuate and promote the hierarchical structures. Walter Rodney in his book, *How Europe Underdeveloped Africa*, discusses the maintenance of this group-based hierarchical structure through an analysis of power relations.[231] He defines power as the ability to defend one's interests and, if necessary, to impose one's will by any means available.[232] Jared Diamond in his book, *Guns, Germs, and Steel: The Fates of Human Societies,* has argued that communities with a long history of living in densely populated, economically specialized, politically centralized social systems tend to develop constellations of power factors that enable them to dominate communities that lack the same power ingredients.[233] He lists these power factors as intensive food production, high population density, economic specialization, social stratification, political organization, information, and technological advancements.[234] In the next section, I focus

[231] Rodney, W 'How Europe Underdeveloped Africa' (2012) Pambazuka Press 224.

[232] Id.

[233] Diamond, J (n 218) pp. 15-16.

[234] Id.

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on how these power factors have enabled some communities to influence the distribution of land resources in the Rift Valley region.

2.3 THE INFLUENCE OF "ENVIRONMENT" IN SHAPING NOTIONS OF PROPERTY

This section is about the community systems' interaction with their environments, broadly defined to include the geography, climate, ecosystem, biodiversity and ontological totality of the territory that a community inhabits. The environment of a community system constitutes the social, economic and political context in which the community operates. As described in the previous chapter under systems theory, the environment contains elements that are useful for a community's self-production and self-sustenance. Within this context, a community eventually arrives at a framework of interaction with its environment that maintains an acceptable equilibrium between the various elements of the environment. This framework of interaction is developed and maintained based on the community system's power or ability to defend its interests or to impose its will against other elements in its environment.

A community's interaction with its environment helps it to identify power factors that can enable its members to nourish themselves better, reproduce better and, generally, dominate other communities that inhabit the same area. As outlined in the previous section, these power factors are intensive food production, high population density, economic specialization, social stratification, political organization, information, and technological advancements.[235] The many distinctive features of the Rift Valley region's geography, climate, ecosystem, biodiversity and ontological totality of the territory provide an explanation for the differences among the communities' customary practices based on these power factors.

Starting with food production, a major difference between the pastoral Maasai, Kikuyu, Nandi and Kipsigis is the pastoral lifestyle of the Maasai, the crop cultivation of the Kikuyu and the mixed pastoralism and crop cultivation of the Nandi and Kipsigis. Food production and the accumulation of a surplus is critical for the development of other power

[235] Id.

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factors. Food production leads to high population densities and the resources necessary to sustain more centralized militaries and political bureaucracies. Communities with food surpluses can also acquire technology and other ingredients of power through interaction with other communities, whether through intermarriage or trade. Colonialism had profound effects on customary practices of Rift Valley communities as well as on their interaction with their environment. In the next section, I discuss the customary practices of the Rift Valley communities based on these power ingredients and how the customary practices have contributed to their struggle to assert their customary tenure rights.

2.4 ILLUSTRATIVE DESCRIPTIONS OF PROPERTY RIGHTS REGIMES AMONG THE MAASAI, KIKUYU, NANDI AND KIPSIGIS

In this section, I describe property rights regimes among the pastoral Maasai, the Kikuyu, Nandi and Kipsigis communities, including concrete examples of the competition over land resources by these communities. The labels Maasai, Nandi Kipsigis and Kikuyu, however, conceal much more variation among the communities than the differences between the individuals that make them up and that live in the Rift Valley region. These illustrative examples of property rights regimes of Rift Valley communities are useful in understanding the communities as systems. As explained earlier in this chapter, Professor Luhmann's systems theory notion of autopoietic law helps to explain how the community system is self-referential, self-sustaining and self-proliferating in a way that uniquely serves and symbiotically defines the community even though individuals within it may differ.[236] The community distils and integrates its norms, practices and other core characteristics into a customary legal system and then communicates these customary practices from generation to generation.[237] Each of the communities first accept to be identified by an identity marker or name that embodies core characteristics of that community. The "Maasai" name, for example, refers to a Maa-speaking, pastoral and war-like social grouping as against those people who do not embody similar traits.[238] The "Nandi" and "Kipsigis" identity markers

[236] The New Science of Niklas Luhmann (n 39).

[237] See John Gillespie (n 7) (describing law as a system of communications).

[238] See Krapf notes (n 188). See also John Galaty (n 7) (citing Dr. Krapf's descriptions of the Maasai).

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also refer to social groupings that speak a Kalenjin dialect and that are cattle-keeping and known to ferociously defend their territory against foreigners.[239] The "Kikuyu" refer primarily to an agricultural social grouping that practice a form of individual tenure known as "Gethaka" or "Githaka", meaning bush or woodland in their language.[240] The use of accepted identity markers or ethnic labels within the community is an example of the community system's self-referential characteristic, as explained in the previous chapter.[241]

The Rift Valley communities developed along very different lines and their development illustrates how environments can affect the customary practices of community systems. As I discuss in chapter 3 under the subheading 'Rift Valley land resources', only a small area within the vast Rift Valley region has sufficient rainfall for tropical farming. For most of the Rift Valley region, the inhabitants have no alternative but to resort to pastoralism which entails moving around in groups with their livestock in search of pasture and water. The pastoralists shift camp along regular seasonal routes to take advantage of predictable seasonal changes in pasturage.

This section begins with a discussion of the pastoral Maasai's customary practices followed by the customary practices of the Kikuyu before describing a form of mixed pastoralism and farming of the Nandi and Kipsigis. I also discuss each community system's struggle to assert its customary land rights, such as through court cases like the *Ole Nchoko case* by the Maasai community or the case against Chief Kioi by members of the Kikuyu community. I also discuss the forced eviction of foreigners by the Kikuyu community against European settlers during the Mau Mau uprising and by the Nandi and Kipsigis communities against other African communities during tribal clashes (1991-1998) and post-election violence (2007-2008). These descriptions of the Rift Valley community systems

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[239] Archived Documents (n 188); George Wynn Brereton Huntingford 'The Nandi of Kenya: Tribal Control in a Pastoral Society' (1953) Routledge & Paul; A. C. Hollis (Text); Sir Charles Eliot (Introduction) 'The Nandi, Their Language and Folk-Lore' (1909) Oxford: Clarendon Press; J. G. Peristiany 'The Social Institution of the Kipsigis' (1939) London: George Routledge & Sons, Ltd.

[240] Archived Documents (n 188); Landmark land case against Chief Kioi (n 227).

[241] See The New Science of Niklas Luhmann (n 39).

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illustrate their resilience and ability to persist and thrive as systems despite colonial and neo-colonial disruption by the state.

2.4.1 THE PASTORAL MAASAI

The "Maasai" or "Masai" is an identity marker or ethnic label that describes a social grouping inhabiting the Kenyan Rift Valley. They are a Nilotic-speaking people, like the Nandi and Kipsigis, who in the late 17th century or early 18th century migrated in a south-easterly direction from the region north of present day Lake Turkana and near the River Nile.[242] Professor Galaty explains that "Maasai", as a name, designates specific persons and groups; but as a concept, it embodies the specific values and qualities accepted and manifested by members of the community system.[243] This identity marker helps us to identify this social grouping and to constructively engage in a discussion on how to recognize its customary land rights more effectively.[244] Professor Galaty describes "Maasai" as embodying a generally accepted set of values referring to Maa-speaking people who are brave, strong and arrogant and who wear distinct and special ornaments.[245] The name "Maasai" therefore refers to this social grouping of brave Maa-speakers to the exclusion of other non-Maa-speaking peoples and individuals inhabiting the same territory.

There are essential characteristics that have become associated with the group of individuals identified as "Maasai", such as pastoralism, language, demeanor, dress, economic practice, and other core characteristics that are active in shaping their own customary practices.[246] These characteristics are defined by the social grouping itself and have led to this social group being referred to as the "Maasai."[247] German missionary, Dr.

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[242] See Dr. Ludwig Krapf 'Notes written by German missionary (Krapf notes)' (c. 1860) (accessed at the Kenya National Archives, Nairobi, in August 2017).

[243] John Galaty (n 7) p. 3.

[244] John Galaty (n 7) p. 16.

[245] John Galaty (n 7) p. 4.

[246] See Peers, C et al (n 188) pp. 5-12 (describing the Maasai); Krapf notes (n 188) (writing about the Maasai). See also John Galaty (n 7) p. 9 (citing Dr. Krapf's descriptions of the Maasai).

[247] See also John Galaty (n 7) p. 3-4.

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Ludwig Krapf, in his writings of around 1860 or 1861 that are available at the Kenya National Archives, described in detail some of the core "Maasai" characteristics that I discuss in this section.[248]

The Maasai community inhabited large territories of land in East Africa before the arrival of the Europeans. They are a nomadic and pastoralist people.[249] Krapf refers to the Maasai by various names, such as "Masai", "Wakuifi", "Orloikob", "Loikob", "loigob", all of which mean "the possessors of the land".[250] The description of this group as "possessors of the land" is appropriate, because, as pastoral tribes, the Maasai considered themselves the exclusive possessors of the plains and wildernesses, with their springs and rivers.[251] The initial British explorers in East Africa found the Maasai occupying large plains in the interior of Eastern Africa, which extend from about two degrees north of the Equator to about four degrees south of it.[252]

As pastoral communities, the Maasai invest their wealth mainly in livestock; cattle, goats and sheep. Around 1914, it was estimated that the Masai numbered about six-hundred thousand (600,000) people and owned approximately seven-hundred fifty thousand (750,000) head of cattle.[253] The Maasai, as most pastoralist communities do, need livestock for their nourishment and live entirely on milk, butter, honey and the meat of black cattle, goats and sheep, and on the game which they hunt.[254] In accordance with their custom, they believe that the nourishment afforded by agricultural produce leads to weakness and therefore they shun agricultural produce.[255] Instead, they believe that they gain strength and

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[248] Krapf notes (n 188).

[249] As above. See also Peers, C et al (n 188) pp. 5-12; John Galaty (n 7) p. 4.

[250] John Galaty (n 7) p. 9 (describing Krapf's ethnic labels for the Maasai). See also Krapf notes (n 188) (describing the Maasai).

[251] As above.

[252] Kieyah, Joseph (n 24) 400.

[253] Krapf notes (n 188).

[254] G. Nasieku Tarayia 'The Legal Perspectives of the Maasai Culture, Customs, and Traditions' (Spring, 2004) 21 Ariz. J. Int'l & Comp. Law 183, 186-187.

[255] John Galaty (n 7) pp. 6-7; Peers, C et al (n 188) p. 11.

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courage from feeding on meat and milk.[256] The Maasai young men also need livestock to marry and, when advanced in years, to become elders of the community.[257] The Maasai value their livestock so much, because they believe that Engai (God) bestowed upon them cattle and that no other nation or tribe had the right to possess any cattle.[258]

The Maasai also have a custom and tradition for centuries of moving around with their cattle, goats and sheep in search of water and pasture to feed them.[259] Their movement was traditionally planned in a way that allowed vegetation in overgrazed areas to regenerate before moving back with their cattle.[260] Wherever they found water and grass for their livestock, they would set up camp together for months until the rains stopped and the grass was gone.[261] They would then break camp and move again to greener pastures.[262] Their most-favoured grazing grounds in the Rift Valley region lay between Lakes Nakuru and Naivasha.[263] The map of Kenya reproduced below, shows the location of lakes Nakuru and Naivasha in the former Rift Valley province.

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[256] As above.

[257] E. Cotran 'Restatement of African Law: Kenya, The Law of Marriage and Divorce' (1968) London: Sweet & Maxwell, vol. 1, p. 159 (discussing marriage consideration under Maasai culture).

[258] John Galaty (n 7) p. 6; Krapf notes (n 188).

[259] As above.

[260] TJRC Report (n 2) vol. IIB, chapter 2, section 58, pp. 181-182.

[261] As above.

[262] As above.

[263] As above.

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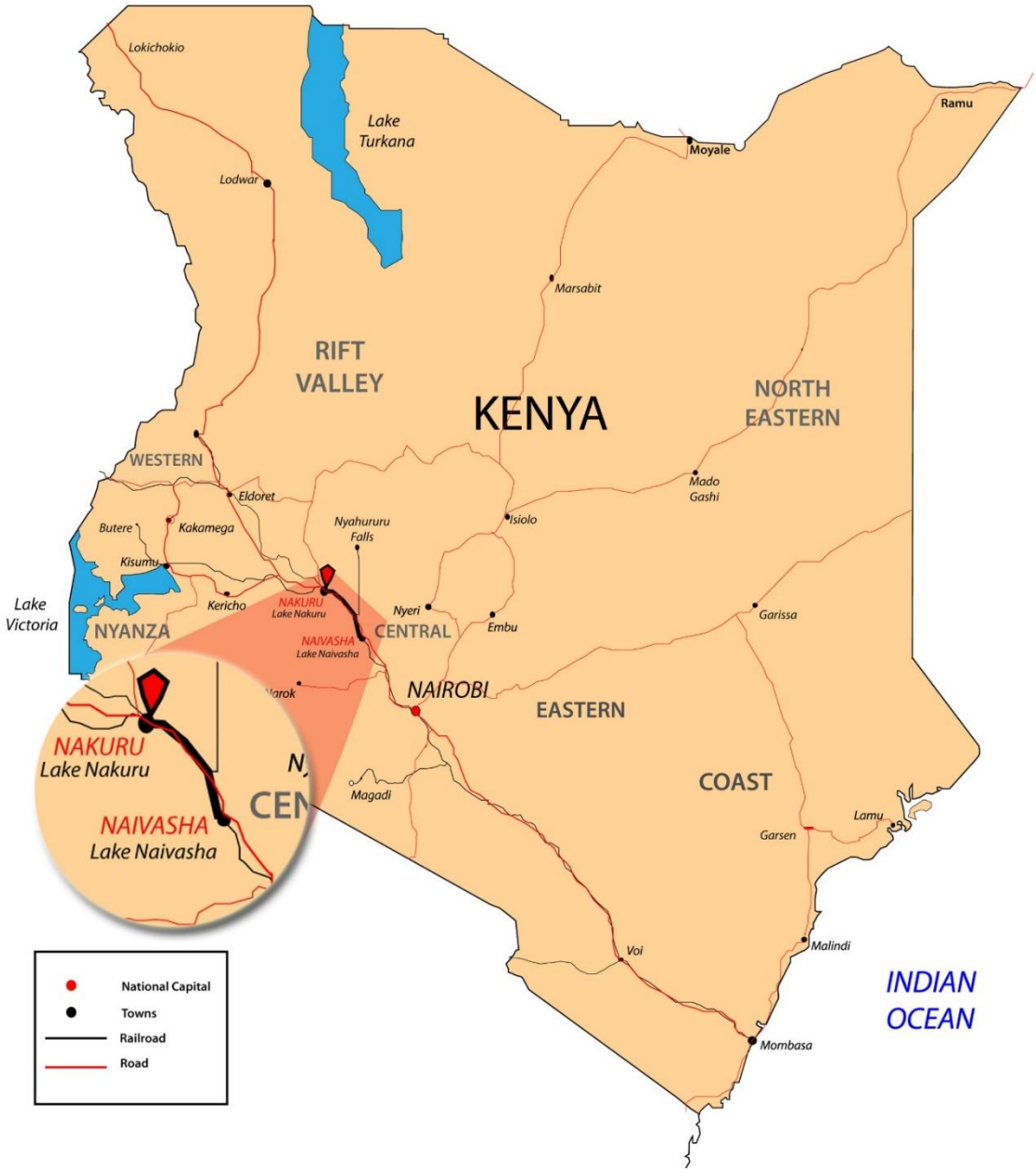

Source: Central Intelligence Agency, The World Factbook available at https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html (Accessed on March 27, 2020)

From around 1860 when Krapf came in contact with them, the Maasai maintained rights of access and control over pasture and water resources for their livestock.[264] They

[264] Krapf notes (n 188); Peers, C et al (n 188) pp. 5-6.

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engaged in warfare with rival communities and even among themselves to safeguard their access and control rights to water and pasture.[265] The Maasai also maintain a small number of kraals, which refers to a village made up of huts known as 'manyattas', typically enclosed by a fence.[266] The Maasai warriors would return to their Kraals annually.[267] The Kraals, however, remained few and frequently uninhabited.[268] Below is a model of a Maasai manyatta:

Source: Picture taken by Author at an exhibition in Kenya in August 2019.

[265] As above.

[266] Peers, C et al (n 188) p. 11.

[267] As above. See also Krapf notes (n 188).

[268] As above.

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The Maasai customarily conducted raids against other communities to acquire livestock or to safeguard their access and control rights over water sources and green pasture.[269] The custom of raiding led to the custom of militarization of their youth.[270] All the male members of the community aged between approximately sixteen (16) and twenty-five (25) years submit to a special military discipline and constitute the warrior class of the community.[271] The males are divided into boys, warriors and elders.[272] The boys are uncircumcised and, after circumcision, become warriors or "muran" or “moran”, meaning those who have been circumcised at about the same time and belong to the same age group.[273] The political leadership of the Maasai is not with the elders or chiefs, but with the Muran or warriors who are governed by ideals of military comradeship and aim to distinguish themselves in battle.[274] Under Maasai custom, elders can only advise; the actual decision in any particular case rests with a council of the moran/muran or warriors.[275]

The Maasai also traditionally relied on medicine men for the divination of future events, administering medicine, conducting rites associated with rainmaking or circumcision, directing raids, providing medicine and, generally, practicing witchcraft.[276] The Maasai designate sacred areas where they traditionally performed socio-cultural rituals and ceremonies.[277] For example, they worshiped their God (Engai) in the hills of the Rift Valley and in neighbouring areas like the Ngong Hills.[278] The slopes of the Kinangop Hills, for example, were well known among the Maasai for circumcision rites and ceremonies such

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[269] Peers, C et al (n 188) p. 6.

[270] Peers, C et al (n 188) pp. 10-11.

[271] As above.

[272] As above.

[273] As above.

[274] As above.

[275] As above. See also Krapf notes (n 188).

[276] Peers, C et al (n 188) p. 12.

[277] Kieyah, Joseph (n 24) 431

[278] John Galaty (n 7) pp. 11-12.

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as the E-Unoto Ceremony, a rite of passage for young men from the warrior class to the council of elders.[279]

When the Europeans arrived, nomadic pastoralism prevailed among the majority of the Maasai because the lands that they inhabited were arid and semi-arid and, therefore, lacked sufficient rainfall and suitable soil for them to practice sedentary food-production. However, some subsets of the Maasai had begun practicing some form of mixed farming and pastoralism even before the arrival of the Europeans in some of the fertile and well-watered areas that were highly suitable for crop farming. Some sedentary Maasai villages based on crop farming were already in existence in the Rift Valley region before the arrival of European settlers. The European settlers did not want any members of the Maasai community inhabiting the land adjacent to the Uganda Railway line and therefore sought creative ways to dispossess them of all the land near the railway line.

2.4.1.1 THE ANGLO - MAASAI AGREEMENTS OF 1904 AND 1911

The community inhabiting the Rift Valley region that lost the largest acreage of land due to the creation of the White Highlands/Scheduled Areas was the Maasai community. The Maasai possessed the land on both sides of the Kenya-Uganda railway before the creation of the White Highlands. The land that European settlers wanted was adjacent to the Uganda Railway line and there was concern about the Maasai being allowed to also reside near it. The general preference was not to allow the Maasai near European settlements because of the militarization culture of the Maasai that the Europeans feared.[280]

The European settler community used the power ingredient of information to exert dominance over the pastoralist Maasai. Information about Maasai customary practices had already spread to Europe through writings by European explores and missionaries such as

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[279] Tarayia, GN (n 254) 187.

[280] See Archived Documents (n 188) (containing the colonial state's concerns about allowing the Maasai communities living near European settlers). See also W. T. W. Morgan 'White Highlands' of Kenya (June, 1963) The Geographical Journal, Published by: The Royal Geographical Society (with the Institute of British Geographers), Vol. 129, No. 2, pp. 140-141, available at https://www.jstor.org/stable/1792632 (accessed 24 April 2020).

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Dr. Krapf. Such written information could be spread more widely and more accurately through writing than it could be transmitted by word of mouth. Writing was also used to create unilateral agreements with whole communities to the benefit of the Europeans. Because of lack of information, the Maasai community naively believed that agreements with the Europeans would benefit them as a community. They agreed to move whole communities from large areas of the Rift Valley to the benefit of the Europeans. The members of the Maasai community had no way of understanding that the Europeans were bent on dispossessing them of all their prime land. The information asymmetry between the European settlers and the Maasai enabled the Europeans to dispossess the Maasai communities of their land through the Anglo - Maasai Agreements of 1904 and 1911.[281]

The aim of the 1904 agreement was to remove the Masai into reserves away from the railway line and away from any land that may be thrown open to European settlement.[282] The Masai agreed to vacate the Rift Valley and to retire into two reserves, one north of the railway line (Laikipia/Northern Masai Reserve) and the other south of the railway line (Narok/Southern Masai Reserve). A road communication was reserved between the two districts.[283] On August 9, 1904, the British High Commissioner to the East African Protectorate, Sir Donald Stewart, held a meeting with the Maasai chiefs at Naivasha and asked them if they were agreeable to move to other lands of their own free will and to give up the Rift Valley to European settlement.[284] The Maasai who attended the meeting agreed and Sir Donald Stewart made a formal agreement with them.[285] Later, Sir Donald Stewart

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[281] Office of the United Nations High Commissioner for Human Rights 'The Anglo-Maasai-Agreements/Treaties-A Case of Historical Injustice and the Dispossession of the Maasai Natural Resources (Land), and the Legal Perspectives (Anglo-Maasai Agreements)' (Dec. 15-17, 2003) 2.0 HR/GENEVA/TSIP/ SEM/2003/BP.7; TJRC Report (n 2) vol. IIB, section 56 et seq., p. 181, et seq.

[282] Morgan, WTW (n 280) pp. 140-141.

[283] Anglo-Maasai Agreements (n 281).

[284] As above.

[285] As above.

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held another meeting with the Maasai chiefs and other members of the Maasai community at another location at which the agreement was read and explained to them.[286]

As part of the 1904 agreement, Sir Donald Stewart agreed to reserve at least five square miles of land at a point on the slopes of Mount Kinangop where the Maasai community could perform their circumcision rites and ceremonies, such as the E-Unoto ceremony.[287] Sir Donald Stewart also agreed to create a road across the Kinangop plateau by which the Maasai could travel between the areas reserved for the two sections of the community.[288] Under the terms of the 1904 Agreement, the Maasai community agreed as follows: "…and by the removal of the foregoing sections to the reserve we undertake to vacate the whole of the Rift Valley to be used by the Government for purposes of European settlement."[289] It is estimated that through the Maasai Agreement of 1904, approximately eleven thousand two hundred (11,200) members of the Maasai community, with over two (2) million heads of livestock, lost their land to only forty-eight (48) Europeans.[290]

The aim of the 1911 agreement was to reunite the Masai by the Masai of the Northern Reserve / Laikipia agreeing to vacate Laikipia and to occupy a reserve south of the railway line and directly east of the original Southern Masai Reserve.[291] The Maasai leaders agreed to the terms of the new agreement so that they would be united in an extended Maasai Southern Reserve rather than be split into the Maasai Northern Reserve in Laikipia and the Maasai Southern Reserve in and around present day Narok District.[292] The agreement, as drafted, was submitted to the Secretary of State, who approved of its terms, by telegram, on May 29, 1911, and by despatch on June 2, 1911.[293] The Maasai and the Nandi communities lost an estimated five (5) million hectares of land to European settlers.[294]

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[286] As above.

[287] As above. See also a summary of the E-Unoto Ceremony in section 2.4.1.

[288] Anglo-Maasai Agreements (n 281).

[289] Anglo-Maasai Agreements (n 281) (quoting the text of the Maasai Agreement of 1904).

[290] TJRC Report (n 2) vol. IIB, section 59, p. 182.

[291] Anglo-Maasai Agreements (n 281).

[292] As above.

[293] As above.

[294] TJRC Report (n 2) vol. IIB, section 104, p. 198.

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2.4.1.2 THE OLE NCHOKO CASE

The Maasai filed a lawsuit captioned *Ole Nchoko and Others, on behalf of themselves personally and on behalf of the Masai of Laikipia and on behalf of the Masai Tribe generally v. The Attorney General on behalf of the East Africa Protectorate Government and Others ("Ole Nchoko case")*, High Court of East Africa at Mombasa, Civil Case No. 91 of 1912, alleging wrongful removal by the colonial Government from Laikipia in violation of the Anglo - Maasai Agreement of 1904.[295] The Maasai also claimed that the members of the community who agreed to the Anglo - Maasai Agreement of 1904 had no authority from the community and, therefore, the agreement was void ab initio. The Maasai community lost the case on jurisdiction grounds; the High Court dismissed the case on the ground that the agreements were treaties and acts pursuant thereto were acts of state.

The Maasai community appealed the High Court's dismissal in a case captioned *Ole Nchoko and others v. The Attorney-General and others*, Court of Appeal 7 / 1913 (December, 1913), which they also lost, again on jurisdiction grounds.[296] The Court of Appeal reasoned that the 1904 and the 1911 agreements were treaties entered into by two sovereigns; the representatives of the Crown in the East Africa Protectorate and representatives of the Maasai tribe.[297] The appellate Court reasoned that since the lawsuit seeks to enforce obligations pursuant to a treaty, the paramount chief and his people are not the right party to bring such an action before the courts.[298] The Court of Appeal affirmed the lower court's decision that acts of State, such as enforcement of treaties, are not cognizable by a Municipal Court as was held in *Raja Saligram v. Secretary of State for India in Council* (a case in British India holding that municipal courts have no jurisdiction to enforce engagements between sovereign parties founded on treaties).[299]

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[295] *Ole Nchoko High Court case* (n 226).

[296] *Ole Nchoko Court of Appeal case* (n 147).

[297] As above.

[298] As above.

[299] Raja Saligram v. Secretary of State for India in Council, (1872) L. R. Ind. App. Suppl. Vol. 119.

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2.4.1.3 THE GROUP RANCHES

There was a serious and widespread attempt to confer land tenure rights to pastoralist groups such as the Maasai through the statutory creation of group ranches.[300] On 26 June 1968, the President of Kenya assented to the Land (Group Representatives) Act, Chapter 287, Laws of Kenya, to provide for the incorporation of representatives of groups who have been recorded as owners of land.[301]

The group ranches were established, generally, in the arid and semi-arid areas of Kenya which are inhabited by pastoralist groups such as the Maasai. In these areas, communal lands were divided into smaller units known as ranches which were then registered in the names of representatives elected by members of the group.[302] A "group" under the Group Representatives Act had the same meaning as "group" under the Land Adjudication Act, Chapter 284, Laws of Kenya, which meant "a tribe, clan, section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner …"[303] The members of the Group

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[300] Kieyah, Joseph (n 24) p. 405.

[301] Robert M. Kibugi 'A Failed Land Use Legal and Policy Framework for the African commons?: Reviewing Rangeland Governance in Kenya' (Spring, 2009) 24 J. Land Use & Envtl. Law 309, 319. See also Land (Group Representatives) Act, Laws of Kenya, Chapter 287 (assent on 26 June 1968; commencement on 28 June 1968) (now repealed) National Council for Law Reporting (Revised Edition 2012) available at www.kenyalaw.org (accessed 26 April 2020) (stating that a group ranch became the property of all its members in equal and undivided shares. A group ranch could be registered in the name of ten representatives as nominal title holders who held the land in trust for the other unregistered members of the community. The Act required the representatives to enact rules to govern the administration and execution of the group's projects and activities in a democratic manner through involvement of all the members in decision making).

[302] B.D. Ogolla and J. Mugabe 'Land Tenure Systems and Natural Resources Management' in C. Juma and J.B. Ojwang (editors) 'Land We Trust: Environmental, Private Property and Constitutional Change' (1996) Nairobi, Kenya: Initiatives Publishers; London: Zed Books.

[303] See Group Representatives Act (n 301); Land Adjudication Act, Chapter 284 (assent on 26th June,

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ranch elected between three to ten group representatives in whose name the ranch was registered.[304] The group representatives were meant to hold the land as trustees and to consult the wider membership in dealings with this land.[305]

Unfortunately, the group ranches idea failed because of various shortcomings, including lack of legitimacy, accountability or transparency of the representatives, failure of the group ranches to enforce their own by-laws, exclusion of women and youth from decision-making and governance and conversion of group ranches to individual ownership.[306] The group representatives entrusted with the management of the customary land under group ranches abused their trust by disposing of the land without consulting the other members of their groups, leading to the failure of group ranches as a communal tenure system.[307] The Community Land Act, No. 27 of 2016 repealed the Land (Group Representatives) Act (Chapter 287 of the Laws of Kenya) thereby cementing the failure of the group ranches. As I discuss in chapters 4 and 5, the pastoral Maasai may seek recognition of their customary land rights through the new communal tenure framework established under the Kenya Constitution of 2010, the Community Land Act of 2016 and its implementing regulations of 2017.

2.4.2 THE KIKUYU

The Kikuyu community are the latest community to settle in the Rift Valley region in recent times. In this section, I discuss the individual form of land tenure that was traditionally practiced by the Kikuyu, the colonial disruption that led to their armed resistance, dispossession and displacement and eventual resettlement in large numbers in the Rift Valley region. Resettlement of the Kikuyu in the Rift Valley poses a critical test of theories about intercommunity differences and interactions in the Rift Valley region. In

1968; commencement on 28th June, 1968) available at www.kenyalaw.org (accessed 31 March 2020).

[304] See Group Representatives Act (n 301).

[305] As above.

[306] Kibugi, RM (n 301) p. 309 - 336.

[307] As above.

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particular, I analyse the power factors that have enabled the Kikuyu community to thrive in farming in the Rift Valley region.

The Kikuyu or Agikuyu community has also practiced a form of individual ownership of land that allegedly existed in the community for centuries.[308] As a community, the Kikuyu tended to interact and intermarry with other communities in Kenya and therefore have cultural similarities with other communities such as the Maasai.[309] Unlike the Maasai and Nandi and Kipsigis communities, the Kikuyu are primarily agriculturalists.[310] Kikuyu farmers had discovered earlier on that they could obtain higher yields by tilling and watering the soil and then sowing seeds. For example, they learned that the potato can be grown up to higher elevations, grows more quickly, and gives higher yields per acre cultivated and per hour of labour. When the Kikuyu community in Central Province obtained more-productive crops through interactions with other communities, they took advantage of them, intensified their food production, and increased in population. The cycle of sow / grow / harvest / sow necessitated a sedentary lifestyle. Moreover, food production even in Central Province became enriched by the addition of crops, livestock, and techniques from other areas of origin. As a result, Central Province itself, which was occupied by the Kikuyu community, had the power factors of food production, high population density, political organization and advanced farming techniques even before the arrival of European settlers.

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[308] Arthur R. Barlow 'Kikuyu land tenure and inheritance' (1932) The East Africa Natural History Society (Introduction) available at https://archive.org/search.php?query=Kikuyu%20land%20tenure (accessed 22 April 2020).

[309] William L. Lawren 'Masai and Kikuyu: An Historical Analysis of Culture Transmission' (1968) The Journal of African History, Vol. 9, No. 4 pp. 571-583, available at https://www.jstor.org/stable/180145 (accessed 22 April 2020) (discussing the cultural similarities between the Maasai and Kikuyu).

[310] William Scoresby Routledge & Katherine Pease Routledge 'With a prehistoric people, the Akikuyu of British East Africa, being some account of the method of life and mode of thought found existent amongst a nation on its first contact with European civilisation' (1910) London: E. Arnold, p. 38, available at https://archive.org/details/withprehistoricp00rout/page/n13/mode/2up (accessed 22 April 2020).

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The Agikuyu or Kikuyu community migrated into the Central Province of Kenya in the late 18th century or early 19th century at a time when the area was mostly thick forest inhabited by a community known as the Wadorobo.[311] The Wadorobo inhabited the forest and lived on hunting and gathering from the forest, especially collecting honey.[312] The Wadorobo may have been motivated to sell their land because they needed protection from the Maasai who were prone to raid them for livestock.[313] The Agikuyu then deforested and cultivated the land that they bought from the Wadorobo.[314] Through the exchange of honey, beer, livestock, sisters and daughters, many Kikuyus bought rights to occupy and cultivate forest land from the Wadorobo.[315]

As a result of the power factors of intensive food production by the Kikuyu community, human population densities in Central Province became so high that the Kikuyu community in particular placed a large premium on extracting more calories per acre. In their subsistence modes, Kikuyus practiced intensive food production and lived in densely populated areas of Central Province. With limited land to practice farming, the Kikuyu community in Central Province had to live together and farm the same piece of land, and to learn to get along with each other. They did so by making peace, trading, intermarrying and being careful to reduce potential conflicts with their neighbours such as the Maasai and the Dorobo. The economic basis of Kikuyu communities consisted of more or less self-sufficient households. The result was a largely agricultural population mostly focused on subsistence farming. This may also explain, in terms of land, why the most complicated and widespread armed resistance against colonial dispossession of land of the four communities examined was by the Kikuyu community. The Kikuyu community had the most pressure on land resources because of the high premium they placed on extracting more calories per acre of land.

When the Kikuyu community were resettled in the Rift Valley region as I discuss later in this section, they were able to deploy the same power factors of intensive food production

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[311] Barlow, AR (n 308) pp. 58-59.

[312] As above.

[313] See section 2.4.1 for a discussion about the Pastoral Maasai.

[314] Barlow, AR (n 308) p. 61.

[315] Barlow, AR (n 308 above) pp. 58-59.

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and thrive more than the other Rift Valley communities. Kikuyu crops, livestock, and subsistence methods did very well in the Rift Valley environment and climate as these were similar to the environment and climate in Central Province without the added pressure on land resources. Food production in the Kikuyu community was still dominated by the crops and agricultural methods that Kikuyus perfected over the course of thousands of years.

The Kikuyu community practiced a form of individual land tenure system before the arrival of European settlers. Their traditional property rights regime therefore approximated more closely to the European settlers' notion of property than the other Rift Valley communities.[316] The Kikuyu land owners who purchased the land from the Wadorobo occupied the position of head of a section of the community that settled on a particular area.[317] The land owner would typically be an elder and, with his family, took up residence in the area purchased from the Wadorobo.[318] The area purchased would then be known by the Kikuyu as a "Gethaka" or "Githaka".[319] "Githaka" is a Kikuyu word meaning bush or woodland.[320] Gethakas were large areas of land occupied by the Gethaka owner and his family and which were then parcelled out to members of the Agikuyu community by the Gethaka owner.[321] The grantees paid compensation to the Gethaka owner for the transfer of a part of the Gethaka.[322] The grantee then became a Gethaka holder by virtue of the compensation.[323] The new Gethaka owner would then be able to also grant Gethaka rights to other Agikuyu.[324] Should a Gethaka holder part with any part of the Gethaka, the new holder simply takes the place of the original holder, meaning he becomes the principal elder

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[316] Kameri-Mbote Dissertation (n 20) p. 82.

[317] Barlow, AR (n 308) p. 60.

[318] As above.

[319] As above. See also Archived Documents (n 188) (containing a summary of the landmark case, *Kimani wa Kanoto and Kitosho wa Kanoto vs Kioi wa Nagi* (c. 1920), that recognized the Gethaka system).

[320] Barlow, AR (n 308) p. 57.

[321] Barlow, AR (n 308) p. 60.

[322] As above.

[323] As above.

[324] As above.

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or headman of the particular area.[325] All occupiers of a Gethaka area look up to the Gethaka holder in the same manner as children look up to a father or villagers to a village headman.[326] However, only male members of a Gethaka holder's family have a say in his disposal of his Gethaka rights.[327] It is claimed that the Gethaka land tenure system has been in place for generations and there are more Gethaka holders than mere occupiers of community land in the Agikuyu community.[328]

Descendants of the original Agikuyu who paid for cultivation and occupation rights over land in Central Province to the Wadorobo claim to be the heads of the Gethakas in the areas occupied by the Kikuyus in Kenya.[329] An occupier has no Gethaka rights but only rights of occupation and cultivation.[330] A non-Gikuyu cannot obtain Gethaka rights unless he first agrees to assimilate into the Gikuyu culture.[331] The Gethaka owners tended to remain the same over time as they are the original occupiers of the piece of land.[332] The incoming migrants usually paid goats, sheep, cows, and even their wives or daughters to the landowner in exchange for occupation and cultivation rights on the piece of land.[333] A person had occupation and cultivation rights to a Gethaka and could pass on such occupation and cultivation rights to their descendant sons.[334] Outsiders would need permission from the Gethaka head or the elder, to join the Gethaka.[335] The elder would claim a right to occupy

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[325] See also Archived Documents (n 188) (containing a summary of the landmark case, *Kimani wa Kanoto and Kitosho wa Kanoto vs Kioi wa Nagi* (c. 1920), that recognized the Gethaka system).

[326] Barlow, AR (n 308) p. 61.

[327] See Archived Documents (n 188) (landmark case, *Kimani wa Kanoto and Kitosho wa Kanoto vs Kioi wa Nagi* (c. 1920)).

[328] Barlow, AR (n 308) pp. 60-64 (describing the Gethaka tenure system and how it has been practiced by the Kikuyu community for generations).

[329] Barlow, AR (n 308) p. 57.

[330] Barlow, AR (n 308) p. 63 (discussing inheritance).

[331] Routledge & Routledge (n 310) p. 176 (discussing the reception of strangers by the Agikuyu).

[332] Barlow, AR (n 308) pp. 60-64.

[333] Barlow, AR (n 308) p. 62.

[334] As above.

[335] As above. See also Routledge & Routledge (n 310) p. 176.

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and cultivate the Gethaka and new immigrants to the area would look up to him as the person with the power to allot parts of this Gethaka to any new immigrant.[336] This Gethaka owner also had the role of designating common areas or communal property, such as grazing areas, trees, wood in forests and salt licks.[337] Because the Kikuyu were a migrant community, the allotments tended to go to individuals and the rights were usually occupation and cultivation rights only.[338]

The purchase of a Gethaka is for rights to occupation and cultivation but not to alienate the land except to the extent that the new immigrant wishes to alienate his or her occupation and cultivation rights only.[339] Crops cultivated or trees planted on a Gethaka belong to the occupier and can be sold for value to anyone at the occupier's discretion even if the occupier leaves the Gethaka.[340] The Gethaka owner remains the head of the particular section, occupying the position of chief/headman with the power to allot the land to other Kikuyu community members or even non-Kikuyu members who seek to reside or cultivate land in the area.[341] A Gethaka holder needs the consent of the whole of his family males before he can transfer part of his Gethaka rights to another Gikuyu.[342] Once a Gethaka holder has transferred part of his Gethaka rights, he cannot get them back.[343] All male members of the Gethaka holder's family have an interest in the land and can object to its alienation.[344] If the Gethaka holder does not have a wife, he can dispose of part of his Gethaka rights as dowry

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[336] Barlow, AR (n 308) p. 60.

[337] As above.

[338] As above.

[339] Barlow, AR (n 308) pp. 60-64.

[340] See Archived Documents (n 188) (landmark case, Kimani wa Kanoto and Kitosho wa Kanoto vs Kioi wa Nagi (c. 1920)).

[341] Barlow, AR (n 308) pp. 60-64.

[342] As above. See also Archived Documents (n 188) (landmark case, Kimani wa Kanoto and Kitosho wa Kanoto vs Kioi wa Nagi (c. 1920)).

[343] Barlow, AR (n 308) pp. 60-64.

[344] As above.

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and if the male members object, they should assist the Gethaka holder in paying the dowry.[345] If the family males object, he cannot transfer any of his Gethaka rights.[346]

2.4.2.1 LANDMARK CASE AGAINST CHIEF KIOI

In *Kimani wa Kanoto and Kitosho wa Kanoto vs Kioi wa Nagi* (c. 1920),[347] the Kenyan High Court recognized the customary land rights of the Agikuyu based on the Gethaka tenure system. The dispute was by two sons of Kanoto – Kimani, about 32 years old, and Kitosho, about 25 years old, against a sub-chief, Kioi wa Nagi, about 55-60 years old.[348] The dispute was over a piece of land in Dagoreti between the Ngara River and Mbagathi River.[349] The brothers claimed ownership of the land through inheritance from their father, Kahoto, who died around 1898.[350] Kahoto had bought the land from the Wadorobo before the Maasai raids that resulted in the Maasai-Dorobo peace deal.[351] Kioi claimed that he had bought the land from Kinyanjui wa Kashigumu (a local chief) around the time of Kahoto's death. [352] Chief Kinyanjui had bought the land from the Maasai following the Maasai-Dorobo peace deal.[353] According to Kioi, all land rights that existed before the Maasai-Dorobo peace deal were extinguished by the deal.[354] He then stored poles on the subject land for building houses and threatened to evict Kitosho who was residing on it at the time. The issue was

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[345] Barlow, AR (n 308) pp. 60-64.

[346] As above.

[347] See Archived Documents (n 188) (landmark case, Kimani wa Kanoto and Kitosho wa Kanoto vs Kioi wa Nagi (c. 1920)).

[348] As above.

[349] As above.

[350] As above.

[351] As above. See also Barlow, AR (n 308) p. 58 (describing the conflicts between the Kikuyu and the Maasai and the alliances forged with the Dorobo).

[352] Archived Documents (n 188) (landmark case, Kimani wa Kanoto and Kitosho wa Kanoto vs Kioi wa Nagi (c. 1920)).

[353] As above.

[354] As above.

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whether the land had passed to the Kanoto boys through the Gethaka system or to Kioi through the willing-buyer-willing-seller system. The High Court held that the Masai-Dorobo Agreement of 1898 did not extinguish the rights of Kikuyu grantees of land from the Wadorobo who had maintained possession and cultivation rights at the time of the peace agreement, such as the sons of Kahoto.[355] The Kenyan High Court held that the Kahoto sons' Gethaka rights were impliedly recognized by the peace agreement because the Maasai did not evict them.[356]

2.4.2.2 THE MAU MAU UPRISING

The Kikuyu struggle to assert their customary land rights in Kenya resulted in the Mau Mau uprising of the 1950s. The African participants in the uprising did not refer to themselves as "Mau Mau" but as the "Kenya Land and Freedom Army (KLFA)".[357] The origin of the term "Mau Mau" is unclear but it may originate from the Akamba word "Ma Umau", meaning 'Our Grandfathers'.[358] 'Ma Umau' was first used by the Akamba community during a pastoralists revolt against de-stocking in 1938.[359] The Akamba urged colonialists to leave Kenya so that they could live freely like in the time of 'Ma Umau', meaning 'Our Grandfathers'.[360] As the Mau Mau uprising progressed, both Africans and British colonialists used the term "Mau Mau" to refer to it and also added the following Kiswahili definition to the words: "Mzungu Arudi Ulaya, Mwafrika Apate Uhuru", meaning "white man return to Europe, African get freedom".[361]

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[355] As above.

[356] As above.

[357] See *Mutua v Foreign and Commonwealth Office (Mau Mau litigation - Mutua)*) [2011] EWHC 1913 (QB), [2011] All ER (D) 200 (Jul); *Mau Mau Litigation – Kimathi* (n 222).

[358] See Maloba, WO (n 222) pp. 1-19 (introduction); Tabitha M. Kanogo 'Dedan Kimathi: A Biography' (1992) Nairobi: East African Educational Publishers, pp. 23-25.

[359] As above.

[360] As above.

[361] As above. See also *Mau Mau Litigation – Mutua* (n 357) and *Mau Mau Litigation – Kimathi* (n 222) (for additional background information on the Mau Mau uprising).

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At the center of the Mau Mau uprising was the Kikuyu community's struggle against a state system that maintained white Europeans at the top of the hierarchy in Kenya.[362] The white Europeans had access to and ownership of the best lands, and control over government and administrative structures, while many Kenyan communities, such as the Kikuyu, were pushed to the periphery of the Kenyan economy.[363] The European settlers found the land inhabited by the Kikuyu community, especially in Kiambu, suitable for habitation due to its warm and temperate climate.[364] The colonial administrators allocated freehold tenure rights to European settlers in the land actually inhabited by the Kikuyu and forced the Kikuyu occupants to move into native reserves.[365] With the institutionalisation of the reserve system, the Kikuyu community members who had previously inhabited these lands found themselves living in overcrowded native reserves or as squatters or labourer-tenants on large European farms.[366] The dispossession and displacement of Kikuyus created instability in the social and economic well-being of the Kikuyu community system and caused it to experience stress and to resist the disruption in a bid to regain its balance.[367]

Although there had been previous instances of violent resistance to colonialism in Kenya, the Kikuyu uprising referred to as the "Mau Mau" was the most expensive and violent form of resistance against colonial rule in Kenya.[368] The Kenyan diaspora in Britain

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[362] See Chapter 3 (for more discussion on the colonial system's disruption of African community systems by dispossessing and displacing African communities from their community land thus leading to the African communities' struggle for survival as systems).

[363] As above.

[364] Kameri-Mbote Dissertation (n 20) Ch. III, p. 94.

[365] Id.

[366] See H.W.O. Okoth-Ogendo 'Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya (tenants of the crown)' (1991) ACTS Press, African Centre for Technology Studies.

[367] See Chapter 1, section 1.4.1 (for a description of systems theory, including how systems struggle for stability and survival when disrupted).

[368] See Maloba, WO (n 222) Introduction, p. 2 (states that the Mau Mau uprising "cost the British government £60 million with the commitment of some 50,000 troops and police and result[ed] in 10,000 Africans killed and 90,000 others impounded in concentration camps under sometimes appalling conditions).

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at the time of the emergency described the uprising as being caused by land dispossession and displacement.[369] The Kenyan diaspora in Britain organized themselves into the Kenya Committee in 1952, shortly before the State of Emergency and, in 1953, issued a statement of its aims, which included the statement that they "believed that the causes of the … unrest in Kenya [lay] in the intolerable poverty and land hunger of the vast majority of the African people, and their complete denial of any democratic rights."[370] Rather than admit that the Mau Mau uprising was the community's response to state-sanctioned dispossession and displacement from land and resulting economic distress, the colonial state preferred to describe the uprising as merely a "primitive irrational attack against the forces of law and order".[371]

The climax of the Mau Mau uprising was the assassination of Senior Chief Waruhiu Wa Kung'u (1890 - 1952) on October 7, 1952.[372] Senior Chief Waruhiu wa Kung'u was a prominent paramount chief in the Central Province of Kenya who the Mau Mau believed to be sympathetic to the state and against the struggle for community land rights.[373] The Governor of Kenya at the time, Sir Evelyn Baring, declared a state of emergency in the territory on October 20, 1952, which lasted until January 12, I960.[374] The Wartime Emergency Powers Order-in-Council 1939 was invoked, which provided the governor with complete discretion to introduce any regulation that he thought "necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services

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[369] Caroline Elkins 'Imperial Reckoning: The Untold Story of Britain′s Gulag in Kenya' (2005) New York: H. Holt.

[370] Elkins, C (n 369 above) Section 4 (Rehabilitation), note 28.

[371] Will Podmore 'British Foreign Policy since 1870' (2008) Xlibris, p. 135 (quoting a statement by Oliver Lyttelton, then British Secretary of State for the Colonies).

[372] See Evanson N. Wamagatta 'Controversial Chiefs in Colonial Kenya, The Untold Story of Senior Chief Waruhiu Wa Kung'u, 1890 – 1952' (April 2016) Rowman & Littlefield; Maloba, WO (n 222) p. 2 (Introduction).

[373] Wamagatta, E (n 372 above).

[374] Elkins, C (n 369).

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essential to the life of the community."[375] The Governor then passed a number of detention ordinances during the 1950s, providing the legal basis for the incarceration of Mau Mau suspects without trial.[376] Operation Jock Scott was launched in Nairobi the day after the State of Emergency was declared, during which one hundred eighty (180) alleged Mau Mau leaders were arrested, including Jomo Kenyatta, a Kikuyu leader who later became the first President of the Republic of Kenya.[377] He was sentenced to seven (7) years' imprisonment.[378] Operation Anvil, launched on April 16, 1954, gave rise to a new wave of arrests, and by December 1954, seventy-one thousand, three hundred forty-six (71,346) Mau Mau suspects were being detained in camps across Kenya.[379]

In Kenya and in Britain, the detention camps were promoted as places of rehabilitation, so as to relieve the Kikuyu of their Mau Mau 'psychopathology'.[380] According to *Mutua and others v Foreign and Commonwealth Office*, a personal injury action against the United Kingdom by former Mau Mau detainees, the colonial state introduced three features of the detention process in the detention camps; "villagisation", "screening" and "dilution".[381] Villagisation referred to the removal of Kikuyus from their scattered homesteads and relocation into emergency villages, which were highly restrictive - surrounded by barbed wire, spiked trenches and twenty-four hour guard – and where the villagers were forced to labour on communal projects.[382] Screening was a form of interrogation that (a) determined a suspect's level of indoctrination; (b) gathered intelligence

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[375] See The Wartime Emergency Powers Order-in-Council (1939) available at https://onlinelibrary.london.ac.uk/resources/databases/justisone (accessed 24 April 2020).

[376] Elkins, C (n 369).

[377] As above. See also Maloba, WO (n 222); Dr. Aoife Duffy 'Legacies of British Colonial Violence: Viewing Kenyan Detention Camps through the Hanslope Disclosure' (August, 2015) Law and History Review, vol. 33, No. 3, 489-542, sections 89-90.

[378] As above.

[379] As above.

[380] Duffy, Aoife (n 377) sections 20, 93.

[381] As above. See also *Mau Mau Litigation – Mutua* (n 357) section 40 et seq.

[382] As above.

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for military and police operations; and (c) determined a suspect's screening category. [383] To become "white" and successfully exit the detention pipeline, the detainee had to demonstrate an attitudinal change: to confess taking the Mau Mau oath, to provide detail on the crimes committed, and to further demonstrate that he or she was once again a "useful citizen" through hard work and labor.[384] Dilution was a technique involving the isolation of small numbers of detainees from the larger group, and systematically using force, together with confessed detainees, to exact compliance and cooperation.[385]

By the end of 1955, one million, fifty thousand, eight hundred and ninety-nine (1,050,899) Kikuyu were removed from their scattered homesteads and forcibly relocated into one of eight hundred and four (804) villages, comprising some two-hundred thirty thousand (230,000) huts to undergo these rehabilitation processes.[386] Following the personal injury action, *Mutua and others v Foreign and Commonwealth Office,* the UK Foreign Secretary announced in June 2013 that a settlement of nineteen million, nine hundred thousand pounds (£19,900,000) would be granted to five thousand, two hundred twenty eight (5,228) Kenyan detainee camp survivors, thereby acknowledging potential for succeeding at trial if the former detainees proceeded with their Mau Mau tort claims based on torture and abuse by British colonial officials. [387]

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[383] See Duffy, Aoife (n 377) (Dr. Aoife Duffy, a law lecturer at the Irish Centre for Human Rights National University of Ireland, Galway, conceptualizes the screening system as a "pipeline," with "hardcore" Kikuyu who were labelled as "Z" or "black", detained in remote high security encampments, eventually to be relabelled as "white," and passed through the pipeline to open camps before release and reintegration into society).

[384] As above. See also *Mau Mau Litigation – Mutua* (n 357) section 40 et seq.

[385] As above.

[386] Elkins, C (n 369).

[387] See Right Honourable William Hague, (Foreign Secretary) 'Statement to Parliament on Settlement of Mau Mau Claims' (June 6, 2013) UK Foreign & Commonwealth Office, available at https://www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims/ (accessed 30 March 2020).

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2.4.2.3 KIKUYU RESETTLEMENT IN THE RIFT VALLEY

The Mau Mau uprising led to many members of the Kikuyu moving out of the native reserves in large numbers in the 1950s. By 1952 many members of the Kikuyu community were settled in various parts of the country.[388] European settlers regarded the Kikuyu as providing better quality labour than the other communities because the Kikuyu community had experience with sedentary agriculture. European settlers therefore sought to relax regulations for members of the Kikuyu to enter into European farms. Olenguruone in the former Rift Valley province is an example of an area where the Kikuyu community settled as squatters or labourer-tenants in large numbers.[389] In 1939, the Europeans settled over four thousand Kikuyu squatters in Olenguruone. During the State of Emergency declared in 1952 following the outbreak of the Mau Mau armed conflict, most of the Kikuyu who had been settled in Olenguruone were rounded up and repatriated to various places in Central Province. The Kikuyu also moved to Kericho district after 1952 to look for work in European farms and by 1957 they were so many Kikuyus in Kericho that the colonial state was forced to regulate their entry and stay in Kericho.[390] In 1957, more than two thousand four hundred (2,400) additional Kikuyu families (men, women and children) were allowed to settle in Nandi Hills and other areas of Kericho. As at the time of Kenyan independence in 1963, the Kikuyu community constituted the largest squatters or labourer-tenant community in the Rift Valley region.

In the period immediately before Kenya's independence in 1963, the colonial government in Kenya embarked on an africanisation programme involving the resettlement of Africans in land owned by European settlers. The resettlement program, involving the introduction of settlement schemes countrywide, aimed to address the problem of landlessness facing many Kenyans at independence and to stimulate agricultural production.[391] The state resettlement program meant buying land from the Europeans and

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[388] Akiwumi Commission Report (n 2) section 105, p. 66.

[389] Akiwumi Commission Report (n 2) section 225, p. 123.

[390] Akiwumi Commission Report (n 2) section 143 - 144, pp. 84 - 85.

[391] TJRC Report (n 2) vol. IIB, section 372, p. 284.

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resettling Africans on them based on the willing-buyer-willing-seller land redistribution model, which had been endorsed by the Second Lancaster House conference in the lead up to independence.[392] This program had been proposed by the European settlers and commenced in 1962 with the resettlement of Africans in the Scheduled Areas/White Highlands.[393]

The Ministry of Agriculture, which was in charge of the resettlement program at independence, proposed two resettlement schemes: (1) a Yeoman Scheme, involving contributions from recipients and (2) the One Million Acre Scheme, financed mostly by the British government.[394] The Yeoman Scheme was also known as the Yeoman Programme or the Assisted Farmers Scheme (AFS) or the Mackenzie settlement schemes.[395] It was financed by the British government, with contribution from the World Bank, to the tune of seven million five hundred thousand (7.5 million). It was planned for establishment of smaller African farms in the borderlands between native reserves and the White Highlands. It envisaged buying two hundred forty thousand (240,000) acres of land in the White Highlands to be sub-divided into one-hundred (100) acre parcels and distributed to Africans to farm alongside European settlers.[396] The African farmers would contribute anywhere from one hundred (100) pounds to five hundred (500) pounds depending on the size of the farm.[397] Most of the land went to ex-loyalists of the colonial administration.[398]

The One Million Acre Scheme was the other state resettlement program which was to be implemented between 1962 and 1967, with financing mostly by the British government.[399] The scheme's components included a loan facility with favourable payment

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[392] TJRC Report (n 2) vol. IIB, section 113, p. 31.

[393] TJRC Report (n 2) vol. IIB, section 116, p. 201; Akiwumi Commission Report (n 2) section 95, p. 62.

[394] TJRC Report (n 2) vol. IIB, section 141 - 145, pp. 208 - 209.

[395] As above.

[396] As above.

[397] As above.

[398] See TJRC Report (n 2) vol. IIB, sections 134 - 188, pp. 207 - 221; Akiwumi Report (n 2) sections 88 - 116, pp. 59 - 71 (for additional information on the state resettlement programs).

[399] TJRC Report (n 2) vol. IIB, section 158 - 159, pp. 213.

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terms, settlement in one's former ethnic domain and priority to the most needy members of the community.[400] Each African beneficiary was advanced a loan repayable in 30 years to purchase land so that there could be a rapid transfer of ownership of farms belonging to settlers who wanted to leave the country after independence. The British government advanced to the Kenyatta government a loan of twenty-one (21) million sterling pounds for the purchase of one (1) million acres of land out of the seven million, five hundred thousand (7.5 million) acres that was held by European settlers in the White Highlands. The incoming Kenyan government established an Agricultural Settlement Fund Trust whose trustees, in liaison with the British, controlled the fund into which all settlement loans were paid.[401] A Central Land Board with regional responsibility and chaired by a Briton was established to take responsibility for the land purchase.[402] Actual settlement of the landless was under the Ministry of Lands, which practically took over the functions of the Central Land Board.[403] West Germany, the Land and Agriculture Bank (LAB), the Agricultural Finance Corporation (AFC) and the United Kingdom contributed to the development loan, but the World Bank declined to contribute because it was not comfortable with the resettlement arrangement. Approximately thirty-five thousand (35,000) families were eventually settled on the One Million Acre Scheme.[404]

Implementation of the One Million Acre Scheme was marred by irregularities. There was no competitive pricing for sale of prime land and other property such that houses in the White Highlands and many more were sold to ministers, members of Parliament, ambassadors, permanent secretaries and provincial commissioners.[405] The willing-buyer-willing-seller settlement schemes allowed migrants from Central Province and the large Kikuyu squatter community in the Rift Valley to acquire white-occupied land in the former White Highlands.[406] Land buying companies, such as the Gikuyu, Embu and Meru

[400] TJRC Report (n 2) vol. IIB, section 162, p. 214.

[401] As above.

[402] As above.

[403] As above.

[404] As above.

[405] TJRC Report (n 2) vol. IIB, section 167 - 168, pp. 216.

[406] TJRC Report (n 2) vol. IIB, section 183, p. 220.

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Association (GEMA), NDEFO and Nyakinyua, operating in the Rift Valley and other places, managed to acquire land and re-distribute it to their members who were mostly kinsmen of their founders.[407]

In parts of the White Highlands which had never been opened up, the Government embarked on state enterprise, through the management of farms for profit in these parts, by the Agricultural Development Corporation (ADC), either independently, or in joint ventures with private farms. Individual Africans, some sponsored by family groups, co-operatives, or land buying companies, bought large farms with single block titles, with loans from the Land Bank or other sources. The ADC took over the management of several farms in Nakuru, Uasin Gishu and Trans Nzoia Districts in the Rift Valley region. Most of these farms were subdivided and sold to various communities to alleviate landlessness. The individuals who settled on the farms had their plots demarcated and had thriving agricultural enterprises, including cooperative societies for developing, processing and marketing their farm produce. They were doing better economically than the communities that considered the area to be their ancestral homes. The majority of these farms were (and some still are) situated in a belt bordering the former Kalenjin native reserves.[408]

Whereas the majority of farm buying companies were formed in the former Central Province, there were many farms in the former Rift Valley Province where members of the Kalenjin community who were willing and able to buy such farms were denied the opportunity to do so and, instead, farm-buying companies from the Central Province bought the same.[409] An example is Miteitei Farm in the Rift Valley. Most of the European settlements in Nandi District within the Rift Valley region were confined to Tinderet Division in present-day Nandi County.[410] The Government re-settlement programme did not impose any limitations as to which ethnic community would be settled on settlement

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[407] TJRC Report (n 2) vol. IIB, section 209, p. 227.

[408] See TJRC Report (n 2) vol. IIB, sections 134 - 188, pp. 207 - 221; Akiwumi Report (n 2) sections 88 - 116, pp. 59 - 71. See also CIPEV Report (n 5) (giving additional information on land ownership in the Rift Valley region).

[409] Akiwumi Commission Report (n 2) section 83, pp. 55 - 56.

[410] Akiwumi Commission Report (n 2) sections 118 - 119, p. 72.

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farm schemes and European settler farms.[411] Among the farms in Tinderet area which were sold to the Government was one previously owned by one DC Dansey of one thousand nine hundred and thirty four (1,934) acres.[412] The farm was later sold for nine hundred sixty seven thousand shillings (Kshs. 967,000) to former squatters on the farm, all non-Kalenjin who, in 1976, jointly with other people formed a company known as Miteitei Farmers Co. Ltd., which became the registered owner of the farm.[413] The Nandi later bought shares from some of the squatters.[414] The original number of shareholders of the company was four hundred and fourteen (414). Before Miteitei Farm was sold to these original shareholders, Nyakinyua Women's group, made up of Kikuyu women only, wanted to buy it and actually took possession but were forced out by members of the Nandi community. Shareholders of Miteitei Farmers Co. Ltd., could not agree on the acreage of the farm which each of them would get. The Nandi wanted five (5) acres per share, but others wanted equal sub-division. A committee of mostly Kalenjins was established to develop a list of shareholders and came up with a list of three hundred nine (309), mostly Kalenjin. There were about two-hundred eighty-six (286), mostly Kikuyus, who said they were supposed to be on the list. The dispute continued until the tribal clashes of October 1991.[415]

Another example of the state's irregular resettlement program is Nakuru and Laikipia.[416] Nakuru district was part of the White Highlands and did not have native reserves in colonial times. Its current residents moved there under resettlement programs. By 1961, there were about forty thousand (40,000) Africans in Nakuru town and about one hundred sixty thousand (160,000) in the farms with more than fifty percent (50%) Kikuyus according to the 1961 Annual Report for Nakuru. Ol Moran (Laikipia district) and Njoro (Nakuru district) Divisions were part of the former European settlements.[417]

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[411] Akiwumi Commission Report (n 2) section 120, p. 72.

[412] As above.

[413] Akiwumi Commission Report (n 2) section 120, p. 72.

[414] As above.

[415] Akiwumi Commission Report (n 2) sections 120 - 121, p. 72.

[416] Akiwumi Commission Report (n 2) section 207, p. 115.

[417] Akiwumi Commission Report (n 2) section 251, p. 138.

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After Kenya gained independence, Uasin Gishu, Nakuru and Trans Nzoia areas were taken over from European settlers by the Agricultural Development Corporation (ADC) under the state resettlement scheme and sold to individual Africans, some sponsored family groups, co-operatives, or land buying companies.[418] Members of the Kikuyu community formed the majority of the land buyers.[419] Example of the land-buying companies was Mutukanio Co. Ltd and Laikipia West Co. Ltd, which companies together with several other sister companies were associated with Dixon Kihika Kimani, a one time member of parliament for Laikipia West.[420] The majority shareholders in the several land buying companies which Kihika Kimani helped to form were Kikuyu.[421] Njoro is one of the fifteen divisions in Nakuru district and lies to the South and South West of Nakuru with different ethnic groups but majority Kikuyu and shareholders of Njoro Mutukanio Co Ltd, a land buying company which in the 1960s and 1970s bought farms of over fifty one thousand (51,000) acres in the area through the efforts of Kihika Kimani, for settlement.[422] Kihika Kimani's family remains a prominent Kikuyu family in Nakuru. Each shareholder could buy shares in the company at the rate of one thousand five hundred shillings (ksh. 1,500) per share which would entitle him to two and a half (2.5) acres per share.[423] Kihika Kimani himself acquired at least three-hundred fifty-three (353) acres.[424]

The Kenyatta family, the family of Kenya's first President and a prominent Kikuyu family, acquired vast farms in Nakuru, Njoro and Rongai areas in the Rift Valley region.[425] Multinational corporations, such as James Finlay Company Limited/the African Highlands Produce Company Ltd and Unilever Kenya Ltd/Brooke Bond, which were mostly European, also acquired large tracts of land that was initially meant for the resettlement of African

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[418] Akiwumi Commission Report (n 2) section 95.

[419] TJRC Report (n 2) vol. IIB, section 186, p. 221.

[420] Akiwumi Commission Report (n 2) section 267, p. 147. See also TJRC Report (n 2) vol. IIB, section 134, et seq., pp. 207, et seq. (for more information on the state resettlement programs).

[421] As above.

[422] Akiwumi Commission Report (n 2) section 267, p. 147.

[423] As above.

[424] Akiwumi Commission Report (n 2) sections 267 - 268, p. 147.

[425] TJRC Report (n 2) vol. IIB, section 204, p. 225.

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communities. These multinational corporations used the land to cultivate tea.[426] They were granted leases for 999 years from 1923.

The general result of the settlement schemes was that the majority of the people who were actually settled through the One Million Acre Scheme were mostly members of the Kikuyu community.[427] By 1979, there were no more parcels of land in the former White Highlands/Scheduled Areas that could be purchased from European settlers for the resettlement of African communities that had been dispossessed of their land during the colonial period.[428]

2.4.3. THE NANDI AND THE KIPSIGIS

The Nandi and the Kipsigis are both Nilotic speaking and belong to the Kalenjin community with similar customs and traditions.[429] The Kipsigis, Nandi and other sub-tribes of the Kalenjin community were practically one tribe some 20 generations ago, assuming a generation is about 32 and a half years.[430] They lived at the North East end of present-day Lake Turkana, a lake in the Northern part of the Kenyan Rift Valley near Ethiopia.[431] The term 'Kalenjin' was allegedly coined by some high school students at the Alliance High School in Kikuyu, Kenya, in the 1940s and means "I tell you" or "I have told you".[432] Before the term 'Kalenjin' came into popular use, all the Nandi, Kipsigis, Keiyo, Marakwet, Tugen

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[426] TJRC Report (n 2) vol. IIB, section 93, p. 193.

[427] TJRC Report (n 2) vol. IIB, section 186, p. 221.

[428] TJRC Report (n 2) vol. IIB, section 723, p. 299.

[429] As above.

[430] Kipkoeech araap Sambu 'The Misiri Legend Explored: A Linguistic Inquiry Into the Kalenjiin People's Oral Tradition of Ancient Egyptian Origin' (2011) University of Nairobi Press pp. 4-5. See also Archived Documents (n 188) (containing writings of Rear Admiral F.R. Dodge, U.S.N. (Retired) 'Effects of Foreign Impact on a Single tribe over a period of time and Intra-family, inter-tribal Similarities' (written around 1949)).

[431] As above.

[432] Araap Sambu, K (n 430) pp. 3-4 (describing the origin of the name 'Kalenjin').

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and other communities in the Rift Valley region had been designated as 'Nandi speaking tribes'.[433]

The Kipsigis and the Nandi migrated from the area near Ethiopia because of natural calamities resulting in famine or the desire to seek better grazing for their livestock.[434] They moved downwards and to the west of Mount Elgon and settled in their present homeland at the edge of and on the hills of the south western escarpment in the Rift Valley region.[435] G. W. B. Huntingford, in '*The Nandi of Kenya: Tribal Control in a Pastoral Society*', has suggested tentatively that the first Kalenjin settlement in the area was started around the beginning of the 17th century.[436]

Their food production methods were thus similar to the pastoral Maasai. Like the Maasai, some members of the Nandi and Kipsigis communities had begun practicing some form of mixed farming and pastoralism before the arrival of the Europeans in some of the fertile and well-watered areas of the Rift Valley that were highly suitable for crop farming.

The Nandi principally inhabit Uasin Gishu County in the northern part of the Rift Valley region.[437] Former Nandi district lies on a plateau, known as Uasin Gishu Plateau, which extends from the Mau mountain range on the east and south-east, to the Nyanza plains on the west and from Sosiani river in the north to the Kano plains in the south.[438] The

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[433] Araap Sambu, K (n 430) pp. 4-5 (stating that the Kalenjin people in Kenya were previously referred to in most early colonial official documents and in general parlance as the 'Nandi - speaking peoples' and names these group of people as comprising the following sub-ethnic groups: Kipsigis, Nandi, Tugen, Keiyo, Pokoot, Merkweeta, Eendo, Almo, Kiptani, Barokot, Senguer, Terik and Ogieek/Dorobo, Saboot clusters (Koony, Sapiiny, Pook, and the Pong'omeek)). See also Archived Documents (n 188) (referring to the Kalenjin as the 'Nandi-speaking peoples').

[434] As above.

[435] Huntingford, GWB (n 239) chapter 1, p. 19.

[436] As above.

[437] Peers, C et al (n 188) p. 37.

[438] John A. Lomurut 'A first generation digital soil map of a portion of the Uasin Gishu Plateau, Kenya' (2014) Purdue University, West Lafayette, IN (Master of Science thesis, Open Access Theses. 649) p. 124, https://docs.lib.purdue.edu/open_access_theses/649 (accessed 22 April

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southern and western limits of the Uasin Gishu Plateau are well defined by granite escarpments rising steeply from the plains.[439] Its average elevation is 6,000 feet and easy access is available only from the extreme south-west, in which region hills are dotted throughout.[440] Nandi oral tradition recounts a major confrontation with the Maasai in the Kipkarren valley in the 1880s that resulted in the defeat and expulsion of the Maasai from Uasin Gishu plateau in the Rift Valley region.[441] "Kipkarren" is the Nandi name for "the place of the spears".[442] The Uasin Gishu plateau comprises some of the best pastures and salt licks in the entire country.[443] Before the confrontation between the Nandi and the Maasai, these pastures and salt licks were not accessible to the Nandi community because of the Maasai occupation of the area.[444] The defeat of the Maasai gave the Nandi community unchallenged access to the pastures and salt licks throughout the extensive Uasin Gishu plateau region stretching from the foothills of Mount Elgon to the Nandi escarpment.[445] The Nandi used Kipkarren, which is a plateau, as their grazing land until the time of white settlement when the plateau was annexed by the government as part of the European White Highlands.[446]

The basic political unit of the Nandi is the Koret, (plural-Korotinwek), the smallest neighborhood unit.[447] The Koret is made up of a group of homesteads, and a group of

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2020) (for more scientific information on the Uasin Gishu Plateau).

[439] As above.

[440] As above.

[441] Huntingford, GWB (n 239) chapter 1, p. 19. Hollis, AC (n 239) part I, pp. 1-2 (discussing the Uasin Gishu plateau). Archived Documents (n 188).

[442] As above.

[443] Lomurut, JA (n 438).

[444] Peers, C et al (n 188) p. 37.

[445] Peers, C et al (n 188) p. 37-38. Hollis, AC (n 239) part I, pp. 1-2 (discussing the Uasin Gishu plateau).

[446] Archived Documents (n 188); Huntingford, GWB (n 239) chapter 1, p. 19; Hollis, AC (n 239) part I, pp. 1-2.

[447] Huntingford, GWB (n 239) chapter 2, pp. 22-23; Archived Documents (n 188).

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Korotinwek make up the 'Bororiet'.[448] Members of different clans traditionally lived in one Bororiet.[449] The political institution which deliberates on the day to day affairs of the Koret is the Kokwet Council, a council of elders of the Koret.[450] The chief functions of the 'Kokwet Council', at which all adult males of the 'koret' are expected to attend, is to organize collective activities, safeguard the natural resources of the 'koret', settle disputes among 'koret' members, investigate anti-social acts among its members and regulate certain agricultural and pastoral activities of its members.[451]

The other social institution among the Nandi is that of the age set system.[452] Every male in the tribe belongs, from birth, to an age set.[453] Traditionally, members of the same age set were circumcised together and engaged in political, military and social activities as one unit.[454] There were seven age sets, comprising the warriors, the boys and the elders.[455] All age set mates regarded themselves as equals and addressed each other as 'Ipindanyo', meaning 'our age set'.[456] The warriors are responsible for military operations of the Bororiet and remain in power for a period of approximately fifteen years before retiring as the incoming warriors take their place and they, in turn, became elders.[457] The Nandi warrior class are similar to the Maasai morans / murans.[458] Once members of an age set age and die,

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[448] As above.

[449] As above.

[450] As above.

[451] Hollis, AC (n 239) pp. 11-12; Huntingford, GWB (n 239) chapter 2.

[452] As above. See also Archived Documents (n 188).

[453] Hollis, AC (n 239) pp. 11-12.

[454] As above.

[455] As above.

[456] As above.

[457] Peers, C et al (n 188) p. 37-38.

[458] As above.

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their name is transferred to a set of small boys, the most junior set.[459] The age sets thus work in a recurring cycle, and the names appear again and again.[460]

The "Bororiet" Council is a territorial, military and political unit.[461] All adult males of the Bororiet unit are eligible to attend its meetings.[462] It traditionally had a well-defined geographical boundary marked by rivers or hills or forests.[463] Within that geographical boundary, all warriors formed a fighting battalion for the "Bororiet".[464] Offensive and defensive warfare of the "Bororiet" were organized in this "Bororiet" Council.[465] The decision for offensive war was made by the warriors in their secret lodges.[466] This decision to go to war was placed before the "Bororiet" Council by the warrior leader.[467] When the proposal to go to war had been formally accepted by the council, the Orkoiyot had to be informed for his approval of the operation and, through his magic, ensure its success.[468] The "Bororiet" Council also deliberated on matters of war, circumcision ceremonies, planting and harvesting of crops.[469] When the Nandi were defeated by the British and British rule established, the "Bororiet" council's geographical boundaries were converted into locations.[470]

The land of the Nandi is regarded as the common possession of the tribe, but with special emphasis on "Bororiet" membership.[471] For within his own "Bororiet", a man can

[459] As above. See also Hollis, AC (n 239) pp. 11-12; Archived Documents (n 188).

[460] As above.

[461] Hollis, AC (n 239) pp. 11-12.

[462] As above.

[463] Huntingford, GWB (n 239) chapter 2.

[464] Hollis, AC (n 239) pp. 11-12.

[465] As above.

[466] As above.

[467] As above.

[468] Peers, C et al (n 188) p. 37.

[469] Hollis, AC (n 239) pp. 11-12.

[470] Archived Documents (n 188).

[471] Huntingford, GWB (n 239) chapter 2, pp. 22-23.

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choose land for cultivation without restriction, and his cattle are free to graze anywhere within the geographical boundaries of the "Bororiet".[472] The land belonging to the Nandi community was traditionally divided into specific spheres with specific functions.[473] The divisions were those for cultivation and grazing.[474] Grazing land was further divided into grazing grounds and homestead land.[475] The grazing grounds were owned communally, while the rights over the ownership of the homestead land were vested in the households.[476] No cultivation or settlement was to be done on the grazing grounds.[477] The land for cultivation was of two types. The first type was that immediately adjacent to a homestead, and the second was allotted by the Kokwet council.[478] A man could cultivate as much land, around the homestead, as his wives and children could manage.[479] The Nandi cultivated crops such as millet, maize, potatoes, pumpkins, bananas, sugarcane, and tobacco.[480] The tenure of cultivated land was in the form of occupancy rights only, vested in the head of the family or his widows.[481] The land reverted to the kokwet once it had been abandoned by its owner.[482] This land could then be re-allocated by the 'Kokwet' elders.[483]

The Nandi economic way of life was traditionally centered on the well-being and increase of their cattle.[484] The Nandi owned large numbers of cattle, goats and sheep.[485]

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[472] As above. See also Hollis, AC (n 239) pp. 11-12.

[473] Huntingford, GWB (n 239) chapter 2, pp. 22-23.

[474] As above.

[475] As above.

[476] As above.

[477] As above.

[478] As above.

[479] Archived Documents (n 188).

[480] As above.

[481] Huntingford, GWB (n 239) chapter 2, pp. 22-23.

[482] As above.

[483] As above. See also Archived Documents (n 188).

[484] Hollis, AC (n 239) p. 20.

[485] As above.

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However, the possession of cattle was essential to full participation in the social and political life of the community.[486] Cattle was a form of currency that could be used to purchase property and to pay dowry.[487] Even participation in a Kokwet council was dependent on cattle ownership.[488] The first ambition of a Nandi youth was, therefore, to acquire cattle. Cattle was traditionally accumulated by inheritance or through raiding expeditions.[489] The Nandi were constantly looking for good pastures and water for their cattle.[490]

The Kipsigis are the largest sub-tribe of the Kalenjin community.[491] They consider members of the Nandi community to be their cousins and understand each other's languages.[492] The Kipsigis occupy mostly Kericho and Bomet counties in the Rift Valley region and consider them to be their homeland.[493]

The Kipsigis are of Nilo-Hamitic origin and can be described as nomadic, depending on livestock for their livelihood.[494] Cultivation was sporadic, in an area known as "Roret", which is a piece of land that members of the community are allowed to cultivate.[495] The only land held in perpetuity by a member of the Kipsigis community was a "Karait" or a

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[486] As above. See also Archived Documents (n 188).

[487] As above.

[488] Huntingford, GWB (n 239) chapter 2, pp. 22-23.

[489] Peers, C et al (n 188) p. 37-38.

[490] Hollis, AC (n 239) p. 20. See also Archived Documents (n 188).

[491] Araap Sambu, K (n 430) p. 7 (stating that the Kipsigis comprise about 40% of the entire Kalenjin population who numbered about 4.96 million in Kenya as per the 2009 National Census).

[492] Samson Moenga Omvvoyo 'The Agricultural Changes in the Kipsigis Land, c. 1894- 1963: An Historical Inquiry' (2000) Kenyatta University (Doctor of Philosophy thesis in Environmental Studies) chapter 2, available at https://hal.archives-ouvertes.fr/tel-01236648 (accessed 22 April 2020).

[493] Omvvoyo, SM (n 492 above) chapter 1.

[494] Michael Saltman 'The Kipsigis: a case study in changing customary law' (1977) Schenkman Publishing Co., Inc., p. 14 (describing the southward migration of the Kipsigis from the Upper Nile valley).

[495] Omvvoyo, SM (n 492) chapter 3, p. 59. J. G. Peristiany 'The Social Institution of the Kipsigis' (1939) London: George Routledge & Sons, Ltd.

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man's homestead, consisting of his house, stores and cattle shed.[496] The owner of a 'Karait' would plant a hedge or fence around the Karait as proof of ownership.[497] The custom was that of a member of the community clearing an area of forest, planting some crops, mostly millet, and reaping the crop.[498] The person would also place a fence of thorns around the cleared area to keep off goats and wild animals.[499] After approximately four harvests or roughly two years, the person would leave the land so that it would revert to communal use and he would move to clear another area.[500]

Some land use was communal.[501] For instance, access to water could not be denied as water was communal.[502] A person could construct a small dam to head off water for his cattle but could not deny others the same water.[503]

The Kipsigis' disputes over land were settled by a group of elders drawn from different areas and from a wide geographical area.[504] The elders were known as a 'Kokwet'.[505] All transactions involving land, such as demarcation of boundaries, resolving of land disputes, and transfer of ownership had to involve the Kokwet elders.[506] A quorum

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[496] Omvvoyo, SM (n 492) chapter 2, pp. 34-35. See also Archived Documents (n 188).

[497] Archived Documents (n 188).

[498] As above. See also Peristiany, JG (n 239).

[499] I. Q. Orchardson 'Some Traits of the Kipsigis in Relation to Their Contact with Europeans' (October, 1931) Africa: Journal of the International African Institute, Vol. 4, No. 4, pp. 467-468 available at https://www.jstor.org/stable/1155433 (accessed 22 April 2020).

[500] Orchardson, IQ (n 499 above) p. 467. See also Archived Documents (n 188).

[501] Orchardson, IQ (n 499) p. 471-478. Omvvoyo, SM (n 492) chapter 3. Archived Documents (n 188).

[502] As above.

[503] As above.

[504] Omvvoyo, SM (n 492) chapter 2, pp. 34-36 (discussing, generally, the Kipsigis' socio-political organisation). Orchardson, IQ (n 499) p. 469 (mentioning that the Kokwet council was made up of adult males).

[505] As above.

[506] Orchardson, IQ (n 499) p. 471-478.

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of Kokwet elders could be made up of thirty elders or more.[507] Appeals from Kokwet elders would go to another group of elders known as the "Kipsarurinik", which had great power to bring curses and death to the guilty party.[508]

Inheritance was patrilineal.[509] The oldest son of the first wife inherited the right to distribute his father's property equitably amongst his brothers and to make provision for his sisters, guided and advised by two elderly relatives of the deceased.[510] If there were no male children, the oldest living brother took the responsibility or, failing that, the oldest living uncle.[511]

Land transactions were possible. For example, crops on land could be bartered in exchange for livestock, but once the crops were harvested, the land reverted back to the community and, if overgrown, could be cleared and treated as a Roret.[512] Dwellings on the land could also be sold but, if cleared, the land was treated as a Roret.[513] Leasing of land was also possible. A person could give a "Roret" on loan to a person living in its neighbourhood if the owner lived far.[514] The owner could request it back at any time after harvest.[515] Cultivation of a leased "Roret" was always subject to the consent of the owner.[516]

The Nandi and Kipsigis have a rich history of asserting their customary land rights against other communities. By the middle of the 19th century, the Nandi and the Kipsigis joined hands to prevent the Arabs from opening up a direct route from the Rift Valley to

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[507] Orchardson, IQ (n 499) p. 469. See also Archived Documents (n 188).

[508] Archived Documents (n 188).

[509] Omvvoyo, SM (n 492) chapter 2, pp. 37-38; Archived Documents (n 188).

[510] As above.

[511] As above.

[512] Omvvoyo, SM (n 492) chapter 3; Archived Documents (n 188).

[513] As above.

[514] As above. See also Peristiany, JG (n 239).

[515] Omvvoyo, SM (n 492) chapter 3; Archived Documents (n 188); Peristiany, JG (n 239).

[516] As above.

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Lake Victoria.[517] The Arab and Swahili traders coined the term 'Nandi' to refer to them.[518] Oral tradition in the Nandi community recounts a major event in the 1850s when the Nandi defeated gun-wielding Arabs at a place known as 'Kipsoboi' and expelled them from Nandi territory.[519] The Nandi also fought against European explorers and settlers from around 1890-1906 that resulted in the brutal murder of their leader Koitalel arap Samoei by the British in 1905 and the signing of the peace treaty of Kipture with the British on 15th December 1905. The colonial administrators used legislation - the Olaibons Removal Ordinance of 1934 – to expel members of the Kipsigis community, known as the 'Talai', from Kipsigis territory because of their stubborn opposition to colonial rule. The Nandi and Kipsigis' struggle to assert their customary land rights have continued to this day as will be discussed in the next section.

2.4.3.1 TRIBAL CLASHES OF 1991-1998

The Kalenjin community, that also controlled the state at the time, used tribal clashes between 1991 and 1998 to forcefully evict those that they considered foreigners from the Rift Valley region.[520] These foreigners happened to be former squatters or labourer-tenants or resettled Africans and were mostly members of the Kikuyu community. The forceful evictions took the form of tribal clashes between 1991 – 1998 and primarily affected the former European settler farms situated in the belt bordering the former Kalenjin native

[517] Hollis, AC (n 239) p. vi (describes Nandi and Kipsigis resistance in the preface.

[518] Timothy H. Parsons 'The Rule of Empires: Those Who Built Them, Those Who Endured Them, And Why They Always Fall' (2010) Oxford University Press, p. 290 (stating that 'Mnandi', which refers to one Nandi person, is the Kiswahili word for 'Cormorant', a bird with a reputation for rapaciousness or living by killing its prey).

[519] Hollis, AC (n 239) part I, p. 3; Archived Documents (n 188) (describing the confrontation between the Nandi and the Arab and Swahili caravans traveling from the Coast to Lake Victoria in search of ivory).

[520] Akiwumi Commission Report (n 2) section 31, pp. 23 - 24.

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reserves from Mount Elgon to Molo in the Nakuru District.[521] The residents of the farms were majority Kalenjin and Kikuyu.

On 1 July 1998, Kenyan President Daniel Toroitich Arap Moi appointed a judicial commission of inquiry to investigate ethnic conflict in Kenya, including that which occurred in the Rift Valley region between 1992 and 1998. Appeal Court Judge Akilano Akiwumi was appointed chair of the commission, hence it was also referred to as the "Akiwumi Commission". Its mandate was to establish the origin, immediate and underlying cause of the conflict and to investigate the action taken by law enforcement officers during the clashes, and their level of preparedness to contain them.[522]

The Akiwumi Commission examined nineteen (19) areas of the Rift Valley region; Molo, Njoro, Olenguruone, Londiani, Fort Tenan, Kipkelion, Thesalia, Kunyak, Sondu, Enoosupukia, Ol Moran, Miteitei, Kamasai, Owiro, Songhor, Burnt Forest, Turbo, Saboti and Nyangusu. It found that the Kipsigis/Nandi were involved in fifteen (15) areas while the Kikuyu were involved in ten (10) of the areas and the Maasai two (2).[523]

The tribal clashes started on 29 October 1991 at the Miteitei farm, situated in the heart of Tinderet Division, in present day Nandi County, pitting the Nandi mostly against the Kikuyu, but also involving all other former squatters or labourer-tenants in the District.[524] The clashes were sparked by the dispute between the Kalenjin and the Kikuyu over Miteitei Farm in Tinderet. The Nandi had decided to resolve the dispute using a method that members of the Nandi community later described as the "Kipgaa" or "home way", which essentially meant reverting to their customary practice of waging war to evict foreigners from their land.[525] The secretary of Miteitei Farmers Co. Ltd., summarized the problem thus: "[t]he problem was tribal land. That the Kalenjin did not want other people to live on their land while they were landless."[526] The clashes were due to the Kalenjin custom and tradition of disliking strangers living in their midst, particularly on their ancestral land, which had in

[521] Akiwumi Commission Report (n 2).

[522] Akiwumi Commission Report (n 2).

[523] Akiwumi Commission Report (n 2) section 31, pp. 23 - 24.

[524] Akiwumi Commission Report (n 2) section 89, p. 59.

[525] Akiwumi Commission Report (n 2) section 137, p. 82.

[526] Akiwumi Commission Report (n 2) section 121, p. 73.

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colonial times been set aside for European settlement.[527] The Kikuyu were driven out in the clashes, the farm later surveyed and shared among the Kalenjin community members and titles issued to them.[528]

The Nandi laid the same claim to other areas of the White Highlands/Scheduled Areas, claiming that their ancestral land had been leased to Europeans, and that the community members did not have to repurchase their land.[529] In 1992, the clashes spread to Molo, Olenguruone, Londiani, parts of Kericho, Trans Nzoia, Uasin Gishu and other parts of the then Rift Valley Province. The clashes continued in 1993, spreading to Enoosupukia, Naivasha and parts of Narok and the Trans Mara Districts, which together formed the greater Narok before the Trans Mara District was hived out of it.

The same situation persisted in Kericho and Nakuru, which also had European settlements. In Kericho, the clashes covered Kipkelion and Londiani, Chirchila (Fort Ternan), and Thessalia, among others.[530] Nakuru district was the headquarters of the former Rift Valley province and was the most hard-hit by the clashes.[531] The 1992 and 1993 clashes in Nakuru affected mainly Molo and Olenguruone Divisions.[532] The Kikuyu stated that the clashes in Olenguruone had been planned and executed by the Kalenjin with a view to driving out of Olenguruone all the non-Kalenjin and more particularly the Kikuyu so that they would thereafter occupy their land.[533]

The state did not intervene to stop the tribal clashes of 1991 - 1998 because the government of the Kenyan state system during this period were majority members of the Kalenjin community.[534] State officials in charge of the Rift Valley region were also

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[527] Akiwumi Commission Report (n 2) section 153, p. 89.

[528] Akiwumi Commission Report (n 2) section 125, p. 75.

[529] Akiwumi Commission Report (n 2) section 126, p. 75.

[530] Akiwumi Commission Report (n 2) section 142, p. 83.

[531] Akiwumi Commission Report (n 2) section 207, p. 115.

[532] Akiwumi Commission Report (n 2) section 237, p. 130.

[533] Akiwumi Commission Report (n 2) section 230, p. 126.

[534] See Akiwumi Commission Report (n 2), Chapter 5, section 523, p. 284 (supporting the view that the government of President Daniel T. arap Moi, himself a Kalenjin, connived in the clashes by

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complicit in allowing the clashes to continue as a way of safeguarding the numerical superiority of the Kalenjin in the area during the electioneering period.[535]

The tribal clashes pertaining to Kalenjin community land appear to have achieved their intended purposes. Many of the non-Kalenjin left Chirchila, Kipkelion and Londiani Divisions in Kericho after the clashes and were not there as at the time of the December 1992 general elections.[536] The Maasai also attempted to reclaim their ancestral land in some areas but their clashes were not as widespread as the Kalenjin. Clashes in Naivasha pitted the Maasai against the Kikuyu.[537]

The tribal clashes were demonstrations of resilience by Rift Valley communities in the face of disruption by the colonial state and its successor Kenyan state.[538] The communities reacted to their dispossession and displacement from their community land by using self-help tactics to retain essentially the same land that they had before the displacement and dispossession happened.[539] The community systems used their internal structures to effectively zone the Rift Valley region along community land boundaries as they were in the period before colonialism.[540] During the tribal clashes of 1991-1998, there was an unprecedented sale of land by minority groups who then moved to areas where their tribesmen and women were predominant.[541] The Kikuyu, for example, moved out of Olenguruone and sold their land cheaply to the Kalenjin.[542] They did not return without risk

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stating as follows: "[i]n our view, it is not the lack of adequate security personnel and equipment or preparedness that contributed to the tribal clashes. The Police Force and the Provincial Administration were well aware of the impending tribal clashes and if anything, connived at it.")

[535] As above.

[536] Akiwumi Commission Report (n 2) section 158, p. 92.

[537] Akiwumi Commission Report (n 2) section 232, p. 127.

[538] See Aguirre, BE (n 219) (describing resilience as "an example of morphostasis--that is, a process directed to preserve the social system"); Ruhl, JB (n 219) (describing resilience in legal systems).

[539] The self-help tactics are, are arguably, the systems' self-preservation tactics under the descriptions of resilience in Aguirre, BE (n 219) and Ruhl, JB (n 219).

[540] Akiwumi Commission Report (n 2) section 248, p. 137.

[541] As above.

[542] As above.

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to their lives and properties. Similar sales occurred in Molo South and Mau Summit areas.[543] This demonstration of resilience became more intense and widespread after the tribal clashes of 1991 - 1998 as will be discussed in the next section on the post-election violence of 2007 - 2008.

2.4.3.2 POST-ELECTION VIOLENCE OF 2007-2008

The self-help efforts by the communities to reverse decades of dispossession and displacement culminated in the unprecedented post-election violence experienced in the Rift Valley following the disputed presidential elections of December 2007.[544] The tribal clashes and the post-election violence are examples of the stress that communities living in the Rift Valley region have experienced over the years because of the lack of equilibrium between their component parts.[545] These communities have used every election cycle to express their dissatisfaction with their dispossession and displacement from their community land.[546] Those clashes were the autopoietic communities' efforts to regenerate and transform the conditions of their validity to ensure their survival as communities.[547] The 2007 - 2008 post-election violence was the culmination of self-help tactics by the Kalenjin community to evict non-Kalenjins from the Rift Valley.[548]

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[543] As above.

[544] See CIPEV Report (n 5); Jerome Lafargue (editor) 'The General Elections in Kenya' (2007) Les Cahiers d'Afrique de l'Est, n° 38, Nairobi, May – August 2008, available at https://muse.jhu.edu/book/17071 (accessed 28 March 2020) (contains various articles describing the cyclic ethnic-based violence in Kenya that culminated in the post-election violence of 2007 - 2008); 'Report of the Parliamentary Select Committee on the Resettlement of the Internally Displaced Persons (IDPs) in Kenya' (April, 2012) Kenya National Assembly, Tenth Parliament – Fourth Session.

[545] As above. See also Aguirre, BE (n 219) and Ruhl, JB (n 219) (describing resilience as a self-preservation process by the community); See Kameri-Mbote (n 2) 103 - 124.

[546] As above.

[547] As above.

[548] As above.

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The genesis of the post-election violence of 2007 - 2008 can be traced to the presidential elections that were held on 27 December 2007. The presidential elections resulted in the country being split into two with the incumbent President Mwai Kibaki winning slightly more than half of the votes cast and the main opposition candidate, Raila Odinga, getting slightly less than half.[549] These results were disputed and an unprecedented wave of violence erupted in several parts of the country. The violence quickly spread and became an ethnic conflict. However, the Rift Valley was the epicentre of the violence and Uasin Gishu, Nakuru and Trans Nzoia experienced the worst of the violence in the region.[550] The then Rift Valley Province accounted for seven hundred forty-four (744) recorded deaths, that is, sixty-six percent (66%) of all the recorded deaths that occurred during the post-election violence period.[551]

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[549] See Jeffrey Gettleman 'Disputed Vote Plunges Kenya Into Bloodshed' (Dec. 31, 2007) N. Y. TIMES available at http://www.nytimes.com/2007/12/31/world/africa/31kenya.html?pagewanted=all&_r=0 (accessed on March 29, 2020) (stating that the Electoral Commission of Kenya (ECK) declared Mr. Kibaki the winner, with 4,584,721 votes compared with 4,352,993 for Mr. Odinga; a spread of about 2 percent".); CIPEV Report (n 5).

[550] As above.

[551] CIPEV Report (n 5) chapter 9.

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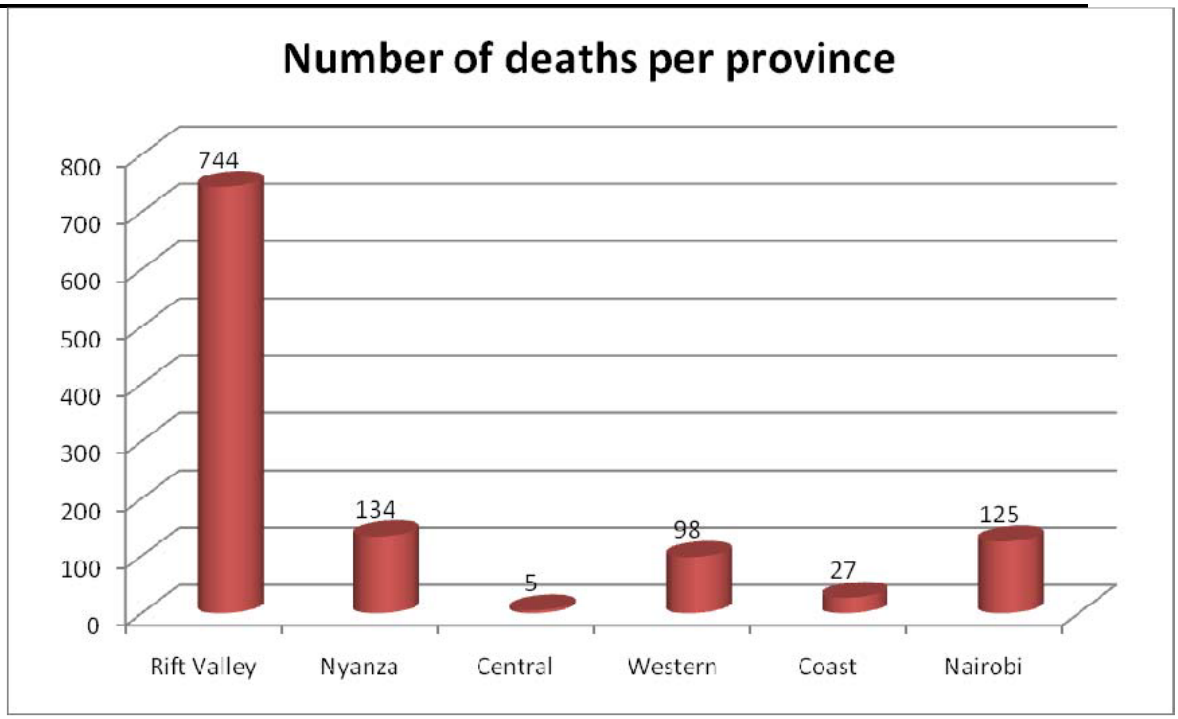

Source: Kenya National Commission on Human Rights, Report of the Commission of Inquiry into Post-Election Violence, Chaired by the Hon. Justice Philip Waki, chapter 9 (The Government Printer, October 15, 2008) (available at http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)

In the Rift Valley region, the epicenter of the post-election violence can be traced to the former White Highlands. Uasin Gishu, Nakuru and Trans-Nzoia districts led the death count with hundreds of deaths; two-hundred thirty (230), two hundred thirteen (213) and one hundred four (104), respectively.[552] The only other district which recorded over one hundred (100) deaths countrywide was Nairobi. The Luo, Kikuyu, Luhya and Kalenjin led the death count with two hundred seventy eight (278), two hundred sixty eight (268), one hundred sixty three (163) and one hundred fifty eight (158) recorded deaths, respectively. It is estimated that during the violence that ensued, one thousand one hundred thirty three (1,133) lives were lost, seventy-eight thousand two hundred fifty four (78,254) houses were destroyed country wide and some six hundred sixty three thousand nine hundred twenty one (663,921) people were displaced.[553] Out of the six hundred sixty three thousand nine hundred twenty one (663,921), it is estimated that about three hundred fifty thousand

[552] CIPEV Report (n 5) chapter 9.

[553] As above.

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(350,000) people sought refuge in one hundred eighteen (118) camps, three hundred thirteen thousand nine hundred twenty one (313,921) were integrated amongst various communities in the country while six hundred forty (640) Internally Displaced Persons ("IDPs") households fled to Uganda. It is also estimated that economic and business losses were in excess of one hundred billion shillings (Kshs. 100) billion.[554]

The clashes and post-election violence are self-help tactics by the communities to reverse decades of dispossession and displacement.[555] The violence meted out on non-Kalenjins is consistent with the Kalenjin custom of waging war to fight off invaders from their land.[556] In Kalenjin oral traditions, the customary practice of violence against outsiders dates back to the 19th century when the Kalenjin community prevented Arab and Swahili traders from penetrating their territory, expelled the Maasai from Uasin Gishu plateau and fought ferociously against British invasion.[557] One of the most tragic stories of the violence by the Kalenjin community against the Kikuyu during the post-election violence of 2007-2008 was the deliberate burning alive of mostly Kikuyu women and children huddled together in a church in Kiambaa on 1 January 2008.[558] The Kikuyu women and children had sought refuge in the church following an attack on their village of Kimuri, bordering Kiambaa, on 30 December 2007. Seventeen (17) people were burnt alive in the church with eleven (11) dying on the way to the Moi Teaching and Referral Hospital in Eldoret.[559] It is no coincidence that the Kikuyu, who are the majority settler community in the Rift Valley region, were also the majority of those who were killed or displaced by the post-election violence in the Rift Valley region.

The pattern of violence in areas populated by the Kalenjin was very similar, starting with the burning of properties owned mainly by the Kikuyu, blocking roads and issuing

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[554] As above.

[555] See also Aguirre, BE (n 219) and Ruhl, JB (n 219) (describing resilience as a self-preservation process by the community); See Kameri-Mbote (n 2) 103 - 124.

[556] Archived Documents (n 188); Huntingford, GWB (n 239); Hollis, AC (n 239).

[557] As above.

[558] CIPEV Report (n 5) p. 46.

[559] As above.

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threats to any Kalenjin deemed to be sympathetic to the outsiders.[560] There were approximately seven thousand (7,000) youth erecting roadblocks, burning and looting Kikuyu-owned properties.[561] The number of attacks was so large that the police were generally ineffective and unable to control the marauding youths.[562] This method of attacking the enemy in large numbers is also consistent with the Kalenjin custom of militarizing their youth by having members of the same age-set comprising the warrior class and fighting alongside each other.[563] A witness to the violence later testified that the large bands of youth of between five thousand (5,000) – seven thousand (7,000) that attacked Eldoret town after 27 December 2007 were from the "Kimnyengei age group" who had been part of a massive oathing ceremony in August 2007.[564] The oathing ceremony allegedly took place secretly in Kipkulei forest within the Rift Valley.[565] The purpose of the oathing was to conduct a cleanup operation to evict foreigners from Kalenjin community land. Some elders disputed the characterization of the ceremony as an oathing ceremony and described it as a simple circumcision ceremony which is part of the Kalenjin custom of initiating their young men into adulthood.[566] However, both the witness and the Kalenjins do not dispute that the Kalenjin community had mobilized itself for a purpose and that purpose was most likely the expulsion of outsiders from their land in accordance with their customs and traditions.[567]

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[560] As above.

[561] As above. See also Gettleman, J (n 549) (discussing the violence by majority members of the Kalenjin community targeting the Kikuyu community during the post-election violence of 2007 - 2008).

[562] As above.

[563] Archived Documents (n 188); See also Peers, C et al (n 188) (discussing the military tactics of the Nandi).

[564] CIPEV Report (n 5) p. 69.

[565] As above.

[566] CIPEV Report (n 5) p. 69. See also Chapter 2 (discussing Kalenjin customs and traditions).

[567] As above. See also International Criminal Court (ICC) 'Request for Authorisation of an Investigation pursuant to Article 15, submitted to the Pre-Trial Chamber II from the Office of the

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Another aspect of Kalenjin custom that was observed in the violence was the involvement of elders.[568] Under Kalenjin custom, the youth constitute the warriors, but are guided by elders who are themselves former warriors.[569] The National Security Intelligence Services ("NSIS") reports indicate that prominent businessmen and professionals were financing the acquisition of firearms for use in evicting the Kikuyu from the Rift Valley.[570] The professionals had also started training the youth on how to use the firearms in the run-up to the violence according to the NSIS.[571]

After the violence, the young warriors went through ritual cleansing in accordance with Kalenjin custom. A witness recounts a cleansing meeting on 28th February 2008 at Baharini in the former Molo district, that was chaired by a retired Assistant Chief and other elders.[572] The meeting sought to discuss measures for ensuring the ritual cleansing of the area youth, who had participated in the burning of non-Kalenjin homes during the post-election violence, as the burning of residences is considered an abomination under Kalenjin custom.[573] The witness testified that in order to achieve the cleansing of local youths who had participated in the burning of homes, the meeting agreed that a goat would be slaughtered for use in conducting the cleansing.[574]

Some reports by the National Security Intelligence Services ("NSIS") indicate that members of the Kalenjin community were prepared to carry out violence/self-help eviction tactics against members of the Kikuyu community no matter the outcome of the December

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Prosecutor' (Nov. 26, 2009), available at http://www.icc-cpi.int/iccdocs/doc/doc785972.pdf (accessed on March 28, 2020) (detailing the systematic actions of the majority Kalenjin community to expel foreigners from their community land).

[568] CIPEV Report (n 5) pp. 104, 275-276

[569] See section 2.4.3, generally, on the customary practices of the Nandi and Kipsigis.

[570] CIPEV Report (n 5) p. 72.

[571] As above.

[572] CIPEV Report (n 5) p. 147.

[573] As above.

[574] As above.

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27, 2007 elections.[575] The NSIS had in their election Security Situation paper noted that the ratio of the police officers to the population, which was already inadequate nationally, would pose potential problems.[576] The police would be over-stretched by election-related duties such as escort and guarding of polling stations.[577] During the 2007 campaigns, the politicians and leaders from the Kalenjin community made utterances that "kimirio" or "bunyot", meaning "the enemy" must leave their area whether the incumbent President Kibaki, won the elections or lost.[578] Witnesses testified that members of the Kalenjin community used the radio to say that whether the ruling Party of National Unity ("PNU") or the opposition Orange Democratic Movement ("ODM") won the elections, Kikuyu would be expelled from the Rift Valley. The District Security and Intelligence Committee ("DSIC") Minutes dated 9th February 2008 observed that the Kalenjin appeared determined to displace the Kikuyu from their farms and that both communities had been arming themselves quietly. This demonstrates that the Kalenjin community used the election cycle to evict outsiders from their land.[579]

In the run up to the 2007 post-election violence in Kenya, communities in the Rift Valley used the media, mostly vernacular FM radio stations, to foment ethnic hatred and/or incite, organize, or plan for violence. KASS FM and Changey FM, the two vernacular radio stations operating in the Rift Valley region in the period before the general elections in December 2007, used derogatory language against Kikuyus, mouthed hate speech, and routinely called for their eviction, thereby helping to build up tensions that eventually exploded in violence. After the violence, KASS FM sent out a broadcast to its listeners

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[575] CIPEV Report (n 5) p. 58, et seq. (see section on 'Intelligence Concerning Post-Election Violence and Its Use').

[576] As above.

[577] As above.

[578] CIPEV Report (n 5) p. 495.

[579] As above. See also ICC Request for Authorization (n 567) (detailing the systematic actions of the majority Kalenjin community to expel foreigners from their community land); Report on IDPs (n 544).

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barring members of the Kalenjin community from disclosing whatever they knew about the post-election violence.[580]

Witnesses recount that the following threatening terms were used against the Kikuyu: madoadoa (spots), maharagwe (bean), bunyot (enemy), sangara (wild grass) with the additional notation that they should be uprooted.[581] This is a demonstration of the autopoietic community adapting to its environment through signalization and coded communication with its members to ensure its survival when it interacts with other autopoietic communities.[582] Thus the Kalenjin community developed coded language to identify outsiders and to communicate tactics for evicting them from their territory.[583]

Following a war/raids conducted under Kalenjin custom, the community would share the spoils of war.[584] Accordingly, meetings were held to discuss how farms formerly occupied by the fleeing outsiders would be purchased or leased out affordably.[585] After the outsiders were evicted, the Kalenjin leaders discussed how to purchase their farms cheaply.[586] For example, the DSIC Minutes of 13th February 2008 state that Kalenjins in Eldama Ravine within the Central Rift Valley region had vowed not to allow displaced Kikuyu back but would instead buy their land at a ceiling price of ten thousand shillings (Kshs. 10,000) per acre and warned that if any Kalenjin paid a price beyond this sum, their houses would be burnt.[587]

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[580] CIPEV Report (n 5) chapter 8, pp., 295 et seq., on the Media and the Post-Election Violence.

[581] CIPEV Report (n 5) chapter 3 (on the tactics used by the perpetrators of post-election violence against their victims).

[582] See Hugh Baxter (n 46) (using the systems theory notion of autopoiesis to explain a community system's ability to self-generate and self-perpetuate).

[583] CIPEV Report (n 5) chapter 3 (on the tactics used by the perpetrators of post-election violence against their victims).

[584] See section 2.4.3, generally, on customary practices of the Nandi and Kipsigis; Peers, C et al (n 188) (discussing the customs and traditions of the Kalenjin community).

[585] CIPEV Report (n 5) p. 148.

[586] As above.

[587] CIPEV Report (n 5) p. 92.

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The post-election violence of 2007 - 2008 led to the dispossession and displacement of mostly members of the Kikuyu community in the Rift Valley region. Unfortunately, internal displacement of communities in Kenya has been a permanent feature of Kenya's history dating back to colonial times. Those that were dispossessed and displaced to make room for European settlement were now dispossessing and displacing the squatters or labourer-tenants who had settled on European farms as labourers. According to the government there were three hundred fifty thousand (350,000) persons displaced as a result of post-election violence of 2007-2008.[588] In some other cases the departure of individuals stemmed from threats or the anticipation of violence.[589] However, in most cases, internally displaced persons (IDPs) were forcefully evicted physically through violence against them and the destruction of their property.[590] IDPs settled in churches, trading centres, police stations, district officer's offices and administration police and Chief's camps as these were considered safe havens.[591] However, locals also attacked these safe havens and the IDPs had to be moved to larger and more secure camps in urban areas, such as stadiums.[592]

In a bid to resolve the root causes of the deepening polarization and divisions that had threatened to tear apart the social, political and economic fabric of the country, on 28th February 2008 and under the auspices of the African Union Panel of Eminent African Personalities chaired by Mr. Kofi Annan, the Government/PNU and ODM signed the 'Agreement on the Principles of Partnership of the Coalition Government.'[593] Within the framework of reconciliation efforts under the Kenya National Dialogue and Reconciliation (KNDR), the parties agreed to a National Accord and Reconciliation Agreement of 2008 and Parliament enacted the National Accord and Reconciliation Act 2008 to end the political

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[588] CIPEV Report (n 5) p. 272; Report on IDPs (n 544).

[589] As above.

[590] As above.

[591] As above.

[592] As above.

[593] 'Acting Together for Kenya: Agreement on the Principles of Partnership of the Coalition Government between Mwai Kibaki and Raila Odinga' (Kibaki-Raila Coalition Agreement)', (February 28, 2008) available at http://www.reuters.com/article/idUSL2822580120080228 (accessed on March 29, 2020).

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crisis.[594] The National Accord and Reconciliation Act 2008 laid the foundation for power sharing and for moving the country out of the crisis.[595]

The power sharing arrangement allowed the state to implement programs for resettling the internally displaced persons (IDPs).[596] In April 2008, the government engaged in operation rudi nyumbani (operation return home).[597] The aim of the operation was to encourage the IDPs to return to their homes.[598] According to the government, as at 8th July 2008, two hundred ten thousand, five hundred ninety-four (210,594) IDPs had been resettled leaving twenty one thousand four hundred thirty one (21,431) in camps.[599] The resettlement programme cost the government an estimated thirty billion shillings (Kshs. 30 billion).[600] A Parliamentary Select Committee on Resettlement of Internally Displaced Persons formed on November 17, 2010 found that out of nine thousand five hundred seventy one (9,571) IDPs in camps following the 2007-2008 post-election violence, only a small fraction of about twenty four percent (24%) was resettled within a period of four years.[601]

A Commission of Inquiry on Post-Election Violence (CIPEV) or the Waki Commission, that was established by the state in February 2008 to investigate the post-election violence of 2007 - 2008 concluded that the successful return of IDPs following the 2007 PEV would be based on three outcomes: the safety of returnees, restitution and return of property to the displaced and the creation of an economic, social and political environment

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[594] National Accord and Reconciliation Act, No. 4 of 2008 (now repealed) (text available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalAccordandReconciliationAct_No4of2008.pdf (accessed 29 March 2020).

[595] As above.

[596] Report on IDPs (n 544). See also the Kibaki-Raila Coalition Agreement (n 593) and the National Accord and Reconciliation Act (n 594) (for details of the power-sharing arrangement).

[597] Report on IDPs (n 544).

[598] As above.

[599] As above.

[600] As above.

[601] As above.

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that sustains them.[602] There is consensus that unless the root causes that led to internal displacement are resolved, the problem of displacement will continue.[603] This insight highlights the extent to which colonialism's disruption of African customary legal systems may have long term destabilising consequences in the Rift Valley region if left unmitigated.[604] The African communities living in the Rift Valley region have adapted to their dispossession and displacement by using the electoral cycle to reclaim their community land, which has led to political instability in Kenya.[605] This instability has significant implications for the Kenyan state and, at a minimum, requires recognition that resort to pre-colonial customary practices by the communities themselves is a likely response to the continuing disruption.[606] In the next chapter, I review existing legal instruments and

[602] See CIPEV Report (n 5) chapter 7, pp. 291 et seq., concerning Internally Displaced Persons (IDPs).

[603] As above.

[604] See TJRC Report (n 2) Vol. IIB, section 566, p. 341 (stating as follows in the conclusion: "…one thing is clear, the stability of Kenya depends to a great extent [on] the willingness of political actors to address these [land related] grievances and disputes"); Akiwumi Commission Report (n 2) chapter 5, section 525 page 285 (stating that "land ownership and use in the various clash areas was given as one of the causes of conflict and tribal clashes"); Kameri-Mbote (n 2) 103 - 124.

[605] See Aguirre, BE (n 219) and Ruhl, JB (n 219) (for descriptions of resilience that I relied on earlier in this Chapter to analyse the Kalenjin community's self-help tactics as demonstrations of the communities' resilience in the face of disruption caused by colonial and post-colonial state policies).

[606] For a discussion of these customary practices that the communities are using as self-help tactics to retain essentially the same land that they had before colonial disruption, see discussion in section 2.4.3, generally, on customary practices of the Nandi and Kipsigis. See also Archived Documents (n 188) (detailing similar customary practices used against other community systems and the colonial state itself). See Kameri-Mbote (n 2) p. 124 (conclusion) (where Professor Kameri-Mbote sums up the instability risk as follows: "[f]ailing to confront dispossession and clamours for restitution is akin to ignoring a festering wound that is covered with a band aid. It is made worse by new forms of dispossession and any rights to land and resources are nuanced by the festering wound underneath. It may even flare up to become cancerous causing war and social disintegration").

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institutions in Kenya to determine whether they are effective in mitigating this risk of instability in the Rift Valley region.

2.5 REVIEW

In this thesis, I analyse the struggles of four communities inhabiting the Kenyan Rift Valley using the lens of systems theory in the sense of the communities being composed of, but greater than, interactive individuals, their laws and customs, cultures, ancestors, land, waters, and other elements that the community considers essential to its continuity and survival. In this chapter, I describe the customs and traditions of the four representative communities of the Rift Valley that I chose for this study; the Maasai, Kikuyu, Nandi and Kipsigis communities. I use the four communities as illustrative examples to show that their customary practices are essentially autopoietic subsystems generated by the communities themselves to ensure their survival and continuity. The notion of autopoiesis is helpful to show that the customary practices of the Maasai, the Nandi, the Kipsigis and the Kikuyu are self-referential, self-sustaining and self-proliferating in a way that uniquely serves and symbiotically defines the community.

The limited scope of this study does not allow me to conduct my own detailed legal anthropological study of these communities but I rely on customary practices that have been summarized in landmark court cases such as the *Ole Nchoko case* by the Maasai community and the case against Chief Kioi by members of the Kikuyu community, articles and journals. Furthermore, I focus my descriptions on the constellations of power factors that have enabled these communities to better interact with their environments and to develop the resilience necessary to persist and thrive as systems despite colonial and neo-colonial disruption.

This chapter thus provides a descriptive summary of the communities' customary practices that will be helpful in analysing their ability to persist, recover and thrive when disrupted by other systems. The issue of systemic disruption is pertinent for Rift Valley communities, because the colonial state disrupted them by dispossessing them of, and displacing them from their land. The colonial state enacted state policies that formally set aside approximately twenty percent (20%) of productive land in the Rift Valley for European settlement and moved the majority African communities into areas known as "Native Reserves". This systemic disruption that I discuss in the next chapter, was a major test of

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the systemic characteristics of these communities and their ability to self-preserve as systems.

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CHAPTER 3 COLONIAL DISRUPTION OF AFRICAN COMMUNITY SYSTEMS

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3.1 INTRODUCTION

In this chapter, I discuss the state disruption of traditional property rights regimes in the Rift Valley region that continues to pose an existential threat to the state due to unhealthy competition over land resources, instabilities and conflicts in the region.[607] The disruption interfered with the stability and hence integrity of the community systems thus forcing them to take corrective measures in search of that stability. In contrast to the previous chapter, I generally analyse the interface between the state legal system and traditional tenure systems from the perspective of the colonial state and its successor Kenyan state.

The state disruption of the traditional tenure systems started in the 1890s after the colonial regime decided to construct the Kenya-Uganda railway and recognized Kenya's rich agricultural potential, particularly in the Rift Valley region.[608] The colonial regime then used various tactics, including, without limitation, predatory legislation, compulsory acquisition of land, agreements or treaties and forced eviction, to create a European reserve, known as the 'White Highlands' or 'Scheduled Areas'.[609] African communities who were living in the area at the time of creation of the White Highlands were dispossessed of their land and some were displaced to areas known as native reserves while others became labour-tenants or squatters on European farms.[610] The native reserves then became a source of

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[607] Jerome Lafargue (editor) 'The General Elections in Kenya' (2007) Les Cahiers d'Afrique de l'Est, n° 38, Nairobi, May – August 2008, available at https://muse.jhu.edu/book/17071 (accessed 28 March 2020) (contains various articles describing the cyclic ethnic-based violence in Kenya that culminated in the post-election violence of 2007 - 2008).

[608] See Kameri-Mbote (n 2) pp. 103-124; UNHRC Report (n 2) pp. 37-46 (discussing the state's dispossession and displacement of the Maasai community in Kenya).

[609] As above.

[610] See TJRC Report (n 2) Vol. IIB, chapter 2, sections 41-55 (discussing land-related conflicts in the Rift Valley region); Akiwumi Commission (n 2) (discussing tribal-based conflicts in the Rift Valley Province).

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cheap labour for the European farms thus continuing the social dominance of the European settlers over the African communities.[611]

I begin this chapter with a description of the Kenyan Rift Valley and its rich land and water resources in section 3.2 below. I then describe the legal and political processes that European settlers used to acquire the land in the area that became known as the "White Highlands" in section 3.3 and to push African communities to areas known as "Native Reserves". In section 3.4, I describe the disruptive effect of land dispossession on the power ingredients that each African community system has traditionally deployed to better interact with its environment, broadly defined to include the geography, climate, ecosystem, biodiversity and ontological totality of the territory that a community inhabits.

3.2 LAND RESOURCES OF THE RIFT VALLEY

The attractiveness of the Rift Valley to the many African communities and, later, to the European settlers, lies in its rich agricultural land and abundant water supply.[612] Kenya, generally, does not have sufficient mineral resources or a strong manufacturing base.[613] Land is the basic and only economic resource from which the majority of Kenyans eke out a livelihood.[614] The ability to access, own, use and control land has implications for a

[611] I discuss the use of cheap labour in more detail as an example of the theory of social dominance in Chapter 4. See also Wilson, EK (n 15); Felicia Pratto, Jim Sidanius & Shana Levin 'Social Dominance Theory and the Dynamics of Intergroup Relations: Taking Stock and Looking Forward' (2006) 17 Eur. Rev. Soc. Psychol. 271; Jim Sidanius et al. 'Social Dominance Theory: Its Agenda and Method' (2004) 25 Pol. Psychol. 845 (for descriptions of social dominance theory as the tendency of human societies to be structured as systems of group-based social hierarchies).

[612] M.P.K. Sorrenson 'Origins of European Settlement in Kenya' (1968) Nairobi: Oxford University Press; Kameri-Mbote (n 2) 103-124; Akiwumi Commission Report (n 2).

[613] TJRC Report (n 2) vol. IIB, section 2, p. 165; The International Bank for Reconstruction and Development (World Bank) 'The Economic Development of Kenya' (1963) The Johns Hopkins Press, Baltimore.

[614] As above.

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community's ability to feed and sustain itself economically and socially. [615] The idea of economies depending on a territory's land is not unique to Kenya or Africa.[616] Shawn A-in-chut Atleo, National Chief of the Assembly of First Nations in Canada, recently observed that "our lands are the backbone of the Canadian economy".[617] Like in Canada, the rich agricultural land in Kenya is its most valuable economic resource.[618]

Kenya's Rift Valley region is approximately seventy-thousand (70,000) square miles in size and is located in the western region of Kenya in East Africa.[619] It runs along the Great Rift Valley from the Kenya-Ethiopian border in the North to the Kenya-Tanzania border in the South.[620] The Mau Forest Complex is situated in Kenya's Rift Valley province, spanning four present day counties - Bomet, Kericho, Nakuru and Narok.[621] The Mau Forest Complex is the largest of five water towers in Kenya, with the largest forest cover.[622] The Mau forest is one of Kenya's largest forest areas, comprising about thirty-six percent (36%) of the total forest cover in the country.[623] These forests form the catchment of the main

[615] As above.

[616] See *Love v Commonwealth* (n 12) (the Australian High Court recognizing the centrality of land to the identity and existence of Aboriginal communities in Australia).

[617] Hon. Harry S. LaForme and Claire Truesdale 'Section 25 of the Charter; Section 35 of the Constitution Act, 1982: Aboriginal and Treaty Rights -- 30 Years of Recognition and Affirmation' (2013), 62 S.C.L.R. (2d) 687 – 740.

[618] World Bank (n 613).

[619] W. R. Ochieng 'An Outline History of the Rift Valley of Kenya up to AD 1900' (1975) East African Literature Bureau 10.

[620] As above; Akiwumi Commission Report (n 2) section 88, p. 59.

[621] 'Report of the Prime Minister's Task Force on the Conservation of the Mau Forest Complex' (March, 2009) Kenya National Assembly; See Philip C. Aka 'Introductory Note to African Commission on Human and Peoples' Rights v Republic of Kenya (August 2017) (AFR. CT. H.P.R.), 56 I.L.M. 726 (discussing the Ogiek community's struggle to continue inhabiting the Mau Forest); John Charles Kunich 'Fiddling Around While the Hotspots Burn Out' (Winter, 2001) 14 Geo. Int'l Envtl. L. Rev. 179.

[622] As above.

[623] As above.

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rivers that provide water to the Rift Valley region.[624] The rivers include the Sondu Miriu, Yala, Nzoia and Nyando rivers, as well as the transboundary Mara river, all of which flow into Lake Victoria.[625] Others are Kerio, flowing into Lake Turkana; Molo, flowing into Lake Baringo; Ewaso Nyiro River, flowing into Lake Natron; and Njoro River, Nderit River, Makalia River and Naishi River, all feeding Lake Nakuru.[626] All but one of the rivers in the west of the Rift Valley originate from the Mau Forest Complex.[627] The rich agricultural land and abundant water supply in the Rift Valley are conducive for large scale agriculture in the highlands and pastoralism in the grassy plains as has been practiced in the region for thousands of years by the Maasai, Nandi, Kipsigis and other Rift Valley communities.[628]

Some of the suitable agricultural areas in Kenya's Rift Valley include the former Molo district, Nakuru and Naivasha. The former Molo district is situated along the Mau Escarpment and is one of the most fertile farmlands in the country. It is famous for growing pyrethrum, potatoes and other agricultural crops due to its cool climate.[629] Nakuru District is an agricultural region best known for Lake Nakuru, which is famous for millions of flamingos that nest along its shores.[630] Naivasha (from Maasai name "Nai'posha", meaning "rough water") is a sprawling town in the Rift Valley region located on the shores of Lake Naivasha that is home to a variety of wildlife and a sizeable population of hippos.[631] Between 1937 and 1950, Lake Naivasha was used as a landing place for flying boats on the

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[624] As above. Archived Documents (n 188) (writing about all Kenyan communities).

[625] See Elijah Oyoo-Okoth 'Monitoring exposure to heavy metals among children in Lake Victoria, Kenya: Environmental and fish matrix' (October 2010) 73 EECOES 7 1797 – 1803 (mentioning the rivers flowing into Lake Victoria).

[626] As above.

[627] As above.

[628] *Ole Nchoko High Court case* (n 226) (discussing Maasai customary practices); Huntingford, GWB (n 239) (discussing the Nandi); Peristiany, JG (n 239) (discussing the Kipsigis).

[629] World Bank (n 613).

[630] As above.

[631] As above. See also Tarayia, GN (n 254) (explaining that Naivasha was a former Maasai territory).

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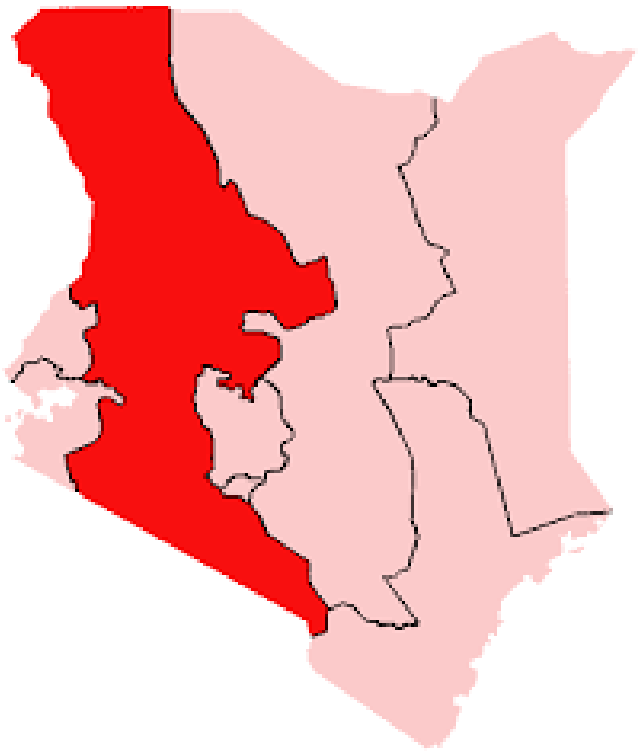
Imperial Airways passenger and mail route from Southampton in Britain to South Africa.[632] The main industry in Naivasha is agriculture, especially floriculture around the lake.[633] There are about fifty-two (52) flower farms in Naivasha area, which accounts for almost 75% of all the flower farms in Kenya.[634]

Below is a map of Kenya with the Rift Valley region marked in red.



Source: The International Bank for Reconstruction and Development (World Bank), The Economic Development of Kenya (The Johns Hopkins Press, Baltimore, 1963)

The below map shows the approximate location of the Mau complex (in green) and its many rivers.

[632] Archived Documents (n 188); World Bank (n 613).

[633] World Bank (n 613).

[634] World Bank (n 613).

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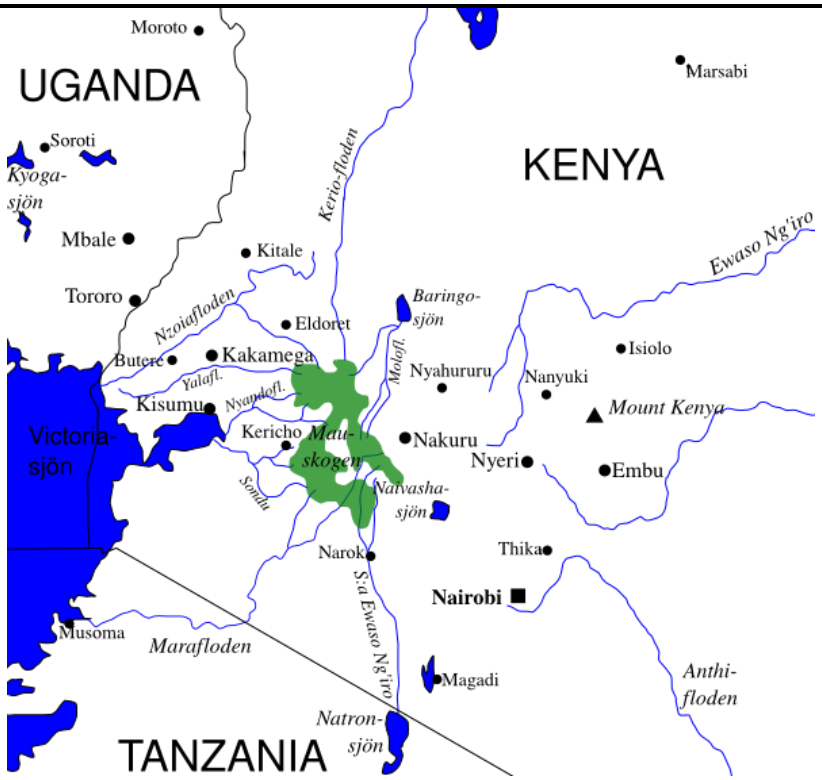

Source: Report of the Prime Mister's Task Force on the Conservation of the Mau Forest Complex, Kenya National Assembly (March, 2009)

This rich agricultural land and the abundant water supply was the cause of the many battles for land in the Rift Valley that are recorded in the oral traditions of the Maasai, Nandi and Kipsigis.[635] For example, the Nandi have stories of their defeat and expulsion of the Maasai from the Uasin Gishu plateau in the 1880s.[636] Their oral traditions record a major battle between the Nandi and the Maasai communities in Kipkarren, the Nandi name for "the place of the spears".[637] European settlers, like the Nandi and the Maasai, also sought to possess

[635] Archived Documents (n 188); Peers, C et al (n 188) (discussing the Maasai and Nandi military prowess); Huntingford, GWB (n 239) (discussing the Nandi); Peristiany, JG (n 239) (discussing the Kipsigis).

[636] Peers, C et al (n 188) p. 37; Hollis, AC (n 239).

[637] Archived Documents (n 188).

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this rich agricultural land and decided to create their own European reserve in the Rift Valley and to expel the African communities from their community land.[638]

3.3 CREATION OF THE WHITE HIGHLANDS

This section focuses on the colonial state's disruption of the traditional tenure systems of communities inhabiting the Rift Valley region, primarily by dispossessing them of their land and confining them in smaller, marginal arid and semi-arid areas not suited to their traditional land use systems. The Kenyan state legal system can be traced back to the Berlin Conference of 1884-85 that allowed the British to create a sphere of influence in East Africa, including the Rift Valley region.[639] The Anglo-German Treaty of 1st July 1890 temporarily settled colonial disputes between Germany and Great Britain, resulting in German abstention from further encroachment into British East Africa.[640] The Indian Lands Acquisition Act of 1894 vested all unoccupied land, including all lands situated within one mile on either side of the Kenya-Uganda Railway that was deemed necessary for the construction of the railway, on the Commissioner for the Protectorate.[641] The Indian Lands Acquisition Act of 1894 had the effect of converting all land in Kenya that had not been appropriated by individuals or by the colonial administration into 'Crown Land', meaning land belonging to Her Majesty,

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[638] Sorrenson, MPK (n 612); World Bank (n 613).

[639] *Mau Mau Litigation – Mutua* (n 357) section 14 (discussing the Berlin Conference); World Bank (n 613).

[640] 'Wilhelmine Germany and the First World War, 1890 - 1918 Anglo-German Treaty (Heligoland-Zanzibar Treaty)' (July 1, 1890) Das Staatsarchiv, Sammlung der offiziellen Aktenstücke zur Geschichte der Gegenwart (The State Archive, 'Collection of Official Documents Relating to Contemporary History' (1891) Leipzig, Verlag von Duncker & Humblot, vol. 51, p. 151. See Tiyanjana Maluwa 'Oil Under Troubled Waters?: Some Legal Aspects of the Boundary Dispute between Malawi and Tanzania Over Lake Malawi' (Spring, 2016) 37 Mich. J. Int'l L. 351 (discussing the Anglo-German Treaty of 1890); World Bank (n 613).

[641] See Dwasi Jane 'International Takings: Emergence of Takings Litigation in Kenya' (Summer, 2013) 19 Hastings W.-N.W. J. Env. L. & Pol'y 445 (discussing the Indian Lands Acquisition Act of 1894); World Bank (n 613).

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the Queen of England.[642] The Act also allowed for the acquisition of land for the construction of government premises and roads.[643] In addition, it empowered the Commissioner for the Protectorate to allocate land to settlers on leases not exceeding 21 years.[644]

On July 1, 1895, the British established the British East Africa Protectorate that included territory within the Rift Valley region.[645] A large part of the British East Africa Protectorate later became the Kenya colony in 1920.[646] On 29 December 1897, the British administrators passed the East African Land Regulations, which extended the period lease granted settlers to 99 years.[647] The regulations also sought to safeguard some areas under African occupation, which were described as those lands "that were cultivated or regularly used by any native or native tribes".[648] Alienation on such areas could only be permitted once the Commissioner for the Protectorate was satisfied that the land "was no longer in use by the native or native tribes and that the issuance of the certificate of title would not be prejudicial to the native interests".[649]

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[642] As above.

[643] As above.

[644] As above.

[645] The East Africa Protectorate Crown Lands Ordinance (Sept. 27, 1902) (reprinted in 1905) 95 British and Foreign State Papers 1901-02, p. 528. See also *Nyali Ltd v. AG*, [1956] 1 QB 1, [1955] 1 All ER 646, [1955] 2 WLR 649 (Court of Appeal, 21 February 1955) (discussing the British East Africa Protectorate).

[646] See Kenya Protectorate Order in Council, 1920 S.R.O. 1920 No. 2343, S.R.O. & S.I. Rev. VIII, 258 vol. 87 p. 968; Kenya (Annexation) Order in Council, 1920, S.R.O. 1902 No. 661, S.R.O. & S.I. Rev. 246.

[647] Sorrenson, MPK (n 612). See also the British East African Land Regulations (29 December 1897) available at https://onlinelibrary.london.ac.uk/resources/databases/justisone (accessed 24 April 2020).

[648] British East African Land Regulations (n 647 above).

[649] British East African Land Regulations (n 647).

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The East Africa Order in Council of 1901 provided the Commissioner with full authority to alienate 'Crown' lands and to expand the definition of Crown Lands.[650] The Crown Lands Ordinance of 1902 vested power in the British High Commissioner to acquire land, including land in native settlements and villages and to sell land acquired in freeholds to any settler in lots not exceeding 1,000 hectares.[651] Under sections 30-31 of the Crown Lands Ordinance of 1902, any land which was unoccupied, temporarily or otherwise by the Africans, was available for alienation to the European settlers without reference to the Africans.[652]

The construction of the Uganda Railway was commenced in 1895, and the line reached the Lake in 1901.[653] In May 1905 a Land Commission, consisting of European settlers in Kenya decided to create a European reserve.[654] The area that the Commission settled on lay between the town of Kiu, in the Eastern Province and Fort Ternan in the Rift Valley.[655] In July 1906, Lord Elgin, as Secretary of State for the Colonies, expressed his approval of the Land Commission report, thereby formally setting aside the area of approximately sixteen thousand, seven hundred (16,700) square miles or a fifth/twenty percent (20%) of the Rift Valley region, for European settlement.[656] The European settlements in the Rift Valley region were principally confined to the large belt of farmland

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[650] See East Africa Order in Council, 1902, S.R.O. 1902 No. 661, S.R.O. S.I. Rev. 246; Crown Lands Ordinance (n 645); The East Africa Protectorate Crown Lands Ordinance (Sept. 27, 1902) reprinted in 95 British and Foreign State Papers 1901 - 1902, at 528 (1905); 'Rules for the Purchase of Land under the Crown Lands Ordinance 1902 No. 76' (1903) The Official Gazette of the East Africa and Uganda Protectorates, East Africa Protectorate.

[651] Crown Lands Ordinance (n 645).

[652] Crown Lands Ordinance (n 645), section 30-31.

[653] See TJRC Report (n 2) Vol. IIB, section 51, p. 180; Sorrenson, MPK (n 612).

[654] Sorrenson, MPK (n 612).

[655] W. T. W. Morgan 'White Highlands' of Kenya (June, 1963) The Geographical Journal, Published by: The Royal Geographical Society (with the Institute of British Geographers), Vol. 129, No. 2, pp. 140-141, available at https://www.jstor.org/stable/1792632 (accessed 24 April 2020).

[656] As above.

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stretching from near Nairobi to Mount Elgon, namely, Naivasha, Laikipia, Nakuru, Kericho, Nandi, Uasin Gishu and Trans Nzoia areas.[657] These areas were part of what became known as the 'White Highlands' or 'Scheduled Areas'.[658] The 'White Highlands' or 'Scheduled Areas' in the Rift Valley region are highlighted in the map below:

[657] As above. See also Sorrenson, MPK (n 612).

[658] Akiwumi Commission Report (n 2) section 94, p. 61; Sorrenson, MPK (n 612).

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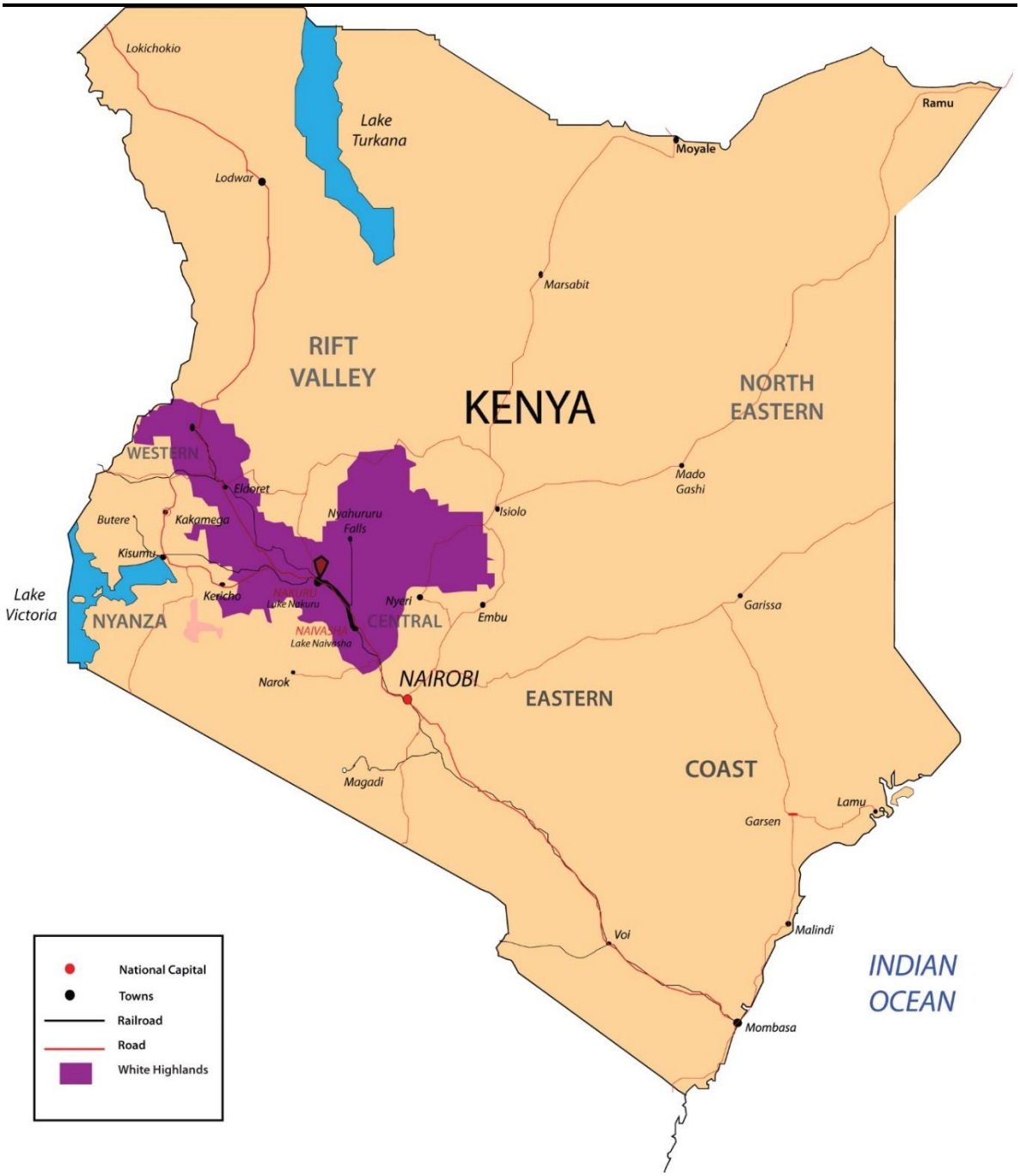

Source: Jedwab, Remi and Adam Storeygard , Edward Kerby, and Alexander Moradi, History, Path Dependence and Development: Evidence from Colonial Railways, Settlers and Cities in Kenya, The Economic Journal, 2017, 127 (603), 1467 - 1494 (with formatting by author)

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After the creation of the European reserve, the Africans who had been dispossessed of their land were driven into native reserves.[659]

3.4 THE DISRUPTIVE EFFECT OF NATIVE RESERVES

As the European settler population increased and pushed African communities out of the White Highlands, the Africans were confined in "native reserves" through a law called the Kenya (Native Areas) Ordinance, passed in 1926.[660] The 1926 Native Areas Ordinance and, later, the Lands Trust Ordinance of 1930 had indications of intention to confer Africans use and occupancy rights over land in the reserves and to protect their rights but, in practice, was used to alienate African communities' prime land.[661] The native reserves of the Rift Valley region comprised mostly the Kalenjin and the Maasai and formed a belt around the White Highlands or Scheduled areas.[662]

The British used the reserve concept to segregate whole communities of non-Europeans throughout the British empire. In Canada, for instance, the reserve concept was enshrined in colonial policy through the Royal Proclamation of 1763, which established the Government of Quebec, Canada.[663] The Royal Proclamation of 1763 provided in part as follows:

> "And whereas it is just and reasonable, and essential to our interest and the security of our colonies, that the several nations or tribes of Indians, with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds…

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[659] See TJRC Report (n 2) vol. IIB, section 51, p. 180; Sorrenson, MPK (n 612).

[660] See Robert Home 'Colonial Township Laws and Urban Governance in Kenya' (1 October 2012) Journal of African Law, vol. 56, no. 2, pp. 175 - 193.

[661] As above.

[662] See TJRC Report (n 2) vol. IIB, section 51, et seq.

[663] See LaForme, HS et al (n 617).

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> And we do further declare it to be our royal will and pleasure, for the present as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the lands and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company…"[664]

Thus, the British confined members of the Indian communities found living in Canada in reserves in the same way that the Maasai, Nandi, Kipsigis and Kikuyu communities of the Rift Valley region were confined to native reserves in Kenya.

Communities inhabiting the Rift Valley region were confined to native reserves or became labour-tenants or squatters. These communities enjoyed a severely limited right of occupancy over their lands. According to Okoth-Ogendo, the African communities effectively became tenants of the crown.[665] A colonial agent quoted by Okoth-Ogendo, stated:

> I am afraid that we have got to hurt their (the communities) feelings, we have got to wound their susceptibilities and, in some cases, I am afraid we may even have to violate some of their most cherished and possibly even sacred traditions if we have to move communities from land on which, according to their own customary law, they have an inalienable right to live, and settle them on land from which the owner has, under that same customary law an indisputable right to eject them.[666]

The forced eviction of African communities from their ancestral lands to native reserves or settlement schemes was systematic and widespread in the Rift Valley region.

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[664] The Royal Proclamation of 1763, R.S.C. 1985, App. II, No. 1. See also as discussed in LaForme, HS et al (n 525).

[665] See Okoth-Ogendo, H.W.O (n 78) (tenants of the crown); H.W.O. Okoth-Ogendo 'Legislative Approaches to Customary Tenure and Tenure Reform in East Africa, in Evolving Land Rights, Policy and Tenure in Africa' (2000) Camilla Toulmin & Julian Quan eds.,123, 127.

[666] As above.

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Some members of the Kalenjin community, such as the Talai community, for example, were forcefully evicted from their lands and moved to other parts of the colony to make room for European settlement. The Talai Community were evicted from their ancestral lands in 1934 through "[t]he Olaibons Removal Ordinance, of 1934" which facilitated and legalized their subsequent deportation to Gwassi in Western Kenya and other parts of the country.[667] Their removal was motivated by the perception that they were instrumental in the Kipsigis uprising against colonial rule.[668] After the Talai's deportation, the colonial administrators demonized the community and ensured that the Kipsigis denounced their leadership.[669]

The Nandi were driven out of Tinderet Division of present-day Nandi District in or about 1905 after their unsuccessful rebellion against European attempts to settle them there.[670] Europeans settled in Tinderet District after evicting the Nandi. The Nandi have over the years claimed that Tinderet District, which, according to them, comprises Nandi Hills, Fort Ternan, Songhor, Chemelil, Kibigori and Londiani, should be returned to them.[671]

Below is a map of the former Native Reserves in the Rift Valley:

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[667] TJRC Report (n 2) vol. IIB, sections 79 - 80, pp. 189 - 190.

[668] As above.

[669] As above.

[670] Akiwumi Commission Report (n 2) section 117, p. 71.

[671] As above.

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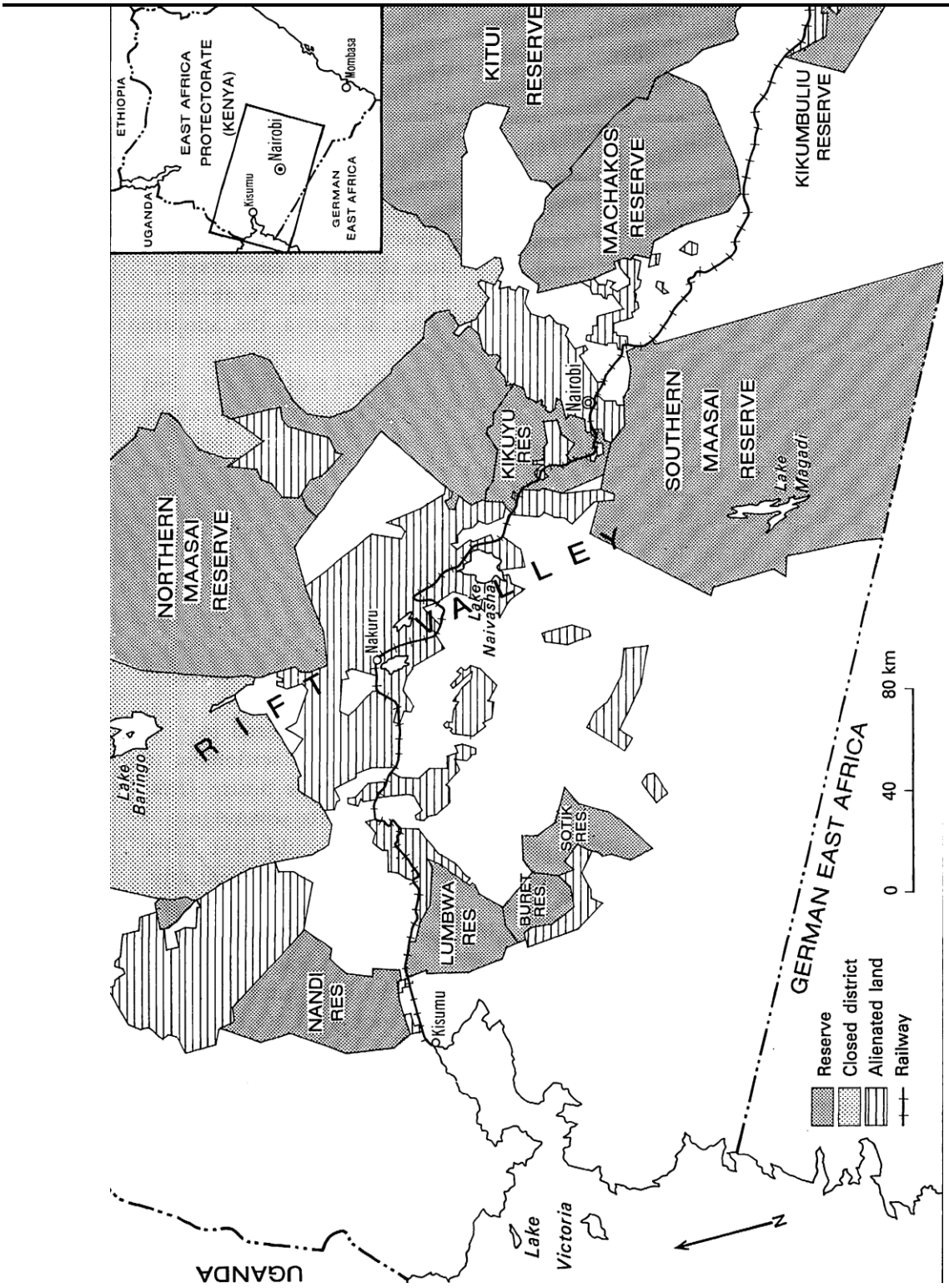

Source: William T. W. Morgan 'The Ethnic Geography of Kenya on the Eve of Independence: The 1962 Census' (Jan - Mar, 2000) Bd. 54, H.1, (Erdkunde,).

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As is visible on the map, members of the Maasai community occupied two native reserves known as the Northern Maasai Reserve and the Southern Maasai Reserve. Members of the Kalenjin community occupied several smaller native reserves such as the Nandi Reserve occupied by members of the Nandi community and the Lumbwa Reserve, the Buret Reserve and the Sotik Reserve occupied by members of the Kipsigis community. Members of the Kikuyu community moved into the Rift Valley region mostly as squatters or labourer-tenants on European farms.[672]

3.4.1 AFRICAN SQUATTERS OR LABOURER-TENANTS

Following the creation of the White Highlands/Scheduled Areas, the majority African population was rendered landless or hemmed in within native reserves.[673] Having lost their communal land, some Africans were recruited by the colonial administrators to work as farm labourers on European farms in the White Highlands/Scheduled Areas.[674] Over time, the population of Africans in the European farms increased and some were allowed to live in the farms as squatters. The Kikuyu community were the largest squatter community in the Rift Valley region as at independence, followed by the Nandi community, because they settled in European farms as squatters / labourer-tenants following their dispossession and displacement from their ancestral lands.[675]

Africans also left the native reserves to look for employment on European farms. Factors which drove Africans from the reserves were the introduction of the Hut and Poll taxes under the Native Hut and Poll Tax Ordinance of 1910, requiring payment of taxes by Africans, the Masters and Servants Ordinance of 1906, mandating Africans to provide forced agricultural labour to Europeans, the 1918 Resident Native (Squatters) Ordinance and the

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[672] P. D. Abrams 'Kenya's Land Resettlement Story' (1979) Nairobi: Challenge Publishers and Distributors.

[673] Akiwumi Commission Report (n 2) section 80, p. 54.

[674] Akiwumi Commission Report (n 2) section 94, p. 61.

[675] TJRC Report (n 2) vol. IIB, sections 134 - 188, pp. 207 - 221; Akiwumi Report (n 2) section 105, p. 66.

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kipande (pass book) system, which made it difficult for Africans to move within the country as they had to show their passes each time to be allowed to move.[676]

In this section, I describe the disruptive effect of land dispossession on the power ingredients that each African community system has traditionally deployed to better interact with its environment, broadly defined to include the geography, climate, ecosystem, biodiversity and ontological totality of the territory that a community inhabits. Confinement in native reserves disrupted the community systems' food supply chains and substantially weakened their legal and institutional structures as I discuss below.

3.4.2 INSUFFICIENT FOOD PRODUCTION

As discussed in chapter 2 on traditional land tenure systems, the Rift Valley communities had their own customary practices that enabled them to interact with their environments effectively and efficiently to feed themselves, reproduce and, generally, thrive as community systems. These customary practices helped them to develop constellations of power factors such as food production and the legal and institutional structural complexities necessary for their own self-preservation. Their land tenure systems reflected these customary practices. Pastoralists, for example, left their drier grazing lands for greener pastures to allow for re-growth during seasonal changes in pasturage.[677] Crop farming communities also practiced shifting cultivation by allowing the land to lie fallow in preparation for the next planting season.[678] A healthy balance also existed in the communities' food supply chain because of trade. The communities that produced surpluses in livestock, crop harvests or other commodities could exchange them for items which they lacked or use their surpluses for marriage and other customary practices. These customary practices ensured that the Rift Valley communities met their basic needs and also maintained an equilibrium between themselves and their environments.

Confinement in native reserves was devastating to the community systems' food supply chains. Pastoralists could no longer move freely with their livestock in search of

[676] TJRC Report (n 2) vo. IIB, section 71, p. 186.

[677] Kameri-Mbote Dissertation (n 20) ch. III, p. 84.

[678] Id.

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water and pasture, while crop farming communities lost much of the land that they previously allowed to lie fallow in preparation for the next planting season. The pressure on land was enormous, thus leading to lower yields and environmental degradation.[679] In contrast, the European settlers who took over the most productive African lands were able to produce food surpluses due to their much longer history of food production in densely populated, economically specialized, politically centralized, and competing social systems.[680] These European settlers thrived because they had already perfected the power ingredient of intensive food production within their European farming communities and only lacked the land resources on which to apply their power. In a sense, their strategy was to integrate the Rift Valley land resources into Europe's capitalist economies without regard to the effect that such a strategy would have on the African communities that previously inhabited these lands.[681] The result was a thriving European farming community and impoverished African pastoral and agricultural communities in the Rift Valley.

The inability of members of African communities to meet their basic needs was one of the main factors that forced them to flee the native reserves in search of employment opportunities in the thriving European farms as discussed in the previous section. The Africans had effectively lost their means of sustenance and had to sell their labour cheaply to European settlers in order to sustain themselves. For example, while Lord Delamare, a European settler in the Rift Valley region, acquired a hundred thousand (100,000) acres of African land to farm, his African labourers earned a wage of approximately twenty (20) Kenyan shillings each per month.[682] This migration of labour from African communities to European settler farms undermined the socio-economic bases of these African community systems and continued to relegate them to the periphery of the integrated Kenyan socio-economic system.

In chapter 4, I analyse the relationship between the European settler community and the African communities using the theory of social dominance that I introduced at the

[679] Rodney, W (n 231) p. 219.

[680] Diamond, J (n 218).

[681] Rodney, W (n 231) p. 25.

[682] Rodney, W (n 231 above) p. 151.

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beginning of this thesis. Under this theory - the tendency of systems to form group-based social hierarchies when they interact - the colonial administration enacted policies that were designed to maintain European dominance over the African communities. An illustration of the colonial administration's determination to suppress and dominate the African communities was their failure to invest in agricultural improvements in Africa beyond cash crop growing for export to Europe and the progressive weakening of African institutions.[683]

3.4.3 WEAKENED LEGAL AND INSTITUTIONAL STRUCTURES

Colonial disruption of African community systems also resulted in a weakening of the communities' legal and institutional structures. As discussed in chapter 2, the Rift Valley communities had their own traditional political organizations that enabled them to better interact with their environment. The capacity of a community system to self-organize through effective institutions is one of the power factors that enables the community to feed itself better, reproduce better and, generally, dominate other communities that inhabit the same area. The pastoral Maasai, Nandi and Kipsigis, generally, practiced the custom of raiding to acquire livestock and land; a custom which was guided by a militarized youth led by councils of elders and respected spiritual leaders. Similarly, the Kikuyu practiced sedentary agriculture and relied on the leadership of Gethaka heads or elders and chiefs who were motivated to make peace, trade, intermarry and minimize conflicts with their neighbours.

Colonialism disrupted these institutional structures that the pastoral communities and the Kikuyu agriculturalists had developed with the passage of time. The communities' legal and institutional structures were unable to successfully resist the disruption and therefore lost their effectiveness internally within the communities and externally against the European settlers. The landmark litigation by the Maasai community leaders against the European settlers – the *Ole Nchoko case* – failed before the High Court and before the Court of Appeal. The Nandi and Kipsigis resistance resulted in the brutal murder of their leader, Koitalel arap Samoei, by the British in 1905 and the forced removal of the Talai clan from

[683] Rodney, W (n 231) p. 221.

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Kipsigis territory.[684] The armed resistance by the Kikuyu community against the European settlers resulted in the forced removal of more than one (1) million community members from their homesteads and their placement in villages and huts to undergo psychologically damaging rehabilitation processes.[685]

The institutional structures that these communities had developed thus ceased to set the communities' value systems, policies, ideologies, ideas of justice, morality and, generally, lost control of the process of passing on the community's customary practices from generation to generation. Albert Memmi in *The Colonizer and the Colonized*, captures the effects of colonialism's disruption of a community's legal and institutional structures as follows:

> The most serious blow suffered by the colonized is being removed from history and from the community. Colonization usurps any free role in either war or peace, every decision contributing to his destiny and that of the world, and all cultural and social responsibility.[686]

Memmi's statement is admittedly sweeping but covers the dramatic disruption of colonialism to communities' legal and institutional structures. The community leaders lost their power to European settlers even in situations where some of that leadership structure was left intact. The European settlers then imposed puppet leaders on the African communities as a way of integrating the Communities' legal and institutional structures into their European legal and institutional structures again without regard to the effect that such a strategy would have on the African communities. This puppet leadership was exposed when the Maasai community in the *Ole Nchoko case* challenged the legitimacy of the leaders who agreed to the Anglo-Maasai Agreements of 1904 and 1911. These challenges were futile because the entire community leadership, whether imposed by European settlers or not, had no power factors to deploy outside the narrow restrictions laid down by colonialism.

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[684] See Chapter 2, section 2.4.3 (discussing the customary practice of youth militarization among the Nandi and Kipsigis.

[685] Elkins, C (n 369).

[686] Rodney, W (n 231) p. 225.

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Where community leaders refused to act within the narrow restrictions imposed by the European settlers, they risked forced removal from the territory as happened to the Talai clan and thousands of Kikuyu community members who resisted colonial rule.

At Kenya's independence in 1963, the gaps in African community leadership that had been created by colonial disruption of the communities' legal and institutional structures were filled by African elites who the European settlers had imposed on the communities to perpetuate their dominance. It is this dominance interface that the state system has been attempting to remodel so as to avoid the resulting unhealthy competition over land resources, instability and conflicts, most visibly in the Rift Valley region. The state's continued domination of the Rift Valley communities poses an existential threat to the Kenyan state itself. A rethinking of existential risk mitigation strategies around a deeper understanding of community resilience is essential and requires fundamental changes to the Kenyan state's legal and policy processes for addressing instability risks in the Rift Valley. The state should study and understand the communities' resilience by mapping their key structural attributes, essential dynamics, interdependencies and feedback loop mechanisms in order to create and sustain interventions in the Rift Valley that will help these communities to achieve stability.

In the next chapter, I examine the interaction between formal state law and these customary practices to test the state's effectiveness in affording community systems genuine options for self-corrective measures to mitigate the risk of instability in the Rift Valley region. These options for self-correction may be effective if the communities are able to re-gain their traditional power ingredients such as intensive food production and effective institutions that they lost when the colonial state and its successor neo-colonial state dispossessed them of their land.

3.5 REVIEW

In this chapter, I discuss the colonial state's disruption of the customs and traditions of the Maasai, Kikuyu, Nandi and Kipsigis communities by dispossessing and displacing them from their most valuable resource; their land. Although I delve into the mechanics of the disruption – the settler's attraction to the rich resources of the Rift Valley for farming and use of the formal state system to acquire community land – the focus of this chapter has

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been on the disruption and destabilization of the African customary practices. There is some discussion of the legal and political process used by the settlers to dispossess and displace the African communities, such as the creation of a European reserve known as the White Highlands, the signing of Anglo - Maasai Agreements of 1904 and 1911, forced labour, forced eviction and confinement of African communities to native reserves. Using Professor Luhmann's systems theory notion of autopoiesis, I show that the disruption interfered with the stability and hence integrity of the community systems, thus forcing them to take corrective measures in search of that stability.[687]

[687] Professor Luhmann's systems theory notion of autopoiesis has been discussed in section 1.4.2 of chapter 1. For more information on autopoiesis, see The New Science of Niklas Luhmann (n 39), King, M (n 51) and Hugh Baxter (n 46).

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CHAPTER 4 INTERFACE BETWEEN STATUTORY LAWS AND TRADITIONAL TENURE SYSTEMS

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4.1 INTRODUCTION

In this chapter I analyse the interface between the formal Kenyan state statutory system and the informal African customary legal systems to test whether Kenya's new communal tenure system will be effective in addressing the socio-economic marginalization of African communities. The interface between state statutory law and customary law relating to land in Kenya has been characterized by the tension between exploitation of the land to maximize agricultural output and equitable distribution of the land among the people that inhabit it.[688] The colonial state system, at the outset, favoured policies and legislation that expropriated the land from the communities inhabiting it and allocated it to an elite that is purportedly able to effectively exploit if for optimal agricultural production.[689] As discussed in the previous chapter, these state policies and laws disrupted African customary systems and pushed Africans to the periphery of the integrated Kenyan socio-economic system, thereby destabilising their community systems.[690] The African communities are, however, resilient, and have stubbornly maintained their customary laws while mounting a spirited struggle to get back to the core of the integrated Kenyan socio-economic system.[691]

The struggle by African communities destabilized the entire colonial state system to the point of posing an existential threat to the state.[692] The colonial state's self-preservation strategy of assimilating a critical mass of the African community was insufficient to create the needed stability, hence the need for an effective pipeline for African community systems to transition from the periphery to the core of the integrated Kenyan socio-economic

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[688] I discuss the challenge of maximizing agricultural production later in this chapter under the "Swynnerton Plan". See R. J. M. Swynnerton 'A Plan to Intensify the Development of African Agriculture in Kenya (Swynnerton Plan)' (1954) Department of Agriculture, Ref: AGR. 32 / 2 (available in hard copy at the Kenya National Archives); World Bank (n 613) (both discussing the challenge of maximizing agricultural production in Kenya).

[689] As above. This is also discussed later in this chapter under the "Swynnerton Plan".

[690] See Chapter 3.

[691] As above.

[692] This was discussed later in section 2.4.2.2 of chapter 2 under the "Mau Mau Uprising".

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system.[693] The new recognition framework for customary land rights in the Kenya Constitution of 2010,[694] the Kenya Community Land Act of 2016[695] and its implementing regulations[696] is a credible attempt to create such a pipeline that needs creative ideas for implementation.

In this chapter, I discuss the effectiveness of Kenya's new communal tenure system in addressing the socio-economic marginalization of African communities. I first describe the colonial state's expropriation of African land, labour and capital to create a modern economy for the colonial state. I use social dominance theory (meaning the tendency of social systems to hierarchize)[697] to explain the marginalization of African communities in the building of the modern economy. I show how the colonial state relied on the doctrine of *terra nullius*[698] and used formal law to expropriate the land from African communities and to sell, lease or otherwise give it to the European settlers. I then explain the colonial state's domination and suppression of African community systems using social dominance theory[699]. As I indicated in the previous chapter, these African community systems are resilient and resisted the colonial state's domination violently, culminating in the Mau Mau Uprising.[700] In the last sections of this chapter, I show how the colonial state and its successor independent Kenyan

[693] This refers to the failure of the Swynnerton Plan to integrate Africans into the integrated Kenyan socio-economic system thus resulting in the clamour for land tenure reform. This is discussed later in this chapter.

[694] Constitution of Kenya of 2010 (n 1) art. 63.

[695] Community Land Act (n 19).

[696] Community Land Regulations (n 19).

[697] Jim Sidanius & Felicia Pratto 'Social Dominance: An Intergroup Theory of Social Hierarchy and Oppression' (1999) Cambridge University Press, Chapter 2; Wilson, EK (n 21) (discussing social dominance theory generally).

[698] Mabo v Queensland (n 22) 19 (explaining that the doctrine of terra nullius refers to the justification of a state's acquisition of territory belonging to no one).

[699] Sidanius & Pratto (n 697) chapter 2.

[700] See section 2.4.2.2 of Chapter 2. See also Aguirre, BE (n 219) and Ruhl, JB (n 219) (discussing resilience).

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state explored ways of assimilating individuals into the state economy. When implementation of the assimilation policy elicited more resistance by the African communities, the state has continued to explore ways of involving the communities themselves into the state economy, including formally recognizing communal tenure.

4.2 SHADOW ECONOMIES OF AFRICAN COMMUNITIES

After declaring a protectorate over the East African territory in 1895, the British set out to create a modern economy for the colonial state. The colonial state's plan to create a modern economy in the territory ignored the pre-existing economies of the African communities. As summarized in the previous chapter, the Maasai, Kikuyu, Nandi and Kipsigis had their own customary practices of pastoralism, agriculture and resource distribution centred around livestock and land.[701] The colonial state ignored the communities' customary practices and, instead, viewed the people and their resources as labour and capital that could be injected into the British economy to create sufficient resources to administer the colony. This view is consistent with modern methods of measuring economic development that tend to optimize a small component of an economic system to the exclusion of the other components.[702]

This modern measure of economic development focuses largely on the gross domestic product (GDP). GDP assesses supply and demand through the account of the market value of goods and services produced and traded in a country during a given year.

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[701] See section 2.4 of chapter 2.

[702] Chihiro Watanabe 'A new paradox of the digital economy - Structural sources of the limitation of GDP statistics' (November 2018) 55 ETECSO 9 - 23 (demonstrates the limitation of GDP statistics in measuring the advancement of the digital economy and, therefore, its overall limitation in measuring shadow economies. It also explains that the measures of the total value of consumer welfare are at odds with the conceptual basis of measuring GDP and income and may thus result in seeking the pseudo optimization in a subsystem at the expense of the total system).

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GDP can be measured using the value added, income or expenditure methods.[703] The value added approach measures the gross output or the sum of total sales receipts across the economy, less the value of intermediate goods and services used as inputs to production.[704] The income approach focuses on the sum of employee compensation, taxes on production and imports less subsidies, and gross operating surplus.[705] The expenditure method measures the sum of the value of "final" expenditures by consumers, businesses, and governments.[706] Economists have developed a macroeconomic equation for measuring GDP which states that GDP equals income (Y) which equals final expenditures, consisting of personal consumption (C), private investment (I), government spending (G), and the net of exports less imports (NX). If the equation is extended to value added (VA), it can be expressed as GDP = Y = C + G + I + NX = VA.[707]

Whether value based, income based or expenditure based, GDP does not adequately measure all the components of an economic system.[708] GDP ignores several components of the economic system that do not involve monetary transactions, excluding, for example, non-monetary production of goods and services in households, donations, wealth variation,

[703] See Bureau of Economic Analysis 'Concepts and Methods of the U.S. National Income and Product Accounts (NIPA Handbook)' (May 2019) United States Government, Chapters 1 – 13, pp. 2-7 to 2-10 available at https://www.bea.gov/resources/methodologies/nipa-handbook (accessed 24 April 2020) (describes three ways to measure Gross Domestic Product or "GDP": (1) as the sum of goods and services sold to final users; (2) as the sum of income payments and other costs incurred in the production of goods and services; and (3) as the sum of "value added" by all industries in the economy).

[704] As above.

[705] As above.

[706] As above.

[707] As above.

[708] See Tālis J. Putniņš and Arnis Sauka 'Measuring the shadow economy using company managers' (May 2015) 43 EJCECO 2 471 - 490 (shows the challenges of measuring shadow economies); Patrick S. Brogan 'The Economic Benefits of Broadband and Information Technology' (Spring, 2009) 18 Media L. & Pol'y 65 (describing the type of data that economists use to measure Gross Domestic Product or "GDP").

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international income flows, household production of services, and destruction of the environment.[709] Because GDP does not address, but often hides, social and economic inequities, it does not properly provide societal insights into economic welfare due to escalating crime, reducing worker productivity and investment.[710] When the growth is concentrated in only one portion of the society, it does not contribute to improving global economic prosperity because the social benefits of increases in consumption by the rich are less positive than increases in spending by the whole community.[711] Moreover, GDP disregards long-term negative consequences of short-term exploitation of the ecosystem and of the ecosystem's services.[712]

This is why the GDP method of measuring economic development is limited and limiting in that it can lead to the optimization of a subsystem to the detriment of the whole economic system.[713] For example, the income and expenditure methods of measuring GDP tend to focus on net exports.[714] Net exports refer to one of the final expenditure components of GDP that captures the difference between the country's exports and imports.[715] The impact of imports on the country's economy depends on the degree to which they act as

[709] See Putniņš & Sauka (n 708) (discussing the difficulty of measuring shadow economies).

[710] Wade M. Cole 'Wealth and health revisited: Economic growth and wellbeing in developing countries, 1970 to 2015' (January 2019) 77 ESOCSR 45 - 67 (highlighting economic growth's possible detrimental effect toward the health of populations).

[711] As above. See also Chihiro Watanabe 'A new paradox of the digital economy - Structural sources of the limitation of GDP statistics' (November 2018) 55 ETECSO 9 - 23 (explaining that the measures of the total value of consumer welfare are at odds with the conceptual basis of measuring GDP and income and may thus result in seeking the pseudo optimization in a subsystem at the expense of the total system).

[712] As above.

[713] As above.

[714] See Brogan, PS (n 708) (describing the type of data that economists use to measure Gross Domestic Product or "GDP").

[715] As above.

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substitutes for, or as complements to, domestic production.[716] For example, raw tea and coffee that are produced in Kenya and shipped to a final processing plant in the United Kingdom are included in Kenyan exports and counted as final expenditures in GDP.[717] A focus on net exports may therefore show an increase in income for the colony through the export of raw coffee and tea but fail to show the resulting dispossession and displacement of whole households to grow the coffee and tea.[718] It is also possible for GDP to rise – as net exports of coffee and tea may rise - even during times of weak economic and social health, thereby giving a false impression about economic wellness.[719] This is because GDP fails to quantify or qualify the impact of an economic crisis on individual families by optimizing some components of an economic system to the exclusion of the rest.[720]

A fundamental limitation of the GDP as a measure of economic development for the Kenyan territory in the colonial era was its failure to capture accurately the social well-being enabled by the economic systems of African communities.[721] These "shadow" or "informal" or "unreported" economies were not factored into policy decisions by the colonial state.[722] The colonial state's obsession with acquiring land, labour and capital resulted in the optimization of only the observable components of the economic system, which ignored the

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[716] As above.

[717] As above. See also World Bank (n 613) chapter 3 (discussing coffee and tea production as presenting the prospects for Kenya's economic development).

[718] As above.

[719] See Putniņš & Sauka (n 708) (discussing the difficulty of measuring shadow economies); Cole, WM (n 710) (highlighting economic growth's possible detrimental effect toward the health of populations).

[720] Cole, WM (n 710 above) (highlighting economic growth's possible detrimental effect toward the health of populations); See also Watanabe, C (n 702) (explaining that the measures of the total value of consumer welfare are at odds with the conceptual basis of measuring GDP and income and may thus result in seeking the pseudo optimization in a subsystem at the expense of the total system).

[721] See, generally, Putniņš & Sauka (n 708) (shows the challenges of measuring shadow economies).

[722] This will be discussed in more detail later in this chapter under the "Swynnerton Plan".

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total economic system within the territory.[723] Had the colonial state taken the time to understand the system of use and distribution of livestock, land and other resources that existed within the territory, they may have concluded that the economic development of the African communities was in a more positive trajectory before colonial disruption.[724]

This failure to accurately measure the economic development of the African communities was also caused by the lack of accurate and reliable source data on the incomes and expenditures of those communities.[725] One critical factor underlying the usefulness of GDP figures is confidence on the part of users that the figures and estimates represent a truthful picture of the economy.[726] The GDP estimation process starts with identifying and obtaining source data that are appropriate as the basis for the estimates.[727] These data largely originate from public sources, such as government surveys and administrative data, and they are supplemented by data from private sources, if any.[728] The source data are then transformed into estimates that are used to measure GDP.[729] The colonial state did not have accurate information on the size of these shadow or informal or unreported economies or

[723] See Brogan, PS (n 708) (describing the type of data that economists use to measure Gross Domestic Product or "GDP").

[724] See Putniņš & Sauka (n 708) (which discusses, generally, the difficulty of measuring shadow economies). See also World Bank (n 613) (demonstrating the colonial state's obsession with creating a modern economy for the settler state based on cash crop production and ignoring the economic systems of the African communities that were centered on livestock).

[725] As above. See also Brogan, PS (n 708) (describing the type of data that economists use to measure Gross Domestic Product or "GDP").

[726] As above.

[727] As above.

[728] As above.

[729] For an example of how the United States measures Gross Domestic Product or "GDP", see NIPA Handbook (n 703) (describes three ways to measure Gross Domestic Product or "GDP": (1) as the sum of goods and services sold to final users; (2) as the sum of income payments and other costs incurred in the production of goods and services; and (3) as the sum of "value added" by all industries in the economy).

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their determinants.[730] Neither did the colonial state have accurate and reliable data on the relation of African economies to their stages of economic development, and their responsiveness to various policy measures.[731] The resulting policy trajectory of the colonial state was to ignore the economies of African communities completely and to simply expropriate land, labour and capital from them for use in building a modern economy for the colonial state.[732]

4.3 DISPOSSESSION OF AFRICAN COMMUNITIES WITHOUT COMPENSATION

In working to build a modern economy for the colonial state, the state understood, at the outset, the importance of land as the main economic driver in Kenya.[733] Nearly all the African communities that the European settlers found inhabiting the Kenyan territory were largely dependent on land for their livelihoods and have continued to primarily depend on land to this day.[734] Kenya's surface comprises 97.8% land and 2.2% water.[735] It has an area of approximately 582,646 sq. km. (224,081 sq. mi.), comparable in size to France and about half the size of Tanzania (Kenya is approximately 580,367 sq. km, France approximately

[730] See, generally, Putniņš & Sauka (n 708) (shows the challenges of measuring shadow economies); World Bank (n 613) (demonstrating the colonial state's obsession with creating a modern economy for the settler state based on cash crop production and ignoring the economic systems of the African communities that were centered on livestock).

[731] As above.

[732] As above. See also Swynnerton Plan (n 688) and World Bank (n 613) (both demonstrating the colonial state's policy goal of building a modern economy for the colonial state).

[733] See also Swynnerton Plan (n 688) and World Bank (n 613) (focus on land resources to build a modern economy for the colonial state).

[734] Republic of Kenya (Ministry of Lands) 'Sessional Paper No. 3 of 2009 on National Land Policy (National Land Policy of 2009)' (August, 2009) National Legislative Bodies / National Authorities, chapter 1, section 1.1(1), available at http://extwprlegs1.fao.org/docs/pdf/ken163862.pdf (accessed 25 April 2020).

[735] National Land Policy of 2009 (n 734) sections 11 - 12.

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551,500 sq. km. and Tanzania is roughly 947,300 sq. km).[736] The plateau and upland areas of Kenya lying between 5,000 and 9,000 feet comprise some of the best land for settlement and agriculture in the whole of Africa.[737] Lying in equatorial latitudes, Kenya experiences differences in climatic conditions caused mainly by variations in altitude.[738] The wide variations in climate and altitude, coupled with a variety of soils, largely determine the pattern of Kenya's agriculture and settlement.[739] Only about 13 percent of the total area of Kenya receives rainfall consistently above 30 inches annually.[740] Only 20% of the land area can be classified as medium to high potential agricultural land with the rest being arid or semi-arid.[741] Approximately seventy-five per cent (75%) of the country's population also lives within the medium to high potential agricultural areas with a population density as high as over two thousand (2000) persons per sq.km. in high potential areas.[742]

Crop production is restricted to some twenty-six (26) million acres mainly in the Rift Valley region and, mostly, in the southwest of the country.[743] Given suitable conditions of rainfall and soil, coffee of the arabica type can be produced efficiently almost anywhere between 4,800 feet and 7,000 feet.[744] There were approximately 260,000 acres suitable for coffee in the scheduled areas alone as at the time of Kenya's independence.[745] Tea is grown mainly on acid or slightly acid soils between 6,000 feet and 7,200 feet, where rainfall is adequate in amount and distribution.[746] As at independence, approximately 123,000 acres

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[736] As above.

[737] World Bank (n 613) chapter 2.

[738] As above.

[739] As above.

[740] World Bank (n 613) chapter 2.

[741] World Bank (n 613) chapter 4, pp. 63-67.

[742] As above. See also Swynnerton Plan (n 688) (Opening Note by F. Cavendish-Bentinck).

[743] Swynnerton Plan (n 688) pp. 9-10.

[744] As above.

[745] As above. See also World Bank (n 613) chapter 4, pp. 63-67, 116-120.

[746] Swynnerton Plan (n 688) pp. 9-10, 32-36. See also World Bank (n 613) pp. 121-123.

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could be used to plant tea in Kenya.[747] In the scheduled areas alone, nearly 75,000 acres had been licensed for planting tea at the beginning of 1961.[748] For the non-scheduled areas, it was estimated at the time that at least 70,000 acres to 80,000 acres could be developed to plant tea.[749] Pyrethrum grows very well above the 6,500-foot level.[750]

European settlers who first arrived in Kenya, therefore, appreciated the importance of the land and instituted a policy of land expropriation to acquire it from African communities. To implement the expropriation policy, the colonial state relied on the doctrine of discovery or doctrine of *terra nullius*, which is a Latin expression meaning "nobody's land".[751] International law at the advent of colonialism in Kenya recognised (1) conquest, (2) cession, and (3) occupation of territory that was *terra nullius*, as three of the effective ways of acquiring sovereignty over a territory.[752] The ICJ Advisory opinion on Western Sahara described occupation as a legal means of peaceably acquiring sovereignty over territory provided that the territory is *terra nullius*, meaning a territory belonging to no-one at the time of occupation.[753] In *Advocate-General of Bengal v Ranee Surnomoye Dossee*, Lord Kingsdown went further to also describe the law that applied in the occupied territories by stating that "[w]here Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws."[754] In *Johnson & Graham's Lessee v. McIntosh*, the United States Supreme Court described the doctrine of *terra nullious* or doctrine of discovery as it applied to North America, including Canada, as follows:

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[747] World Bank (n 613) pp. 121-123.

[748] As above.

[749] As above.

[750] World Bank (n 613) pp. 125-126.

[751] Mabo v Queensland (n 22) (explaining that the doctrine of terra nullius refers to the justification of a state's acquisition of territory belonging to no-one).

[752] See *Western Sahara, Advisory Opinion*, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975).

[753] As above.

[754] *Advocate-General of Bengal v. Ranee Surnomoye Dossee* (1863) 15 ER 811.

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> "[A]ll vacant lands are vested in the Crown ... and the exclusive power to grant them is admitted to reside in the Crown as a branch of royal prerogative. ... [N]o distinction was made between vacant lands and lands occupied by the Indians. ... The lands, then, to which this proclamation referred, were lands which the King had a right to grant, or to reserve for the Indians."[755]

European settlers who first arrived in Kenya, just like the first settlers in North America, relied on the doctrine of *terra nullius* or doctrine of discovery to expropriate land from African communities.[756]

The doctrine of *terra nullius* ignored African customary systems and their well-established frameworks for ownership, management and governance of the land as exemplified by the customary laws of the Maasai, Kikuyu, Nandi and Kipsigis in the Rift Valley region.[757] In addition, the United Kingdom's Foreign Jurisdiction Act of 1890 gave the British government control over waste and unoccupied land in protectorates where there was no settled form of government and where land had not been appropriated either to a local sovereign or to individuals.[758] The British government formally assumed administration of the Protectorate of East Africa in 1895, a territory covering modern day Kenya and Uganda.[759] The British did not recognize African communities living in East Africa in the 1890s as sovereigns and, therefore, applied the doctrine of *terra nullius* and the UK's Foreign Jurisdiction Act of 1890 to declare their land "waste and unoccupied".[760] This declaration gave the British sufficient legal backing to expropriate the land under international law.[761]

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[755] *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. 543, 595-96 (1823).

[756] Sorrenson, MPK (n 612).

[757] The African customary legal systems are described in more detail in chapter 2.

[758] See Foreign Jurisdiction Act 1890, 1890 CHAPTER 37 (4 August 1890) (available though the UK government website: http://www.legislation.gov.uk/).

[759] Sorrenson, MPK (n 612).

[760] As above. See also Foreign Jurisdiction Act 1890 (n 758).

[761] As above.

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The colonial state then enacted legislation known as Orders-in-Council that had the effect of conferring enormous discretion upon the state administration to alienate the land and to grant it to European settlers.[762] An "Order in Council" refers to an order by the British government at a meeting of the Privy Council, a formal body of advisers to the Sovereign of the United Kingdom.[763] Beginning with the 1901 East African (Lands) Order-in-Council (1901 Order-in-Council), the colonial state created the category of 'Crown Lands' or public lands, which were vested in the Commissioner of the Protectorate on behalf of the British Crown.[764] The Commissioner was "empowered to make Ordinances for the administration of justice, the raising of revenue and generally for the peace, order and good government of all persons in the Protectorate."[765] The 1901 Order in Council defined "Crown Land" to mean all public land subject to the control of Her Majesty. The Commissioner had unfettered discretion to dispose of Crown Lands.[766] The use of the undefined term 'public lands' left the door open for massive alienation of African land.[767] Settlers scrambled for high-value land around Nairobi and the fertile highlands that later became known as the "White Highlands or "Scheduled Areas", for agriculture, business, residential use and speculation. [768]

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[762] See East Africa Order in Council, 1902, S.R.O. 1902 No. 661, S.R.O. S.I. Rev. 246; East Africa Protectorate Crown Lands Ordinance (n 645); Kenya Protectorate Order in Council (n 646); Kenya (Annexation) Order in Council (n 646).

[763] Sir William Wade 'The Crown – old platitudes and new heresies' (18 September 1992) 142 NLJ 1275 (stating that the powers of the Crown are exercisable usually by order in council).

[764] See East Africa Order in council (n 762); East Africa Protectorate Crown Lands Ordinance (n 645). See also TJRC Report (n 2) Vol. IIB, chapter 2, sections 43-48.

[765] As above. See also Crown Lands Ordinance (n 645) and *Nyali Ltd v. AG* (n 645) (discussing the British East Africa Protectorate).

[766] Okoth-Ogendo, H.W.O (n 366) (tenants of the crown) pp. 16 - 17.

[767] Fiona D. Mackenzie 'Land, Ecology and Resistance in Kenya' (1998) Edinburgh: Edinburgh University Press, p. 67.

[768] As above. See also Morgan, WTW (n 655).

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The British enacted the 1902 Crown Lands Ordinance (1902 Order-in-Council), the predecessor of the Government Lands Act, for purposes of regulating the state's control of the Crown Lands.[769] The 1902 Order-in- Council gave the Commissioner power to sell freeholds in Crown Lands to any purchaser in lots not exceeding one thousand (1000) acres, to lease land for periods not exceeding 99 years and to give licences for temporary occupation to non-whites.[770] Under sections 30 - 31 of the 1902 Order-in-Council, any land which was unoccupied, temporarily or otherwise by the Africans, was available for alienation to the European settlers without reference to the Africans.[771] The 1902 Order-in-Council provided that in all dealings with Crown Lands, regard should be had for the rights and requirements of natives or Africans and, in particular, the Commissioner could not sell or lease any land in actual occupation of natives or Africans.[772] In 1915, the British enacted the 1915 Crown Lands Ordinance or Order-in-Council which repealed the 1902 Order-in-Council and made it clear that "Crown Lands[773]" meant all land in Kenya, inclusive of all land occupied by African communities. The 1915 Crown Lands Ordinance concentrated power over Crown Lands in the hands of the Governor, who had replaced the Commissioner as the highest-ranking colonial officer in the state.[774] Under the 1915 Crown Lands Ordinance, the Governor, at any time, could sell, lease or otherwise dispose of Crown

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[769] See Crown Lands Ordinance (n 645); East Africa Protectorate Crown Lands Ordinance (n 645); Crown Lands Ordinance Land Purchase Rules (n 647).

[770] As above.

[771] Crown Lands Ordinance (n 645) sections 30-31.

[772] As above.

[773] The 1915 Crown Lands Ordinance defined Crown Land to mean "[a]ll 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 tribes".)

[774] *Nyali Ltd v. AG* (n 645) (discussing the British East Africa Protectorate).

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Lands.[775] He or she could grant 999 year leases for agricultural land and had wide discretion to create reserves ('native land') and manipulate their boundaries.[776]

In 1920, the East African Protectorate was annexed by the Kenya (Annexation) Order in Council (June 11, 1920), under Section 2 of the British Settlement Act 1887, to create the colony of Kenya.[777] The British Settlement Act further enabled the Crown, by Letters Patent, "to delegate to any three or more persons within the settlement" the powers conferred by Parliament.[778] Letters Patent refers to legal instruments used by the British Crown to confer authority to perform particular functions, such as setting out the details of a new colony's governmental institutions.[779] Article 1 of the Letters Patent set out the Office of the Governor General while Article 3 conferred powers on it.[780]

Africans were confined in "native reserves" through a law called the Kenya (Native Areas) Ordinance, passed in 1926.[781] The 1926 Native Areas Ordinance and, later, the Lands Trust Ordinance of 1930 were used to alienate local communities' prime land and to confine the Africans in native reserves.[782] This segregationist policy of creating White Highlands for European settlers and native reserves for Africans was formally implemented through the Kenya Land Commission.[783] The Kenya Land Commission was established in 1932 and,

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[775] As above.

[776] As above.

[777] See Kenya Protectorate Order in Council (n 646); Kenya (Annexation) Order in Council (n 646); British Settlements Act 1887, UK Public General Acts c. 54 (Regnal. 50 and 51 Vict) Section 2, available at http://www.legislation.gov.uk/ (accessed 25 April 2020).

[778] British Settlements Act 1887 (n 777 above) section 3.

[779] *Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc., and Others v. Attorney General*, [2009] 4 LRC 818 (Privy Council, 21 January, 28 April 2009) (describing "Letters Patent").

[780] As above. See Kenya Protectorate Order in Council (n 646) and Kenya (Annexation) Order in Council (n 646) (implementing the Letters Patent).

[781] Nyali Ltd v. AG (n 645).

[782] Sorrenson, MPK (n 612).

[783] As above. See also Sir William Morris Carter 'Report of the Kenya land commission: September 1933 (Carter Report)' (1934) London, H.M. Stationery Off.

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under its chairman Sir Morris Carter, recommended in 1934 the division of land, generally, into Highlands for Europeans and Native Lands for Africans.[784] The Governor was also given a veto over any land transaction as a way of protecting segregation.[785] The British later modified the 1915 Crown Lands Ordinance by enacting the Native Lands Trust Ordinance of 1939 that excluded land declared to be native lands from the wide discretion given to the Governor to sell, lease or otherwise dispose of Crown Lands.[786] The Kenya (Native Areas) Order in Council of 1939 vested the African lands in a Native Lands Trust Board as follows: "[s]ubject at all times to all such rights in respect of land as are or may be enjoyed by native tribes, groups, families or individuals by virtue of existing native law or custom, or any subsequent modification thereof, in so far as such rights are not repugnant to any law from time to time in force in the colony."[787] Following enactment of the Native Lands Trust Ordinance of 1939, Africans were confined in native reserves where they could exercise their customary land rights.[788]

Although the African population outnumbered the rest by far and Africans occupied most of the land, they were excluded from the integrated Kenyan socio-economic system. The first population census in Kenya was taken in 1948 with its results being published in 1952.[789] There were about six (6) million Africans in Kenya in the period between 1948-1952.[790] With a rate of natural increase of approximately 2.25 percent a year since then, there were about 7.3 million people in Kenya as at 1961.[791] The number of European settlers in 1944 can be estimated at two thousand (2000) with about seven (7) million acres of land

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[784] Carter Report (n 783). See also Morgan, WTW (n 655).

[785] Sorrenson, MPK (n 612).

[786] The Kenya (Native Areas) Order in Council, 1939, S.R.O. 516. See also Simon Coldham 'Colonial Policy and the Highlands of Kenya' (Spring, 1979) Journal of African Law, Vol. 23, No. 1, pp. 65 - 83.

[787] Native Areas Order in Council (n 786) section 6.

[788] TJRC Report (n 2) vol IIB, chapter 2, sections 66-70.

[789] World Bank (n 613) p. 6.

[790] As above.

[791] As above.

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of which only eight hundred sixty-four thousand (864,000) were actually in cultivation or cropped.[792] In 1961, there were approximately three thousand six hundred (3,600) European and Asian farms occupying a cropped acreage of around 15% or 1.14 million acres of an estimated 7.5 million acres and bringing in an estimated gross income of £35.9 million.[793] By 1965, the majority of the land held by European settlers in Kenya was under lease: 6,350,000 acres on 999-year leases; 591,000 acres on 99-year leases; and 560,000 acres on freehold.[794] In 1961, the African or nonscheduled areas were composed of some 120 million acres, of which only 11.65 million acres receive sufficient rainfall in a normal year for cropping.[795] There were an estimated nine hundred fifty thousand (950,000) African farms in the non-scheduled areas, with a gross income of approximately £10.4 million in 1961.[796] The imputed gross value of African subsistence production was £47 million in 1961.[797]

In 1961-1965, therefore, most of the African communities were excluded from the integrated Kenyan socio-economic system. The below charts summarize Kenya's population growth and the African communities' participation in land use since 1944.

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[792] World Bank (n 613) pp. 80-85 (statistics related to European settler agriculture in Kenya).

[793] As above.

[794] World Bank (n 613) pp. 65-66.

[795] World Bank (n 613) pp. 70-80 (discussing agricultural production in the non-scheduled areas).

[796] As above.

[797] As above.

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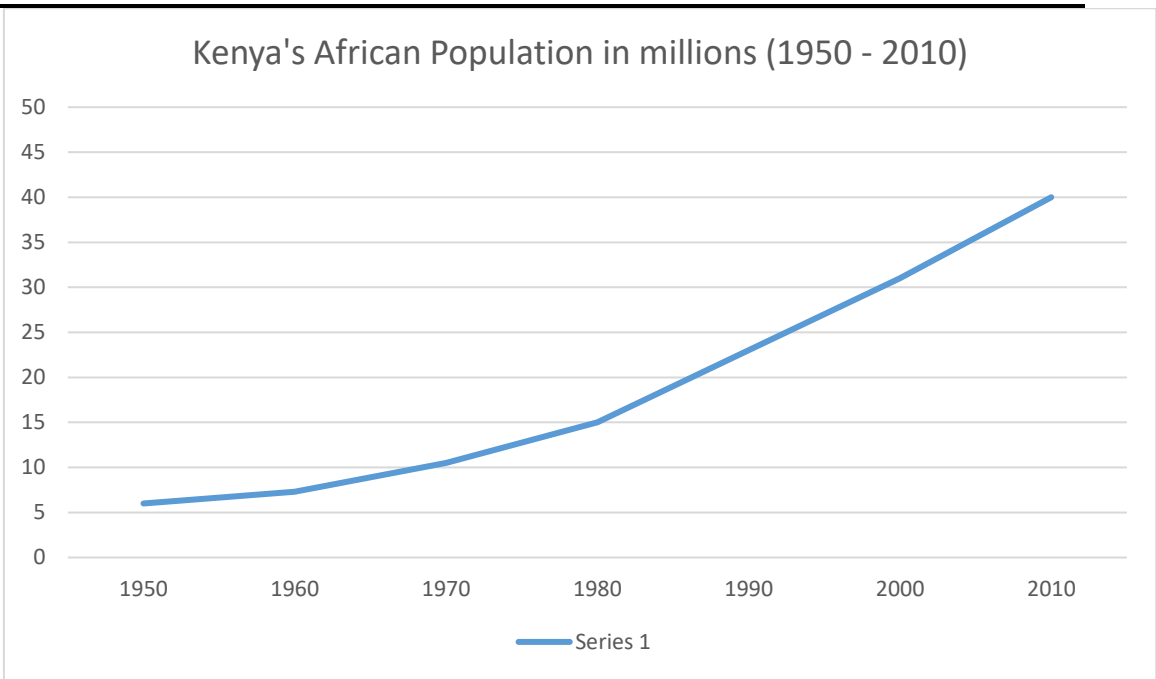
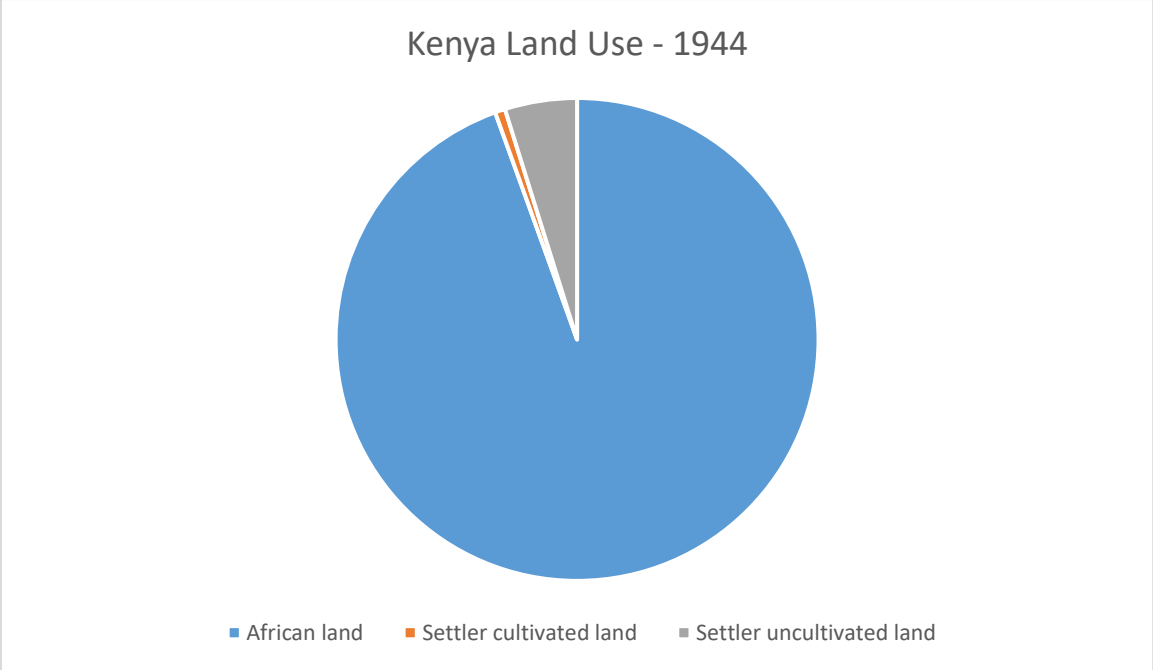


Source: Line graph created by author based on information from The International Bank for Reconstruction and Development (World Bank), The Economic Development of Kenya (The Johns Hopkins Press, Baltimore, 1963).



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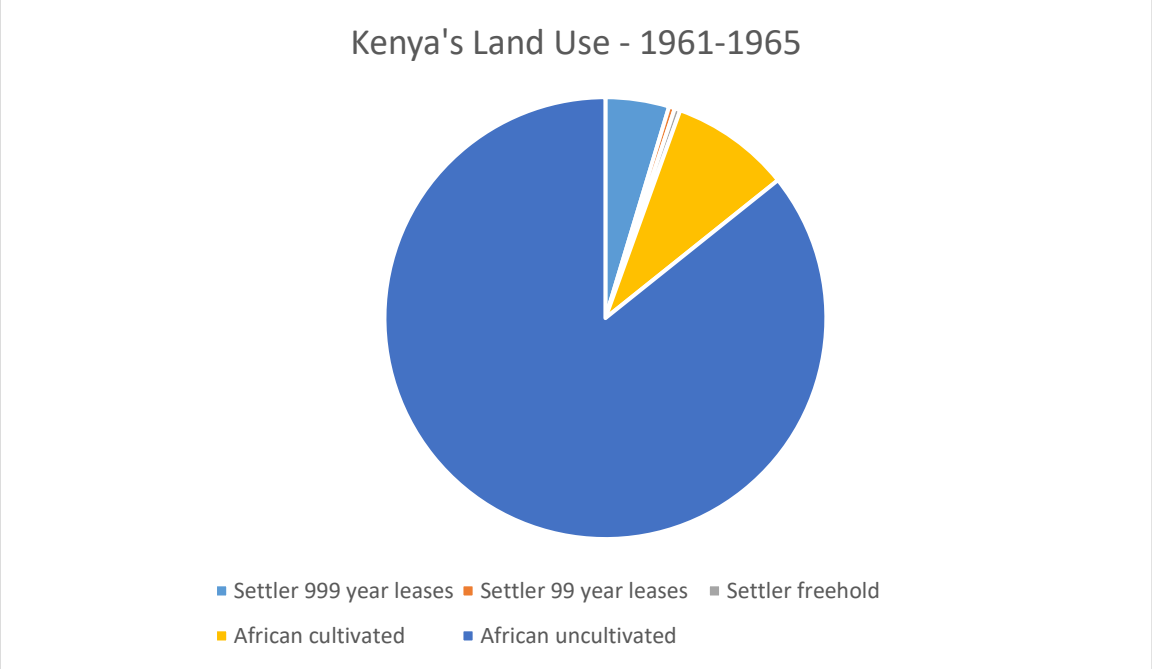

Source: Pie charts created by author based on information from The International Bank for Reconstruction and Development (World Bank), The Economic Development of Kenya (The Johns Hopkins Press, Baltimore, 1963).

The colonial state doctrine of terra nullius and policy of expropriation created a dual tenure system in the East African territory; a colonial tenure system for expropriated land and customary tenure systems for lands that continued to be inhabited by African communities.[798] Whereas the colonial tenure system existed formally by statute, customary tenure systems existed by default in areas occupied by Africans and which had not been expropriated by the colonial state.[799]

There was a failed attempt to introduce a communal reserve for both African communities and Arabs by state statute to be known as the Digo-Shimoni Reserve.[800] The

[798] See Carter Report (n 783) (shows that the dual tenure system in Kenya was intended to protect European settler farms).

[799] As above.

[800] See Kenya National Assembly Official Record (Hansard) (8th June 1931) (for records of proceedings in the Kenya National Assembly relating to the Digo-Shimoni Reserve).

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communal reserve was meant to allow the Arabs and two native tribes in the coastal strip - the Wasegeju and the Wakifundi – to exercise their customary rights over the land that they inhabited.[801] Both communities could not exercise customary rights over the same land because the statutory framework for such customary rights, the Native Land Trust Ordinance of 1926 and, later, the Lands Trust Ordinance of 1930, targeted African communities only and not Arabs.[802] The Bill was an amendment to the Crown Lands Ordinance, known as the Crown Lands (Amendment Bill) and was introduced in Parliament in June 1929.[803] The Bill was ultimately unsuccessful because the Arabs resisted the idea of a communal reserve which they would occupy with Africans.[804] They viewed such a communal reserve as an inferior type of tenure because occupants of such communal reserves had no ownership interest or any proofs of such ownership and lived on land that was not surveyed by the state.[805] The Arabs wanted recognition of their freehold interest in the land and individual titles that would be confirmed by certificates of ownership issued by the colonial state.[806] The colonial state, therefore, shelved the idea of formally creating mixed communal reserves for natives and non-natives and, instead, continued to implement the Native Land Trust Ordinance allowing native reserves for Africans only.[807] The World Bank estimates that, as at 1961, the Native Lands Trust Ordinance, applied to approximately 31 million acres of Kenyan land.[808]

The next serious and widespread attempt to formally recognize communal tenure by statute after independence was through the creation of group ranches.[809] On 26 June 1968, the President of Kenya assented to the Land (Group Representatives) Act, Chapter 287, Laws

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[801] As above.

[802] See *Nyali Ltd v. AG* (n 645); Sorrenson, MPK (n 612).

[803] See Coldham, S (n 786) pp. 65 - 83.

[804] As above.

[805] As above.

[806] As above.

[807] As above.

[808] World Bank (n 613) pp. 63 - 67.

[809] Kieyah, Joseph (n 24) p. 405.

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of Kenya, to provide for the incorporation of representatives of groups who have been recorded as owners of land.[810] The other way for groups to formally record interests in land before enactment of the Group Representatives Act was as trustees under the Trust Lands Act, Chapter 288, Laws of Kenya of 1 March 1939.[811] Groups could also create trusts under the Trustees Act (Chapter 167 Laws of Kenya, 1956) and the Trustees (Perpetual Succession) Act (Chapter 164, Laws of Kenya), which dealt with the appointment and powers of trustees and functions of the trust.[812] These laws were not designed specifically for providing a legal framework for communities to manage their resources, but were adapted to such functions as a result of a lack of dedicated recognition for communal tenure.[813] However, all African customary land had been declared "Crown Land" under the 1915 Crown Lands Ordinance or Order-in-Council, meaning that the Governor was the de facto trustee for all African customary land.[814] After independence in 1963, the

[810] Robert M. Kibugi 'A Failed Land Use Legal and Policy Framework for the African commons?: Reviewing Rangeland Governance in Kenya' (Spring, 2009) 24 J. Land Use & Envtl. Law 309, 319. See also Land (Group Representatives) Act, Laws of Kenya, Chapter 287 (assent on 26 June 1968; commencement on 28 June 1968) (now repealed) National Council for Law Reporting (Revised Edition 2012) available at www.kenyalaw.org (accessed 26 April 2020) (stating that a group ranch became the property of all its members in equal and undivided shares. A group ranch could be registered in the name of ten representatives as nominal title holders who held the land in trust for the other unregistered members of the community. The Act required the representatives to enact rules to govern the administration and execution of the group's projects and activities in a democratic manner through involvement of all the members in decision making).

[811] Trust Land Act, Laws of Kenya, Chapter 288 (commencement on 1st March, 1939) (now repealed) National Council for Law Reporting (Revised Edition 2012) available at www.kenyalaw.org (accessed 26 April 2020).

[812] Trustee Act, Laws of Kenya, Chapter 167 (commencement on 16th November, 1929) National Council for Law Reporting, available at www.kenyalaw.org (accessed 26 April 2020); Trustees (Perpetual Succession) Act, Laws of Kenya, Chapter 164 (commencement on 31st May, 1923) National Council for Law Reporting, available at www.kenyalaw.org (accessed 26 April 2020).

[813] As above.

[814] Nyali Ltd v. AG (n 645).

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Municipal/County Councils became the de facto trustees for African customary land within their boundaries.[815]

It was also possible for communities that have had an association with a forest to register and participate in the management of that forest and its component resources through Community Forest Associations (CFAs) under the Forests Act (2005).[816] The Forests Act provided a procedure and mechanism for community participation in forest management under section 46 but did not make provision for individualized ownership of land that had been brought under the operation of the Act.[817] This affected only a few African communities. The Group Representatives Act of 1968, was, therefore, the second serious and widespread attempt to give statutory recognition to communal tenure after the failed Crown Lands (Amendment Bill) of 1929.[818]

The group ranches were established, generally, in the arid and semi-arid areas of Kenya. In these areas, communal lands were divided into smaller units known as ranches which were then registered in the names of representatives elected by members of the group.[819] A "group" under the Group Representatives Act had the same meaning as "group" under the Land Adjudication Act, Chapter 284, Laws of Kenya which meant "a tribe, clan, section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner …"[820] The

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[815] Kieyah, Joseph (n 24) p. 405.

[816] Forests Act, Laws of Kenya, Chapter 385 (assent on 18th November, 2005; commencement on 1st February, 2007) (now repealed) National Council for Law Reporting, available at https://www.fankenya.org/downloads/ForestsAct2005.pdf) (accessed 30 March 2020).

[817] Forests Act (n 816) section 46.

[818] Kibugi, RM (n 810) p. 319.

[819] B.D. Ogolla and J. Mugabe 'Land Tenure Systems and Natural Resources Management' in C. Juma and J.B. Ojwang (editors) 'Land We Trust: Environmental, Private Property and Constitutional Change' (1996) Nairobi, Kenya: Initiatives Publishers; London: Zed Books.

[820] See Group Representatives Act (n 301); Land Adjudication Act, Chapter 284 (assent on 26th June, 1968; commencement on 28th June, 1968) available at www.kenyalaw.org (accessed 31 March

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members of the Group ranch elected between three to ten group representatives in whose name the ranch was registered.[821] The group representatives were meant to hold the land as trustees and to consult the wider membership in dealings with this land.[822]

Unfortunately, the group ranches idea failed because of various shortcomings, including lack of legitimacy, accountability or transparency of the representatives, failure of the group ranches to enforce their own by-laws, exclusion of women and youth from decision-making and governance and conversion of group ranches to individual ownership.[823] The group representatives entrusted with the management of the customary land under group ranches abused their trust by disposing of the land without consulting the other members of their groups, leading to the failure of group ranches as a communal tenure system.[824]

With the failed attempt to create a mixed communal reserve and the failed group ranches, African communities were once more pushed to the periphery of Kenya's socio-economic life. Practically, the dual tenure system only allowed African communities use and occupation rights in areas of low agricultural potential that were often densely populated. The African communities became, effectively, 'tenants of the crown'.[825] Furthermore, no surveys were done to distinguish lands occupied by African communities from unoccupied ones.[826] The boundaries of native reserves and the definitions of "public land" and "customary" were left vague deliberately to allow the state sufficient political leeway in interpretation and also freedom to expropriate the land at will.[827] As John Ainsworth, Chief Native Commissioner of the Kenya Colony, suggested in 1899:

2020).

[821] See Group Representatives Act (n 301).

[822] As above.

[823] Kibugi, RM (n 810) p. 309 - 336.

[824] As above.

[825] See Okoth-Ogendo, H.W.O (n 366) (tenants of the crown) pp. 16 - 17.

[826] See World Bank (n 613) pp. 70-80 (showing that over 70% of the land occupied by African communities was under informal communal tenure as at the time of Kenya's independence).

[827] As above.

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> "Of course we can stretch such customs to be almost anything within their reasoning; if we say it means freehold, it means freehold, but in our interpretation of the laws and customs I think it wiser not to recognize any system of freehold, we want some control over non-native holders of land."[828]

By reducing access to land and other resources for African communities, the dual tenure system helped to generate pressures for members of the African communities to search for low paying jobs in settler farms and, after independence, in towns and trading centres.[829] The end result was a hierarchical arrangement in which the settler community stayed on top and the African communities at the bottom.[830] The colonial state and its successor Kenyan state used legislation and implementing regulations to preserve, perpetuate and promote this hierarchical arrangement.[831]

4.4 THE SWYNNERTON PLAN OF 1954

The colonial state's policy of optimizing a subsystem of the integrated Kenyan socio-economic system at the expense of the economic systems of the African communities was bound to run into resistance by the African communities.[832] The Mau Mau uprising of 1952

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[828] Sorrenson, MPK (n 612) pp. 178-179; see also Jacqueline M. Klopp & Odenda Lumumba 'Reform and counter-reform in Kenya's land governance' (2017) Review of African Political Economy, pp. 4-5, available at http://dx.doi.org/10.1080/03056244.2017.1367919 (accessed 26 April 2020) (quoting the same words by John Ainsworth).

[829] This economic marginalization will be discussed in the next section under the "Swynnerton Plan".

[830] This can be explained using social dominance theory; the interaction between the colonial state system and the African community systems resulted in a structure in which the colonial state system dominated and suppressed the African community systems and proceeded to maintain and promote that structure. See Adams, M (n 106) p. 1107; Carbado & Rock (n 106) p. 175.

[831] As above.

[832] See Chapter 1 (discussion on resilience and resistance of community systems when disrupted).

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- 1960 was the climax of smaller, localised protests against the colonial system.[833] It is a practical example of the African communities' struggle to persist, recover and thrive in the face of the disruption caused by the colonial land tenure system that threatened their very existence as communities.[834] The smaller resistance movements amplified themselves and exploded into a widespread resistance movement that threatened the entire Kenyan state.[835] These resistance movements by African communities forced the colonial state system to address the dispossession and displacement of Africans by seeking to assimilate a critical mass of Africans into the colonial state's economic system.[836] The colonial state assumed that assimilating a critical mass of Africans in the colonial socio-economic system would create an equilibrium that would ensure the socio-economic system's survival or long-term stability despite the continuing disruption to the African customary system or eventual independence of the Kenyan state.[837]

This policy of assimilating a critical mass of Africans into the colonial socio-economic system was described in a colonial government report entitled, 'the Plan to Intensify the Development of African Agriculture in Kenya' (Swynnerton Plan), compiled by R. J. M. Swynnerton, an Assistant Director of Agriculture, in 1954.[838] The colonial state system accepted the Swynnerton Plan as the general framework within which the development of African agriculture in Kenya should proceed and gave the colony a grant of approximately five million British pounds (£5M) to implement it.[839] Section XII of the government report describes the Swynnerton Plan as follows:

See also Aguirre, BE (n 219) and Ruhl, JB (n 219) (describing resilience as a self-preservation characteristic).

[833] Maloba, WO (n 222) chapter 1.

[834] See Chapter 2; Aguirre, BE (n 219) and Ruhl, JB (n 219) (discussing resilience).

[835] Maloba, WO (n 222) chapter 1.

[836] Swynnerton Plan (n 688) pp. 12-15; Carbado & Rock (n 106) (discussing strategies used by systems to maintain hierarchy by using tactics that reinforce and promote the status quo).

[837] Swynnerton Plan (n 688) pp. 12-15.

[838] Swynnerton Plan (n 688).

[839] Swynnerton Plan (n 688) (introductory note by F. Cavendish-Bentinck, Minister for Agriculture

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> A five-year plan that has been prepared to intensify the development of African agriculture in Kenya, having as its main objective substantial improvement to the economy of the African producer and to the economy of the Colony by developing sound and intensive systems of farming.[840]

The colonial state's assimilation policy through the Swynnerton Plan is similar to the policy of assimilation that the British colonial state system adopted in Canada through the Indian Act of 1876.[841] The Indian Act was assented to on 12 April 1876 and described as "[a]n Act to amend and consolidate the laws respecting Indians."[842] The Indian Act of 1876 is still in existence today although it has undergone several amendments that have not changed its policy of assimilation. It created a category of "enfranchised Indians" described in section 3(5) of the Act as follows:

> "The term "enfranchised Indian" means any Indian, his wife or minor unmarried child, who has received letters patent granting him in fee simple any portion of the reserve which may have been allotted to him, his wife and minor children, by the band to which he belongs, or any unmarried Indian who may have received letters patent for an allotment of the reserve."[843]

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and Water Resources).

[840] Swynnerton Plan (n 688) section XII (I), p. 57, para. 1-4 (Summary).

[841] See Indian Act (12 April 1876) 39 Vict. c. 18, available through the Canadian government's Justice Laws Website: https://laws.justice.gc.ca/ (accessed 26 April 2020); LaForme, HS et al (n 617).

[842] Indian Act (n 841 above); LaForme, HS et al (n 617).

[843] See Indian Act Amendment and Replacement Act, S.C. 2014, c. 38, section 3(5) (Assented to 16 December 2014) (available through the Canadian government's Justice Laws Website: https://laws.justice.gc.ca/).

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In 1884, the colonial state in Canada amended the Indian Act of 1876 to provide for the creation of Indian residential schools that were intended to assimilate Indian children into the colonial state system or to 'civilize the Indian'.[844] In 1920, further amendments to the Indian Act of 1876 were passed to make it mandatory for all native children between the ages of seven (7) and fifteen (15) to attend one of Canada's Residential Schools.[845] In all, about one hundred fifty thousand (150,000) Aboriginal children were removed from their communities and forced to attend the residential schools.[846] Just as would happen later in Kenya, the colonial state in Canada thus used education as their main tool for assimilating the local Aboriginal communities into the colonial state system.[847]

The colonial state in Kenya sought to assimilate Africans living in the Rift Valley region through the Swynnerton Plan.[848] The Swynnerton Plan's authors, like the African communities living in the Rift Valley for thousands of years, recognized that the main driver of the Kenyan economy is land.[849] Accordingly, the Plan divided Kenyan land into four broad categories: (1) high potential areas; (2) semi-potential areas; (3) semi-arid and pastoral areas; and (4) special areas.[850]. High potential areas were areas that the colonial state deemed suitable for balanced mixed farming intensively and which, with the correct investment, could yield surplus crop and livestock products.[851] The Plan stated that these high potential areas should be able to support approximately six-hundred thousand (600,000) families with

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[844] Indian Act. R. S., c. 43, s. 1. 1884.

[845] See Indian Act amendments of 1920, Library and Archives Canada (LAC) available at https://www.bac-lac.gc.ca/eng/Pages/home.aspx (accessed 26 April 2020).

[846] Kathleen Mahoney 'The Untold Story: How Indigenous Legal Principles Informed the Largest Settlement in Canadian Legal History' (2018) 69 UNBLJ 198 - 232 / (2018) 69 R.D. U.N.-B. 198 – 232 (discussing Prime Minister Harper's public apology to the Canadian Aboriginal or Indian or First Nations community).

[847] As above.

[848] Swynnerton Plan (n 688) part XII, p. 57 et seq., (summary).

[849] Swynnerton Plan (n 688) pp. 9-10.

[850] Swynnerton Plan (n 688) p. 7.

[851] As above.

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an output increase from a few pounds a year to something of the order of one-hundred pounds (£100) per family per year.[852] Semi-potential areas were lands on which the intensity of cultivation could be enhanced by irrigation, swamp reclamation or flood control.[853] The total estimated amount of Kenyan land that fell within the high-potential and semi-potential areas was approximately thirty percent (30%) or, roughly, a third of Kenyan land.[854] A World Bank assessment carried out around 1961 concluded that coffee of the mild arabica type could be successfully cultivated in physical conditions that exist in the middle altitudes in the Kenyan highlands.[855] The same assessment concluded that tea could be grown at higher levels while sisal could thrive in the drier, semi-intensive farming areas.[856] Three quarters of Kenyan land falls within the semi-arid and pastoral areas category of land which has low rainfall and can yield a constant and valuable flow of livestock and their products.[857] Special areas or areas and projects requiring special treatment refers to areas such as the coastal belt.[858] The Rift Valley region falls, generally, within the thirty-percent (30%) high-potential and semi-potential areas suitable for intensive and semi-intensive mixed farming.[859]

The colonial state embarked on a program to encourage individual African participants in the Swynnerton Plan to grow cash crops in the high potential and semi-potential areas just as the settlers had done in the White Highlands/Scheduled Areas from 1895.[860] The government report described this policy trajectory as follows:

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[852] Swynnerton Plan (n 688) section 114, p. 58.

[853] Swynnerton Plan (n 688) p. 7.

[854] Swynnerton Plan (n 688) pp. 7-12.

[855] World Bank (n 613) pp. 116-120.

[856] World Bank (n 613) pp. 121-124.

[857] World Bank (n 613) pp. 63-70.

[858] Swynnerton Plan (n 688) p. 7.

[859] Swynnerton Plan (n 688) pp. 7-12; World Bank (n 613) pp. 63-70.

[860] As above.

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> "[T]he bulk of the African population lies in areas suited to intensive or semi-intensive farming and the order of their contribution to the economy of the Colony should aim at raising the surplus output of 600,000 families from £10 or so per annum to £100 or more apiece."[861]

This policy of encouraging cash crop growing by Africans as a way of optimizing land use in Kenya was consistent with the colonial state's policy of measuring economic development in terms of GDP.[862] The colonial authorities concluded that the colony could achieve a higher GDP by increasing net exports of cash crops.[863] Since settlers were the ones growing cash crops, the strategy was to encourage select Africans to join the cash crop farming community. [864] The government report described the strategy as follows:

> "Provision was made to encourage the establishment of holdings of economic size, for security of tenure, for intensification of farming, for the growing and marketing of cash crops, for the better management and the improvement of livestock and for the provision of water supplies to individuals and groups of progressive farmers."[865]

The colonial state reasoned that cash crop growing by Africans would continue the policy of developing a modern economy for the colony while at the same time assimilating a critical mass of individual Africans into the integrated socio-economic system. The colonial state was so bent on this strategy that, using the policy rationale that "money invested in development begets money for further development", the state offered loans to individual Africans to grow cash crops.[866] The Plan suggested that two hundred thousand

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[861] Swynnerton Plan (n 688) section 134, p. 62.

[862] See Swynnerton Plan (n 688); NIPA Handbook (n 703) (describes ways of measuring Gross Domestic Product or 'GDP').

[863] Swynnerton Plan (n 688) section 115, p. 58.

[864] Swynnerton Plan (n 688).

[865] Swynnerton Plan (n 688) section 115, p. 58.

[866] Swynnerton Plan (n 688) section 118, pp. 55 and 59.

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pounds (£200,000) be made available for loans to African farmers in five years and that the ceiling for each farmer be two hundred pounds (£200), meaning the loans could cater for a maximum of ten thousand (10,000) farmers out of the possible six-hundred thousand (600,000) families in high-potential and semi-potential agricultural areas.[867] The Plan states that "were each farmer with a registered title to his land able to borrow up to this amount against the security of his title, ultimately borrowing would greatly exceed the resources of Kenya."[868] The Plan projected further that if Africans were to develop their lands to their full potential they will require much greater access to finance and if they achieve titles to their land in economic units, much greater facilities should be made available to them for borrowing against the security of their land. The Plan's authors developed the following projections for areas that would fall under cash crop growing by 1968, or in fifteen (15) years:[869]

	Acres 1953	Acres 1958	Acres 1963	Acres 1968
Coffee	4k	18k	43k	71.5k
Pyrethrum	1.3k	12k	30k	48k
Tea	35	2k	6k	12k
Pineapples	3k	10k	18k	25k
Sugarcane	200	10k	25k	45k

Source: Compiled by author using data from R. J. M. Swynnerton, A Plan to Intensify the Development of African Agriculture in Kenya, Department of Agriculture, Ref: AGR. 32 / 2 (1954)

[867] Swynnerton Plan (n 688) p. 55.

[868] As above.

[869] See Swynnerton Plan (n 688) p. 15.

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Specific to the Rift Valley region, the Plan envisioned large swathes of land being used to grow coffee, pyrethrum and tea as follows:[870]

District	Coffee	Pyrethrum	Tea
Kericho			16k
Nandi, Elgeyo, West Suk		5k	10k
Total for the country	71.5k	43.8k	70k

Source: Compiled by author using data from R. J. M. Swynnerton, A Plan to Intensify the Development of African Agriculture in Kenya, Department of Agriculture, Ref: AGR. 32 / 2 (1954)

A later World Bank report of around 1963 – about a decade after the launch of the Swynnerton Plan – determined that it had succeeded in increasing African participation in cash crop growing. According to the World Bank's assessment, cash crops for export formed by far the most valuable part of marketed production of agriculture.[871] Coffee, tea, sisal and pyrethrum have played a continuously important role in Kenya as export crops.[872] According to the World Bank mission, at independence in 1963, the greater part of the value of marketed agricultural output was derived from non-African farms and plantations, £36 million of a total of £46 million in 1961.[873]

The cash crop growing emphasis in the Swynnerton Plan paid off because the colonial state gave the progressive farmer a holding of economic size in a sea of fragmented land and all the available aids of survey, farm planning, registration of title and loans.[874] The Swynnerton Plan's authors believed that it is the progressive farmer who may well start the

[870] See Swynnerton Plan (n 688) pp. 18 - 19.

[871] World Bank (n 613).

[872] World Bank (n 613) pp. 115 - 125

[873] As above.

[874] See World Bank (n 613).

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snowball rolling for consolidation in an otherwise backward and difficult area.[875] The Plan's authors even suggested further dispossession and displacement of African communities to create room for land where individual Africans would practice the Swynnerton Plan's new tenure system that would "make available to the African farmer a unit of land and a system of farming whose production will support his family at a level, taking into account perquisites derived from the farm, comparable with other occupations."[876] In effect, the colonial state was looking to acquire land for a select group of individual Africans to participate in the Swynnerton Plan the same way they had acquired land for European settlers to develop a modern economy for the state.[877] This would mean forced eviction of large groups of people to create room for agricultural land.[878]

The other procedural fairness issue that the Plan was willing to overlook is accuracy in determining land boundaries. The Plan's authors observed that, in England, land was demarcated by enclosure, survey coming centuries later and that even in the 1950s, farms still existed in England with sketch plans not accurately surveyed.[879] The Plan observed that accuracy was to be sacrificed for the sake of security of tenure and an occupational licence.[880] Again, the Plan drew from the experience of the settler community in the White Highlands/Scheduled Areas; stating that just as in the White Highlands, there must be the closest tie-up between the survey plan, the conservation lay-out, the agricultural development plan and the correlation of financial investment with prospective and actual income.[881]

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[875] Swynnerton Plan (n 688) pp. 11.

[876] Swynnerton Plan (n 688) pp. 9 - 10.

[877] As above.

[878] See Swynnerton Plan (n 688) pp. 9–10 (implying that forced eviction would be necessary because high and semi-potential land had been parceled out to European settlers and the rest of the productive land occupied by African communities in the native reserves).

[879] As above.

[880] As above.

[881] Swynnerton Plan (n 688) p. 11. See also Morgan, WTW (n 655) (for more details on the experience of the settler community in the White Highlands/Scheduled Areas).

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A recurring issue is why the colonial state became so determined to assimilate individual Africans into the integrated Kenyan socio-economic system through cash crop growing when it previously viewed the people and their resources merely as labour and capital for the settler economy.[882] The answer lies in the ability of a system – even the colonial state system – to maintain its own systemic integrity through regeneration and transformation until it finds a relatively stable equilibrium between its component parts.[883] The colonial state system had become unstable and experienced stress as a result of the resistance movements by African communities.[884] It needed to regenerate and transform itself to meet this existential threat.[885] The resistance movements by African communities forced the colonial state system to address the dispossession and displacement of Africans by seeking to integrate the African communities, somehow, into the Kenyan socio-economic system.[886] The Plan's authors recognized that "in the long term, the greatest gain from the participation of the African community in running its own agricultural industries will be a politically contented and stable community."[887] However, instead of integrating whole African communities into the socio-economic system, the colonial state chose to assimilate only a select group of individual Africans through the Swynnerton Plan to ensure its own long-term survival.

Implementers of the Swynnerton Plan also had to find and recruit "progressive" or "able" or "well trained" Africans to implement the Plan.[888] The targeted Africans are

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[882] See Carter Report (n 783) (recommending separation of the European settlers from the African communities so that the settlers could engage in farming).

[883] See section 1.4.2 of Chapter 1 for more discussion of the systems theory notion of autopoiesis. See also Hugh Baxter (n 46) (using the systems theory notion of autopoiesis to explain a community system's ability to self-generate and self-perpetuate).

[884] As above.

[885] As above.

[886] As above. See also Aguirre, BE (n 219) and Ruhl, JB (n 219) (for further discussion about resilience).

[887] Swynnerton Plan (n 688) p. 8.

[888] Swynnerton Plan (n 688) p. 13, section IX, pp. 52 et seq (Agricultural Education).

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described in various sections of the Plan as "the progressive African farmer", "able, energetic or rich African", "a good and well trained African", and other identity markers or labels of assimilated Africans.[889] The strategy, as outlined in the government's report, was to encourage a select group of African participants to farm their land well and to participate in general agricultural planning and co-ordinated development of their local communities and of specialized agricultural industries in which they may be concerned.[890] The select Africans would be provided with security of tenure for their land through an indefeasible title as will encourage them to invest labour and profits into the development of their farms and as will enable them to offer the farm as security against such financial credits as they may wish to secure from such sources as may be open to them.[891]

Again, the main obstacle to finding African participants in the Plan was the pre-existing African customary practices.[892] The customary practices by individual members of African communities have gained widespread acceptance and legitimacy within those communities over a long period of time.[893] These practices are viewed by members of each community, generally, as better serving their needs and interests and being more representative of each community's value system, policies, ideologies, ideas of justice, morality and other conditions of validity of laws.[894] Examples of resilient African customary practices were the communal land tenure systems practiced in areas occupied by African

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[889] As above. See also Coldham, S (n 786) pp. 65 - 83 (describing a deliberate push to reward persons who were loyal to the state system).

[890] Swynnerton Plan (n 688) p. 7-10.

[891] As above. See also Jaramogi Oginga-Odinga 'Not Yet Uhuru' (January 1967) Hill & Wang, First edition, chapters 3 & 14 (using the title 'the White Hand of Authority' for chapter 3 and 'Obstacles to Uhuru' for chapter 14, Oginga-Odinga writes about the colonial state's use of African elites to maintain their dominance over African communities post-independence).

[892] The African customary practices are described in more detail in Chapter 2.

[893] As above.

[894] See section 1.4.4 of Chapter 1 (discussions on legal pluralism that adopt the legal anthropologist/naturalist approach to legal pluralism; that the legitimacy of customary law is backed by wide acceptance of the obligatory nature of the laws by members of the community).

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communities and the accompanying inheritance practices used to maintain wealth within families, clans and other subsets of the community.[895] The colonial state realized that it had to erase those customary practices of African communities in order to successfully institute its own state statutory system, hence the narrative of reform of African customary tenure systems.[896] This strategy ignored entire African communities such as the Maasai, Kikuyu, Nandi or Kipsigis.[897]

The Swynnerton Plan ignored whole African communities because the colonial state believed that the customary land practices of African communities were hostile to economic development.[898] According to the government report, all the African lands in Kenya that were naturally suited to intensive or semi-intensive farming were already densely populated by African communities, suffering from low standards of cultivation and fragmentation whereby one family may possess several, and in recorded instances 10 to 29, small to minute fields scattered at wide intervals so that they cannot be developed economically either to the system of farming best suited to the area or to the inclination of the farmer himself.[899] The government report blamed the low standards of cultivation and fragmentation on African customary land tenure systems and inheritance practices.[900]

The government report identified a number of problems and directly associated them with the Africans' traditional tenure systems. First, the customary tenure system promoted fragmented holdings of land that did not encourage farmers to own or possess land holdings of a size that allowed them to maximize agricultural output.[901] Second, the African customary system did not allow the farmer to acquire security of tenure over his land to

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[895] See Aguirre, BE (n 219) and Ruhl, JB (n 219) (discussing resilience).

[896] Swynnerton Plan (n 688) p. 9-10 (emphasizing the importance of a sound system of land tenure for agricultural development of the colony).

[897] As above.

[898] See Swynnerton Plan (n 688) section 113, p. 58.

[899] Swynnerton Plan (n 688) section 14, p. 9.

[900] As above.

[901] Swynnerton Plan (n 688) pp. 9-10. See TJRC Report (n 2) vol. IIB, section 100, p. 196-197.

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safeguard his labour and investment in the development of the land.[902] Third, the African customary system did not provide the farmer with any technical assistance to develop his land on sound economic lines, having regard to the ecological conditions under which he lived.[903] Fourth, African customary systems did not encourage the growing of high-priced cash crops which were probably going to be in high demand for the long term and which would help to provide money needed to cover household expenses, to finance farming operations and development and as a backing for any agricultural credit required by the farmer.[904] Fifth, African customary systems did not provide any yardstick by which a farmer may rear, manage, feed, select and breed livestock to yield an economic return from his pastures.[905] Sixth, the pre-existing tenure systems had no ready access to water for a farmer's livestock or any marketing facilities to give a farmer secure and profitable outlets for his crop and livestock and to obtain finance for establishing processing factories.[906] Lastly, the African customary systems did not provide any access to sources of agricultural credit sufficient to meet the requirements of very large numbers of very small farmers or an agricultural bias for the farmer to educate his children and to give them a progressive outlook on farming.[907]

These indictments of African customary systems were cited by state policy makers without reference to any source data showing that the African communities who had inhabited the land for thousands of years had misused the land.[908] There is no reference, for instance, to customary practices that helped to conserve the soil and to help it regenerate.[909]

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[902] Swynnerton Plan (n 688) pp. 9-10.

[903] As above.

[904] As above.

[905] As above.

[906] As above.

[907] As above.

[908] See generally, Swynnerton Plan (n 688) pp. 9-10, 58, section 113 (no data cited concerning African customary tenure systems). See also Chapter 2 (discussing traditional land tenure systems in the Rift Valley).

[909] See Chapter 2 (discussing customary practices of the Maasai, Kikuyu, Nandi, and Kipsigis

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The Maasai customary practice of allowing vegetation in overgrazed areas to regenerate before moving back with their cattle was useful for establishing and maintaining productive grass.[910] The Kipsigis customary practice of allowing land to remain fallow and thereby regenerate after approximately four harvests or roughly two years achieved a similar goal.[911] The colonial state concluded, without any basis, that it is impossible under African customary tenure systems to develop sound farming rotations, to cart and apply manure, to establish and manage grass, to improve the management and feeding of livestock or to tend cash crops in any satisfactory manner.[912] According to state policymakers, the African customary tenure systems had to be reformed or, in practice, extinguished, for the Swynnerton Plan to succeed.[913] The government report describes the necessity for reform of African customary tenure systems as follows:

> "A reform of African customary land tenure, and legislation therefor, is essential if sound and productive farming, irrigation or settlement are to succeed. Without it, holdings of economic size cannot be established where land is fragmented…The African farmer should have access to medium- or long-term agricultural credit by offering his land as security to authorized bodies."[914]

Although the colonial state's excuse for pushing for reform of African customary tenure systems was the need to consolidate the land and to institute better farming practices, their real fear was deeply rooted in the interface between the various African customary

communities of the Rift Valley).

[910] As above. See also Archived Documents (n 188); Tarayia, GN (n 254) (describing the Maasai's pastoral identity trait).

[911] The Kipsigis customary practices are also discussed in section 2.4.3 of Chapter 2. See also Peristiany, JG (n 239) (discussing customs and traditions of the Kipsigis community).

[912] See Swynnerton Plan (n 688) pp. 9-10, 58, section 113.

[913] Swynnerton Plan (n 688) p. 58, section 113.

[914] As above.

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systems and state statutory law.[915] As discussed earlier under social dominance theory, when systems interact, they tend to structure themselves hierarchically such that some systems are dominant, and others are subordinate.[916] African customary systems of communities such as the Maasai, the Nandi, the Kipsigis and the Kikuyu are resilient and have survived and thrived for centuries despite attempts from external forces to suppress and eventually supplant them.[917] The colonial state was aware that the African customary systems were destined to outlive and outlast the colonial state itself or, in other words, African customary systems were destined to dominate and suppress the colonial state system.[918] The colonial state, therefore, implemented policies that perpetuated hierarchy-enhancing forms and ideologies in which members of the colonial state system remained on top and African communities remained at the bottom.[919]

By applying these individual-level forces of discrimination and asymmetrical behaviours, the colonial state ended up hoarding a disproportionate share of political authority and power, access to high potential areas for agriculture, labour, and capital.[920] The African communities were left with a disproportionate share of items that have negative social value, such as limited use and possession rights in areas of low agricultural potential or lived as squatters or labour-tenants in settler farms.[921] The end result was a hierarchical

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[915] See the earlier discussion on social dominance theory in this Chapter. See also Wilson, EK (n 15) pp. 133 - 134 (describes social dominance theory as a "theory of intergroup relations" that suggests that social groupings have the same basic human predisposition to form group-based social hierarchies).

[916] As above.

[917] See Chapter 2 (discussions of traditional tenure systems and their resilience).

[918] See Carter Report (n 783) (expressing concerns about interactions between European communities and the African communities and recommending separation between the Europeans and Africans).

[919] Carbado & Rock (n 106) p. 175 (discussing strategies used to maintain social dominance).

[920] See Carbado & Rock (n 106 above) (detailing the strategies that the colonial state, as a system, applied to maintain dominance over the African community systems).

[921] See Swynnerton Plan (n 688) pp. 7-10 (describing the African lands of Kenya).

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arrangement with African communities at the bottom.[922] The colonial state then used instruments such as education and agricultural loans to preserve, perpetuate and promote this hierarchical arrangement.[923]

The Plan's success, according to its authors, depended on securing the right quantity and quality of staff. The state's strategy for securing the right staff was through agricultural education. The Plan described the strategy as follows:

> "The first step is therefore educational, to teach the African farmer how to establish and maintain productive grass, how to provide supplementary fodder for periods of grass shortage and for raising milk yields and how to reduce the dangers of disease by tick control and restriction of movement of cattle to water."[924]

The above description summarizes the intent of agricultural education, which was to replace African customary practices. There is hardly any mention of African customary practices that may have been used to achieve the same goals with respect to soil conservation. There is in fact a disdain for African customary practices. The Plan cites the necessity "to effect grazing control among these backward people who will soon ruin their land" in reference to the West Suk and Riwa-Kipkoma Grazing Control scheme in the Rift Valley region.[925] The Swynnerton Plan did not discuss the need to, at a minimum, include some useful African customary practices in the agricultural education process. Instead, the selected African farmers, their children and teachers were to be taught better farming methods and practices that, in effect, replaced their African customary practices.[926]

Another example of the reluctance by the Plan to incorporate any useful concepts from African customary practices was its dismissal of African cooperative societies. The

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[922] As above.

[923] Swynnerton Plan (n 688) pp. 52-56.

[924] Swynnerton Plan (n 688) p. 28.

[925] Swynnerton Plan (n 688) p. 46.

[926] Swynnerton Plan (n 688) pp. 52 - 53. (this is an example of communication by the state system itself. It is also a reminder that the state system is itself autopoietic as well).

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government report outlines the benefits of cooperative societies, generally, such as developing, processing and marketing cash crops.[927] The report states that "[i]t is most important to establish a strong co-operative organization to weld the very large numbers of small producers into a corporate body and to collect their produce into a bulk and quality which will command the interest of buyers and markets, commanding a preferential demand over "penny packets" of variable quality."[928] Specific to African communities, the government report observes that cooperative societies are particularly desirable for educating Africans in running their own affairs, to train and pick out leaders and to raise funds through shares, commissions and levies for the operation of business affairs of members.[929] The report even acknowledges that Africans had already formed their own cooperative societies despite the challenges posed to them by the state statutory system. The government report describes African cooperative societies as follows:

> "In recent years in Kenya there has been a large development of African agricultural producers' organizations which have frequently lacked stability because of inexperienced or irresponsible committees or management and because the staff available to the Registrar of Co-operative Societies has been quite inadequate to give them the necessary training."[930]

However, the Plan's authors gave three reasons for refusing to allow African communities to continue developing, processing and marketing cash crops through the cooperative societies that they were already forming.[931] First, the Plan's authors saw the African cooperative societies as being too local and representing only a section of the community or a single market instead of a whole district and, ultimately, the entire colonial

[927] Swynnerton Plan (n 688) p. 26.

[928] As above.

[929] Swynnerton Plan (n 688) p. 55.

[930] Swynnerton Plan (n 688) pp. 24 - 25.

[931] As above.

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state.[932] Again, the Plan did not cite any comprehensive source data showing the state's understanding of the extent of the cooperative societies or whether encouraging them to be more national was not feasible.[933] The second stated reason for denying African communities the opportunity to associate and collectively develop, process and market their produce was the alleged embryonic nature of the African cooperative societies.[934] Again, the state had no source data to show the extent of complexity of African cooperative societies or even to attempt to drive the existing ones to the required complexity.[935] The following statement from the government report demonstrates the extent of the state's ignorance of African cooperative societies:

> "It will be extremely difficult to get and train Africans to carry responsibility at managerial level for organizations of this size until they have climbed the ladder of co-operative business experience for at least 15 to 20 years. The Kilimanjaro Native Co-operative Union built up its wide reputation because it employed and was prepared to accept a European general manager who inculcated co-operative principles into 30,000 coffee growers over a period 15 years, trained the committees and staffs of nearly 30 co-operative societies from whom were selected and promoted those capable of the senior and responsible managerial and clerical duties of the central union, handling with integrity the present annual turn-over of £1,065,000. Similarly the Union Committee received their baptism of public service on the primary committees. While the K.N.C.U. has had its own African general manager

[932] As above. See also Oginga-Odinga (n 891) chapters 3 & 14 (using the title 'the White Hand of Authority' for chapter 3 and 'Obstacles to Uhuru' for chapter 14, Oginga-Odinga writes about the colonial state's use of African elites to maintain their dominance over African communities after independence).

[933] Swynnerton Plan (n 688) pp. 24 - 25.

[934] As above.

[935] As above.

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for the last eight years, nevertheless his European predecessor has remained handy to guide and advise the Union."[936]

In the above statement, the Plan's authors cite the example of a successful African cooperative society – the Kilimanjaro Native Co-operative Union – but attribute its success to European management and continued guidance.

The third stated reason for dismissing African cooperative systems was the lack of relevant knowledge by their members.[937] The government report stated that members of African cooperative societies lacked the technical knowledge required to guide them in insisting upon sound cultural practices and knowledge of world market conditions.[938] Although other sections of the Plan insisted on agricultural education for African farmers, their children and the teachers, there was no mention of the possibility of educating members of African cooperative societies to develop sound cultural practices or knowledge of world market conditions as cooperative societies.[939]

The reasons for the Plan's rejection of African cooperative societies are merely subtexts of the larger reason rooted in the clash between the state statutory system and the African customary systems.[940] The African cooperative societies were themselves subsystems of African customary systems and the colonial state feared that the interface between the various African customary systems and state statutory system would eventually lead to dominance and suppression of one system by the other.[941] As stated earlier, the fear

[936] Swynnerton Plan (n 688) p. 25.

[937] Swynnerton Plan (n 688) pp. 24 - 25.

[938] As above.

[939] See Swynnerton Plan (n 688) section 113.

[940] See Wilson, EK (n 15) pp. 133 - 134 (describes social dominance theory as a "theory of intergroup relations" that suggests that social groupings have the same basic human predisposition to form group-based social hierarchies).

[941] See Swynnerton Plan (n 688) pp. 24 – 25 (showing the reluctance of the colonial state to acknowledge the achievements of an African-owned cooperative, under the pretext that the governing officials were European-trained).

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was that the African customary systems that have survived and thrived for centuries would eventually dominate and suppress the state statutory system.[942]

4.5 REGISTRATION OF LAND RIGHTS AND LAND TENURE REFORMS

Registration of land rights was the means by which the colonial state and the new independent Kenyan state aimed to achieve the goals of the Swynnerton Plan. The World Bank pushed forcefully for registration of land rights in the run up to Kenya's independence. The World Bank based its reasoning on the theory of Peruvian economist Hernando De Soto that secure property rights articulated in a written, formal, legal system of property titles can spur economic growth by allowing property owners to access credit.[943]

Tanzania has also experimented with De Soto's theory by formulating programmes aimed at giving land titles or other formal documents to property owners in informal settlements. The Tanzanian government started property formalization programmes seeking to give property owners land titles or some other forms of temporary documents to enhance security of tenure and enable them to access credit. For example, in 2004, the Tanzanian government formulated a programme known as the "Property and Business Formalization Programme", also known in Kiswahili as "Mpango kurasimisha rasilimali na biashara za

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[942] See the discussion in section 1.4.3 of chapter 1 about social dominance theory.

[943] Hernando de Soto 'The Mystery Of Capital: Why Capitalism Triumphs In The West And Fails Everywhere Else' (2000) New York: Basic Books, a member of the Perseus Books Group, p. 173 (concluding that capitalism can be a cause that promises opportunity for all if governments are willing to accept the following: (1) The situation and potential of the poor need to be better documented; (2) All people are capable of saving; (3) What the poor are missing are the legally integrated property systems that can convert their work and savings into capital; (4) Civil disobedience and the mafias of today are not marginal phenomena but the result of people marching by the billions from life organized on a small scale to life on a big scale; (5) in this context, the poor are not the problem but the solution; and (6) implementing a property system that creates capital is a political challenge because it involves getting in touch with people, grasping the social contract, and overhauling the legal system).

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wanyonge Tanzania" with the acronym "MKURABITA").[944] MKURABITA was led by state officials working in the office of the President of Tanzania and appointed Hernando de Soto′s consultancy, the Institute of Liberty and Democracy (ILD) to assist in its implementation.[945] It focused on issuance of either residential licences or Certificates of Customary Right of Occupancy (CCROs) to land owners in rural areas.[946] The same concept of property formalization was also aggressively pushed in Kenya through registration of land rights.

The World Bank summarized its rationale for registration of land rights in a report following an assessment done in Kenya in 1961 as follows:

> "…registered title is essential to the full development of agricultural land. It provides an incentive to improvement and it furnishes the security needed in order to obtain the loans required for development."[947]

Registration refers to the entry of established rights onto the land register and issuing a title deed. A proper registration system requires accuracy (needs a proper survey followed by boundaries), cheapness (fees for registration and preparation of documents), simplicity, ubiquity (there should be more registries that are accessible throughout the country.[948] The Land Registration Act No. 3 of 2012 is the current statutory framework for registration of land rights in Kenya.[949] It uses the words "rights" and "interests" interchangeably and defines registration of land rights or interests to mean bringing of a right or an interest in

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[944] Kusiluka, MM & Chiwambo, MD (n 207) pp. 176 - 182.

[945] As above.

[946] As above.

[947] World Bank (n 613) p. 67.

[948] Onalo, PL (n 198) p. 215.

[949] Land Registration Act No. 3 of 2012, Laws of Kenya (assent on 27th April, 2012; commencement on 2nd May, 2012) available at www.kenyalaw.org (accessed 31 March 2020).

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land or lease under the provisions of the Act and includes making of an entry, note or record in the land register.[950]

The Land Registration Act No. 3 of 2012 repealed the Indian Transfer of Property Act, 1882, the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) and the Registered Land Act (Cap. 300) that also provided for registration of land rights in Kenya.[951] Section 24 of the Land Registration Act No. 3 of 2012 provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.[952] Under section 26 of the Land Registration Act No. 3 of 2012, the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. [953] The title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.[954] Section 29 of the Land Registration Act No. 3 of 2012 also provides that "every proprietor, at the time of acquiring any land, lease or charge, shall be deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition."[955] Therefore, the act of registration confers absolution and indefeasible property rights on the holder of the certificate of registration of title.

The notion of conferring absolute and indefeasible property rights by the mere act of registration has been a feature of state statutory legislation since the advent of colonialism

[950] See Land Registration Act (n 949) section 2 (Interpretation).

[951] See Land Registration Act (n 949) part XIII, section 109 (scheduled of repealed laws).

[952] Land Registration Act (n 949) section 24.

[953] Land Registration Act (n 949) section 26.

[954] As above.

[955] Land Registration Act (n 949) section 29.

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in Kenya.[956] Before the current statutory framework for registration, the Land Registration Act No. 3 of 2012, there were five land registration systems under five state statutes in Kenya that simply changed names after independence as follows: (a) Registration of Documents Act (1902); (b) Land Titles Act (1908) (c) Crown Lands Ordinance of 1915/Government Lands Act (Cap 280); (d) the Registration of Title Act (1919); and (e) Registered Land Act (Cap 300).[957] The Registration of Documents Act (1902) was a simple registration of deeds that recorded isolated transactions.[958] The Land Titles Act (1908) had a registration court and applied mostly at the Coast (Malindi, Mombasa, Tana River, Sultanate of Witu and Lamu Archipelago).[959] It was enacted to facilitate adjudication of the rights of the inhabitants of the ten-mile coastal strip that was owned by the Sultan of Zanzibar.[960] The Government Land Act (1915) was a fairly advanced system of registration of deeds with the provision for accurate survey and deed plans.[961] Registration of Titles Act (1920) was based on the Torrens system of title which is a system for recording land titles under which a court may direct the issuance of a certificate of title upon application by the landowner.[962] Under the Registration of Titles Act, there was only an inland registry at Nairobi and a registry at the Coast.[963]

The Registered Land Act (1963) or "RLA of 1963" was a comprehensive, substantive and registration code of land law.[964] It was the first system for recognition of claims or

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[956] See Joel M. Ngugi 'Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration' (Winter, 2004) 25 Mich. J. Int'l L. 467 (analyzing land registration in Kenya).

[957] Onalo, PL (n 198) pp. 4, 175-177.

[958] Onalo, PL (n 198) p. 175.

[959] Onalo, PL (n 198) pp. 175-176.

[960] As above.

[961] As above.

[962] As above.

[963] As above.

[964] The Registered Land Act, Chapter 300, Laws of Kenya (commenced on 16th September, 1963; now repealed) available at www.kenyalaw.org (accessed 31 March 2020).

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adjudication and registration of claims of Africans under customary law.[965] Apart from the central registry at Nairobi, there were district registries in Bungoma, Eldoret, Embu, Nakuru, Muranga, Kakamega, Kiambu, Kisii, Kisumu, Mombasa, Nyeri and Busia under the RLA of 1963.[966] Before the RLA of 1963, the Indian Transfer of Property Act of 1882 was applied to Kenya by article IIb of the East African Order in Council of 1897.[967] Section 164 of RLA of 1963 stipulates that upon the first registration of any land under the Act, the Transfer of Property Act 1882 of India shall cease to apply to that land, except in relation to any dealing entered into before the date of first registration.[968] The RLA of 1963 was the statutory land rights registration framework for land owned, used and managed by members of African communities following implementation of the Swynnerton Plan and up to enactment of the current land rights registration framework, the Land Registration Act No. 3 of 2012.[969]

Consistent with the Swynnerton Plan, registration of land rights under the RLA of 1963 was meant to extinguish any pre-existing African customary land rights.[970] Various state statutes relating to land, including the Indian Transfer of Property Act (1882) ("ITPA"), applicable in Kenya, state that unregistered instruments are either unenforceable or invalid or void.[971] The Kenyan courts in *Popatlal v. Reichand* (1963) EA 69 and *Sela Obiero v. Orego Opiyo and Others* (High Court Civil Case no. 44 of 1970) have also upheld the notion that an unregistered instrument may not create any interest or estate that would be enforceable against third parties.[972] The Kenyan courts take the position that a Certificate

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[965] Onalo, PL (n 198) p. 176.

[966] Onalo, PL (n 198) p. 181.

[967] Onalo, PL (n 198) p. 176.

[968] Registered Land Act (repealed) (n 964) section 164.

[969] See Land Registration Act (n 964 above) part XIII, section 109 (scheduled of repealed laws).

[970] Onalo, PL (n 198) p. 181.

[971] Onalo, PL (n 198) chapter 10, pp. 187 et seq.

[972] See for example the following cases cited in Onalo, PL (n 198) p. 190 - 191: *Popatlal v. Reichand* (1963) EA 69 (the Court voided a loan transaction because of failure to register a memorandum of equitable mortgage as per the Money Lenders Act); *Sela Obiero v. Orego Opiyo and Others* (High Court Civil Case no. 44 of 1970) (the Court refused to enforce customary law rights and

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of Title is free from encumbrances and rights arising under customary law and that these are not among the interests formerly listed in section 30 of the RLA[973] as overriding interests not requiring to be shown on the register. According to the High Court Judge in *Sela Obiero v. Orego Opiyo and Others* (High Court Civil Case no. 44 of 1970), if the legislature had intended that rights of a registered person would be subjected to customary law rights, it would have said so.[974] Eventually, the state amended the Registered Land Act to introduce section 38(2) that gave recognition to cases holding that an unregistered instrument operates as a contract inter partes.[975] However, according to state statutory law that was enacted as part of the state's implementation of the Swynnerton Plan, customary land rights were not meant to have any recognition within the formal state statutory system.[976]

The Swynnerton Plan's assimilation policy was incorporated into Kenya's state policy and legal framework following independence from British colonial rule in 1963.[977] Kenya became independent on 12 December 1963, as a matter of English law by virtue of the Kenya Independence Act of 1963.[978] Immediately prior to 12 December 1963 a new constitution for the independent Kenya was enacted by the Kenya Independence Order in Council 1963.[979] Upon the attainment of independence in 1963, the Kenya Government took

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stated that they were extinguished upon registration under the Registered Land Act. The Court thus gave ownership of a parcel of land to a widow over sons of co-wives who were claiming customary land rights over the same parcel of land).

[973] As above. See also Registered Land Act (repealed) (n 964) section 30.

[974] See also Onalo, PL (n 198) p. 190 - 191 (discussing the High Court Judge's decision in *Sela Obiero v. Orego Opiyo and Others* (High Court Civil Case no. 44 of 1970) and state statutory law's extinguishment of customary land rights through registration).

[975] Registered Land Act (repealed) (n 964) section 38(2).

[976] See Swynnerton Plan (n 688) pp. 9-11, 58, section 113 (expressing the need to reform African customary land tenure through legislation)

[977] Onalo, PL (n 198) p. 42.

[978] Kenya Independence Act 1963, UK Public General Acts1963 c. 54 (available at http://www.legislation.gov.uk/) (accessed on March 30, 2020).

[979] See The Kenya Independence Order in Council, No. 1968 (1963) Kenya Gazette Supplement No.

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over and confirmed the laws that had been enacted during the colonial era, including laws relating to land.[980] The National Land Policy of 2009 described the continuation of the state's assimilation policy post-independence as follows:

> "It was expected that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of the legacy on land. This did not materialise and the result was a general re-entrenchment and continuity of colonial land policies, laws and administrative infrastructure. This was because the decolonisation process represented an adaptive, co-optive and pre-emptive process which gave the new power elites access to the European economy."[981]

The new Kenyan state also took over the claims to and titles of the former Government over all Crown land which became known as Government Land and at the same time accepted and guaranteed all titles to land already granted to alienees.[982] The new Kenyan state maintained the dual tenure system with state statutory law applying in formerly the European/Scheduled Areas and African customary laws applying in African/non-Scheduled Areas.[983]

Government policy at the time of Kenya's independence also favoured a continuation of the Swynnerton Plan and its land registration legislative framework.[984] "The Economic Development of Kenya", a report prepared by the World Bank at the time of Kenya's independence in 1963 gave strong support for a continuation of the Swynnerton Plan.[985] The

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[980] Onalo, PL (n 198) p. 42.

[981] National Land Policy of 2009 (n 734) p. 5, section 19.

[982] Onalo, PL (n 198) p. 42.

[983] As above.

[984] See World Bank (n 613).

[985] See World Bank (n 613) chapter 1, p. 2 (stating that "[t]he transformation of African agriculture that has already been achieved since the introduction of the Swynnerton Plan in the mid-1950's has been remarkable").

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first formal economic blueprint by the Kenyan state following independence was Sessional Paper No. 10, known as 'African Socialism and its Application to Planning in Kenya', and was published in 1965.[986] It recognized that land was previously owned communally with access regulated through membership in a particular group (clan or ethnic group).[987] However, consistent with the Swynnerton Plan, it asserted that a system of secure private title to land was necessary to anchor economic growth.[988] Therefore, registration of land rights remained a key tenet of the state statutory system following Kenya's independence in 1963.

Despite the law of registration under the state statutory system that purports to extinguish customary land rights, customary rights remain resilient and state statutory law has been forced to recognize customary land rights in spite of registration.[989] First, registration was not absolute even under the RLA 1963.[990] Second, the courts also recognized unregistered interests such as overriding interests under section 30 of the Registered Land Act.[991] Customary land rights can still be found as "overriding interests"

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[986] TJRC Report (n 2) vol. IV, chapter 1, section 231, p. 50.

[987] As above.

[988] TJRC Report (n 2) vol. IIB, section 116, p. 32; TJRC Report (n 2) vol. IV, section 231, p. 50.

[989] Onalo, PL (n 198) pp. 199 – 205.

[990] See Registered Land Act (repealed) (n 964) section 142-143 (section 142 permitted the Registrar to rectify the register in case of errors or omissions or where all interested parties consented to such rectification. Section 143 permitted rectification by the court where there has been fraud or mistake, with the exception of a first registration).

[991] See cases cited in Onalo, PL (n 198) p. 190 - 191: *Popatlal v. Reichand* (1963) EA 69 (the Court voided a loan transaction because of failure to register a memorandum of equitable mortgage as per the Money Lenders Act); *Sela Obiero v. Orego Opiyo and Others* (High Court Civil Case no. 44 of 1970) (the Court refused to enforce customary law rights and stated that they were extinguished upon registration under the Registered Land Act. The Court thus gave ownership of a parcel of land to a widow over sons of co-wives who were claiming customary land rights over the same parcel of land).

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within formal law and, can still exist as contracts inter partes where a court decides that transactions involving unregistered land have occurred.[992]

In addition, as at the time of Kenya's independence in 1963, most of the approximately 31 million acres of land inhabited by African communities and administered under the Native Trust Lands Ordinance, was considered trust land held in trust for African communities by the Crown before independence, and by the Kenyan Government, after independence.[993] Much of this land was under the "customary tenures" of the African communities inhabiting them.[994] Under the independence constitution, trust lands were regulated by Chapter IX of the Constitution of Kenya Act number 5 of 1969 and Trust Lands Act, Chapter 288 which vested all trust land in the local County Council to hold in trust for the benefit of the persons resident on that land and to give effect to such rights, interests or other benefits in respect of the land as may exist under the African customary law applicable to the residents.[995] The arbitrary and highly centralised power of the Governor over these lands was now given to the President, who operated via the Commissioner of Lands and the Ministry of Lands more generally.[996] However, any customary land rights were subject to the right of the Government to set apart and alienate any land required for public purposes or for such other purpose as the local County Council deemed beneficial.[997] The Commissioner of Lands acted as the agent of the County Council in respect of any Trust

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[992] As above.

[993] Onalo, PL (n 198) pp. 40 - 44.

[994] As above.

[995] The Constitution of Kenya Act, No. 5 of 1969, chapter IX (assent on 10th April 1969; commencement on 18th April 1969) (available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution/HistoryoftheConstitutionofKenya/Acts/1969/ActNo.5of1969.pdf) (accessed 30 March 2020); Trust Land Act (n 885).

[996] See Crown Lands Ordinance (n 645) section 31 (allowing the Commissioner to "grant leases of areas of land containing native villages or settlements without specifically excluding such villages or settlements"); TJRC Report (n 2) vol IIB, pp. 260-262.

[997] TJRC Report (n 2) vol IIB, p. 262, section 314.

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Land to be set apart and alienated.[998] The broad discretion given to the Government and Local Councils over trust lands was open to abuse and political machinations.[999] Customary tenure therefore continued to be an inferior form of tenure to the formal statute statutory tenure system where the act of registration of land rights and state issuance of a certificate of title conferred absolute ownership of land together with all rights and privileges belonging or appurtenant thereto.[1000]

The formal state statutory system also created the concept of "customary land trusts" to recognize pre-existing customary land rights despite the act of registration.[1001] Section 28 of the Land Registration Act No. 3 of 2012 expressly lists "trusts including customary trusts" as overriding interests that subsist and affect all registered land. This is more precise than section 30(g) of the now-repealed RLA 1963, which defined a similar overriding interest as follows: "the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed".[1002] A trust enables a person or clans of persons who for some reason cannot acquire legal ownership of property to enjoy the land interests and rights incidental to ownership.[1003] By virtue of a trust, the beneficiaries can partake of the full benefits of the Trust property.

Kenyan courts have also held that customary law trusts are overriding interests implied by law. This is an unregistered interest under Kenyan law.[1004] Kenya High Court

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[998] TJRC Report (n 2) vol IIB, p. 262, section 315.

[999] TJRC Report (n 2) vol IIB, pp. 262-263, section 314-317. See also Okoth-Ogendo, H.W.O (n 366) (tenants of the crown).

[1000] As above.

[1001] See Land Act, No. 6 of 2012, section 2, available at www.kenyalaw.org (accessed 27 April 2020) (states: "customary land rights" refer to rights conferred by or derived from Kenyan customary law whether formally recognized by legislation or not").

[1002] See Registered Land Act (repealed) (n 964) section 30(g).

[1003] Onalo, PL (n 198) p. 30.

[1004] See Registered Land Act (repealed) (n 964) (showed the challenge with finding customary trusts where land rights have been registered because it did not recognize unregistered interests in land.

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Judge C.B. Madan (as he then was) in *Gatimu Kinguru v. Muya Gathangi*, Civil Case No. 176 of 1973, pp. 10-11, recognized a customary law trust as an overriding interest when he held that the plaintiff held the parcel in trust for himself and the defendant as tenants in common in equal shares and ordered the defendant's name to be entered in the register.[1005] Judge Madan stated as follows:

> "[a]s regards section 126, there was no need to register the defendant 'as trustee'. He was registered owner as the oldest son of the family in accordance with Kikuyu custom which has the inherent of trust in it. Ordinarily, in pursuance of Kikuyu custom he would have transferred a half share in 'Marango' (Land) to the plaintiff. In any event this section does not make registration as 'trustee' obligation. It sates that a person may be described by that capacity."[1006]

It provided in sections 28, 126 and 143(1) that, unless a registered owner was described as a trustee under section 126 in the instrument of title/of acquisition of land, there can be no trust and the land cannot be said to be held under trust. Section 126(1) stated that a person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and if so described shall be registered with the addition of the words "as trustee" to give purchasers notice of his capacity so that they can protect themselves with regard to receipts to purchase money. Under section 126(2), a settlement of trust may be deposited with the Registrar but it cannot be registered. Further, section 143(5) provides that a first registration may not be attacked even if it is obtained, made or omitted by fraud or mistake). See also Land Registration Act (n 949) section 66 (similar to section 126 of the Registered Land Act (repealed) (n 964), it stated that a person acquiring land, a lease or a charge in a fiduciary capacity may be described in that capacity in the instrument of acquisition and be registered with the addition of the words "as trustee", but the Registrar shall not enter particulars of any trust in the register).

[1005] *Gatimu Kinguru v. Muya Gathangi*, Civil Case No. 176 of 1973, pp. 10-11 (in the High Court at Nairobi), available at www.kenyalaw.org (accessed 27 April 2020). See also Onalo, PL (n 198) pp. 199-200 (summarizing the Court's decision in the case of *Gatimu v. Muya Gathangi*, Civil Case No. 176 of 1973).

[1006] *Gatimu v. Muya Gathangi* (n 1005 above) p. 9.

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Referring to section 143(1) the Judge said that the registration was done in pursuance of custom which may be described as a custom of primogeniture holding and by consent of everyone concerned.[1007] This section did not exclude recognition of a trust provided it can be established.[1008] He added: "[p]arliament could not have intended to destroy this custom of one of the largest sections of the people of Kenya.[1009] It would have required express legislation to enable the courts to so hold."[1010] Accordingly, the courts recognized pre-existing customary land rights through a finding of "customary trusts" despite the act of registration.[1011]

Another major shortcoming of registration is the state's failure to register almost seventy (70%) of Kenyan land.[1012] Out of approximately 31 million acres of land administered as African trust land under the Native Trust Lands Ordinance at the time of Kenya's independence, only approximately 1,081,000 acres had been registered as at June 30, 1962.[1013] Less than 30% of Kenya's total area of 582,650 sq. km was registered as of 2012 with approximately 4.06 million titles registered countrywide.[1014] Approximately 51% of the counties have attained first registration while 38% are at various stages of attaining first registration through the land adjudication program and 11% are yet to commence the

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[1007] As above.

[1008] As above.

[1009] As above.

[1010] As above. See also Onalo, PL (n 198) p. 199 (quoting excerpts from Judge C.B. Madan's opinion in *Gatimu v. Muya Gathangi* (n 1005).

[1011] Onalo, PL (n 198) pp. 199-200; *Gatimu v. Muya Gathangi* (n 1005).

[1012] Patricia Kameri-Mbote (Kenya Country Coordinator) 'Kenya Land Governance Assessment Report' (27 June 2016) World Bank Document, p. 21, available at http://documents.worldbank.org/ (accessed 27 April 2020).

[1013] World Bank (n 613) pp. 65-67.

[1014] Republic of Kenya (Office of the Prime Minister Ministry of state for Planning, National Development and Vision 2030) 'Sessional paper No. 10 of 2012 On Kenya Vision 2030' (2012) Kenya Gazette, section 2.7, p. 23, available at http://vision2030.go.ke/ (accessed 25 April 2020).

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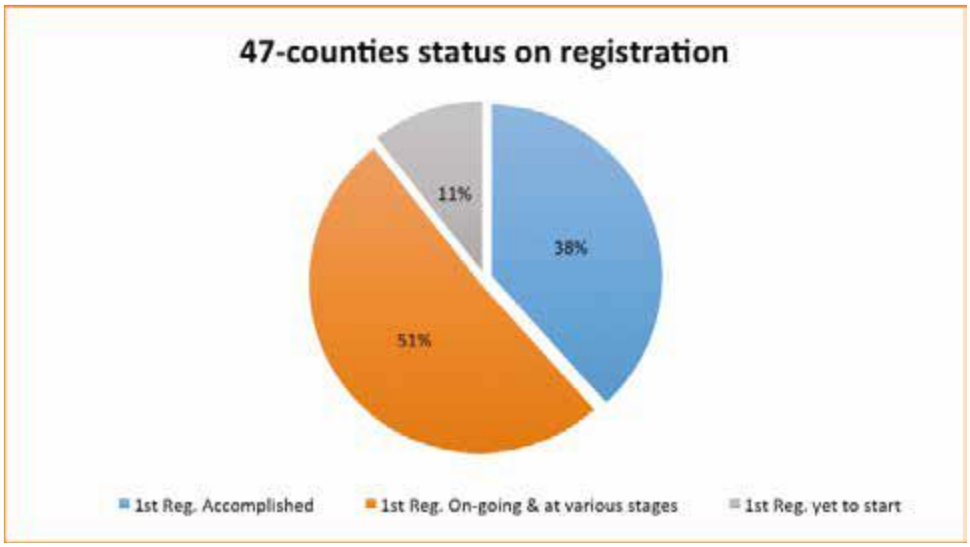
process leading to first registration.[1015] Below is a chart of the status of first registrations in Kenyan counties:



Source: 'Advisory on Comprehensive Programme for Registration of Title in Land (Draft Report)' (2018) National Land Commission (NLC), p. 33 (pie-chart), available at http://www.landcommission.go.ke/ (accessed 27 April 2020).

The table below illustrates the total number of titles from adjudication exercises in the counties or sub counties as of 31st August 2018.

County/Sub-County	**No. of Parcels**	**Area in Ha.**
Kericho	60,280	246,839.56
Nandi	37,577	145,962.62
Keiyo	30,632	49,443
Marakwet	17,459	52,943
Baringo	38,223	140,006.42
Koibatek	9,410	137.495.99

[1015] 'Advisory on Comprehensive Programme for Registration of Title in Land (Draft Report)' (2018) National Land Commission (NLC), p. 5 (Executive Summary), 33 (pie-chart) available at http://www.landcommission.go.ke/ (accessed 27 April 2020).

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Narok	7,142	755790.82
Narok North	13,040	40,237.23
Narok South	149	117,726.58
Trans Mara	13,702	150,256.19
Kajiado	6,377	2,002,612.03
West Pokot	19,185	232,789.32
Samburu	611	924,716.15
Laikipia	70	44,664

Source: 'Advisory on Comprehensive Programme for Registration of Title in Land (Draft Report)' (2018) National Land Commission (NLC), pp. 49-50, available at http://www.landcommission.go.ke/ (accessed 27 April 2020).

As is evident from the above chart and table, a majority of Kenyan land – approximately seventy percent (70%) - remains unregistered and will continue to be owned, used and managed according to the customary practices of the African communities that inhabit the unregistered land.[1016] The informal nature of land rights in Kenya is similar to Tanzania where many members of the African communities inhabit informal settlements without any documentary proof that they own the land.[1017] Similar to Kenya, informal settlements accounted for about 70% of urban settlements in Tanzania in 2012.[1018] The African communities that depend on these unregistered lands for their livelihoods in both East African countries continue to exist and persist at the periphery of the integrated socio-

[1016] NLC Advisory on Registration of Title (n 1015) pp. 33, 49-50.

[1017] The United Republic of Tanzania (Ministry of Lands, Housing and Human Settlements Development) 'Habitat III National Report – Tanzania (Final Report)' (July, 2016) p. 3, available at http://habitat3.org/ (accessed 27 April 2020).

[1018] As above.

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economic system under a formal state statutory system that in colonial times sought to extinguish their customary land rights.[1019]

The clamour for land tenure reforms in Kenya grew as the state statutory system continued to implement the Swynnerton Plan's land registration system in only about thirty percent (30%) of the land, while the majority of African communities continued to use and possess their customary land without any tenure security.[1020] The majority of African communities continued to participate in the informal African customary system which relegated them to the periphery of Kenya's socio-economic system. As was proposed under the Swynnerton Plan before Kenya's independence, "[a] reform of African customary land tenure, and legislation therefore, is essential if sound and productive farming, irrigation or settlement are to succeed."[1021] The World Bank mission, at the time of Kenya's independence, also advocated for land tenure reforms to include African farms in the modern economy.[1022] The state system also continued its land tenure reforms based on the policy of assimilation that translated into dominating and suppressing the African community systems by expropriating their land and undermining their customary practices.[1023] The state continued applying discriminatory tactics and behaviours that preserved the hierarchical structure in which the African community systems remained subordinate to the state system.[1024] The autopoietic system remained intact and merely recruited African

[1019] See NLC Advisory on Registration of Title (n 1017) pp. 33, 49-50; Kameri-Mbote, P (World Bank) (n 1012) p. 21 (stating that majority of community land remains unregistered and therefore outside the formal state statutory tenure regime).

[1020] See National Land Policy of 2009 (n 229) (Foreword) (calling for land tenure reform); Akiwumi Commission Report (n 2) chapter 5, section 525 (also calling for changes to land ownership and use to avoid land-based conflicts in the Rift Valley region); TJRC Report (n 2) Vol. IIB, chapter 2 (also proposing land reforms).

[1021] Swynnerton Plan (n 688) section 113.

[1022] World Bank (n 613) pp. 65-67.

[1023] Onalo, PL (n 198) p. 42.

[1024] This analysis is based on social dominance theory discussed earlier in this Chapter. See Wilson, EK (n 15) pp. 133 - 134 (describes social dominance theory as a "theory of intergroup relations"

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stewards.[1025] In other words, the progressive Africans or the African farmers merely replaced the white settlers.[1026] So, the clash between the state statutory system and the African customary system continued; whereas it was formerly between visibly-distinct white settlers and black Africans, it now became a clash between a newly-minted African bourgeoisie and an economically-depressed and socially-isolated African majority.[1027] African communities resisted the state's assimilation policy, generally, and more particularly, the Swynnerton Plan's land registration system.[1028]

This clash between the state statutory system and African community systems took the form of isolated or small, localised tribal clashes and protests against state policies.[1029] These smaller resistance movements by African communities were suppressed by the state system during the authoritarian rule of Jomo Kenyatta, the first President of Kenya, between 1963 and 1978.[1030] His successor, President Daniel Arap Moi, ruled Kenya for 24 years (1978 - 2002) and was also authoritarian with limited tolerance for resistance by African communities.[1031] However, even during the years of oppression and suppression by the state system, the African communities adapted their resistance methods to use election cycles to

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that suggests that social groupings have the same basic human predisposition to form group-based social hierarchies).

[1025] See Swynnerton Plan (n 688) pp. 12-15; See also Oginga-Odinga (n 891) chapters 3 & 14 (using the title 'the White Hand of Authority' for chapter 3 and 'Obstacles to Uhuru' for chapter 14, Oginga-Odinga writes about the colonial state's use of African elites to maintain their dominance over African communities after independence).

[1026] As above.

[1027] As above.

[1028] See Chapter 2 (discusses the traditional tenure systems of African communities and their resistance to state disruption). See also Aguirre, BE (n 219) and Ruhl, JB (n 219) (discussing resilience).

[1029] As above.

[1030] Laurence Juma 'Ethnic Politics and the Constitutional Review Process in Kenya' (Spring, 2002) 9 Tulsa J. Comp. & Int'l L. 471, 490-492 (discussing the authoritarian rule of Jomo Kenyatta).

[1031] Juma, L (n 1030) pp. 492-494 (discussing the authoritarian rule of Daniel Toroitich Arap Moi).

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express their dissatisfaction with their dispossession and displacement from their customary land.[1032] The Kalenjin community, in particular, used tribal clashes or self-help eviction tactics to forcefully evict from the Rift Valley region those that they considered foreigners.[1033] The community targeted beneficiaries of the state's land registration system whose only claim to land ownership was a certificate of title issued by the state.[1034] These self-help eviction efforts, climaxing in the post-election violence of 2007 - 2008, posed an existential threat to the Kenyan state and forced it to steer its land tenure reforms in a direction that would preserve its very existence.[1035]

As the resistance by African communities grew in the late 1990s and early 2000s, the Kenyan state realised that the policy of assimilation would not create an equilibrium that would ensure the state system's survival or long-term stability.[1036] The state statutory system then recognized that, without including African communities into the state statutory system, it was unsustainable.[1037] It sought creative ways of absorbing African communities into independent Kenya's socio-economic system just as the colonial state had attempted to absorb individual Africans into their system through the Swynnerton Plan.[1038] The state's

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[1032] See Akiwumi Commission Report (n 2); TJRC Report (n 2) Vol. IIB; CIPEV Report (n 5).

[1033] As above.

[1034] As above.

[1035] CIPEV Report (n 5).

[1036] '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 (Njonjo Land Commission)' (2002) Commission of Inquiry into the Land Law System of Kenya (National government publication), p. 19 (detailing some of the failures of Kenya's land policies).

[1037] As above.

[1038] See National Land Policy of 2009 (n 229) p. x (providing as follows in the Executive Summary:

> "[l]and issues requiring special intervention, such as historical injustices, land rights of minority communities (such as hunter-gatherers, forest-dwellers and pastoralists) and vulnerable groups will be addressed. The rights of these groups will be recognized and protected. Measures will be initiated to identify such groups and ensure their access to land and participation in decision making over land and land-based resources.")

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innovation was in seeking to transition whole African communities, and not only individuals, from the periphery to the core of the integrated Kenyan socio-economic system.[1039] This exploration took the form of task forces and commissions that were formed to lay the groundwork for the development of a National Land Policy.[1040]

In 1999, the state established the Njonjo Commission of Inquiry into Land Law systems to come up with principles of a National Land Policy framework, the constitutional position of land and formulation of a new institutional framework for land administration.[1041] It was chaired by former Attorney General Charles Njonjo.[1042] It tendered a report on its inquiry into the land law system in Kenya in 2002, highlighting the issue of 'land grabbing', which refers to land expropriation by the state and individuals within the state.[1043] In 2003, the state established the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (the "Ndungu Commission"), that went into more details on the land grabbing, including listing powerful individuals within the state who had grabbed public land.[1044] The Njonjo Commission, in its report of 2002, reiterated the importance of land as an essential component of African community systems:

> "For indigenous Kenyans, land has an important spiritual value, for it is not merely a factor of production; it is first and foremost the medium which defines and binds together social and spiritual relations within and across generations. Land belongs to a vast family of which many are dead, few are living, and countless members are still unborn."[1045]

[1039] As above.

[1040] National Land Policy of 2009 (n 229).

[1041] Njonjo Land Commission (n 1036).

[1042] As above.

[1043] As above.

[1044] Paul N. Ndungu, et al 'Report Of The Commission Of Inquiry Into The Illegal/Irregular Allocation Of Public Land (Ndungu Land Report)' (2004) Government printer, Nairobi.

[1045] Njonjo Land Commission (n 1036) p. 19.

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The Njonjo Commission recommended, inter alia, the introduction of a National Land Policy, enactment of a law that would enable claims made under customary law concerning land to be heard in established courts and investigation of historical injustices dealing with the issue of land in the Coast and Rift Valley.[1046]

On 21 November 2005, widespread socio-economic reforms were proposed in Kenya through a constitutional referendum. The proposed new constitution was gazetted on 22 August 2005 in accordance with Kenyan law.[1047] Section 81 of the proposed constitution dealt with community land and provided that "[c]ommunity land shall vest in and be held by communities identified on the basis of ethnicity, culture, or community of interest."[1048] Community land was to be registered and any unregistered community land held in trust by district governments on behalf of the communities.[1049] Parliament was then tasked with enacting more specific legislation to implement the new communal tenure framework.[1050] A National Constitutional Conference held at the Bomas of Kenya had also adopted a draft constitution known as "the Bomas Draft" on 15 March 2004 with a similar communal tenure framework in its section 80.[1051] Kenyans rejected the proposed constitution during the referendum of 21 November 2005 but the clamour for land tenure reforms continued.

[1046] As above.

[1047] See 'The Proposed New Constitution of Kenya' (22nd August, 2005) Kenya Gazette Supplement No. 63 (2005) (Drafted and Published by the Attorney-General Pursuant to Section 27 of the Constitution of Kenya Review Act, Cap 3A of the Laws of Kenya).

[1048] See The Proposed New Constitution of Kenya, 2005 (n 1047 above) section 81. The same language is used in Constitution of Kenya of 2010 (n 1) article 63(1) as follows:

"Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest." See Constitution of Kenya of 2010 (n 1) art. 63(1).

[1049] As above.

[1050] See The Proposed New Constitution of Kenya, 2005 (n 1047) section 81.

[1051] See National Constitutional Conference 'The Draft Constitution of Kenya 2004 (Bomas Draft)' (2004) Circulated to delegates and commissioners in hard copy on 23rd March 2004 and available at http://www.katibainstitute.org/Archives/images/3-Bomas_draft.pdf) (accessed 31 March, 2020).

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In April 2007, a Draft National Land Policy was adopted by stakeholders through a National Symposium.[1052] The Seventh Cabinet meeting held on 25th June, 2009 approved the Draft National Land Policy and directed the Minister for Lands to proceed with the preparation of the Sessional Paper for presentation to Parliament.[1053] The National Land Policy, 2009 was to form the foundation upon which the administrative and legislative framework would be built; to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity.[1054]

The Kenya National Land Policy, Sessional Paper No. 3 of 2009, was the first single and clearly defined National Land Policy since independence in Kenya and is the only National Land Policy in Kenya.[1055] It describes land as "the most emotive and culturally sensitive issue in Kenya".[1056] Chapter 1 of the National Land Policy, 2009, explains further that "[l]and is critical to the economic, social, and cultural development of Kenya.[1057] Land was also a key reason for the struggle for independence and land issues remain "politically sensitive and culturally complex."[1058] Section 29, chapter 3 of the National Land Policy states that land is not just a commodity that can be traded in the market and describes it as "an economic resource that should be managed productively", "a significant resource to which members of society should have equitable access for livelihood", "a finite resource that should be utilized sustainably" and "a cultural heritage which should be conserved for future generations".[1059]

The National Land Policy, 2009 calls for formal state statutory recognition of communal tenure regimes that pre-existed the state system.[1060] It criticizes the state's land

[1052] National Land Policy of 2009 (n 229) p. vii (Foreword).

[1053] As above.

[1054] National Land Policy of 2009 (n 229) p. ix (Executive Summary).

[1055] As above.

[1056] National Land Policy of 2009 (n 229) p. vii (Foreword).

[1057] National Land Policy of 2009 (n 229) chapter 1, section 1.

[1058] As above.

[1059] National Land Policy of 2009 (n 229) chapter 3, section 29.

[1060] National Land Policy of 2009 (n 229) chapter 3, section 66.

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registration system for ignoring customary land rights.[1061] Section 3.3.1.2 (64) of the National Land Policy, 2009, governs community land and provides as follows:

> The process of individualization of tenure, that is, land adjudication and/or consolidation, the eventual registration of interests in land under the Registered Land Act (Cap 300) and declaration of whole districts in the pre-independence period as Government land has affected customary tenure in two material respects:
>
> (a) Undermining traditional resource management institutions; and
>
> (b) Ignoring customary land rights not deemed to amount to ownership, such as family interests in land, the rights of "strangers" (for example jodak among the Luo and the ahoi among the Kikuyu), and communal rights to clan land (such as rights to inkutot land among the Maasai and rights to kaya forests among the Mijikenda).[1062]

The National Land Policy, 2009, also took issue with the dual tenure system that was created by the colonial state and perpetuated by the new Kenyan state following independence in 1963. According to section 2.2.3 (23) of the National Land Policy, 2009, the net effect of these tenure systems on land administration was to perpetuate a dual system of economic relationships consisting of an export enclave controlled by a small number of European settlers and a subsistence periphery operated by a large number of African peasantry.[1063] The duality was manifest in:

> (a) Systems of land tenure based on principles of English property law on the one hand and a largely neglected regime of customary property law on the other hand;
>
> (b) A structure of land distribution characterized by large holdings of high potential land, on the one hand, and highly degraded and fragmented small holdings on the other;

[1061] National Land Policy of 2009 (n 229) chapter 3, section 64.

[1062] National Land Policy of 2009 (n 229) chapter 3, section 64, paragraph 3.3.1.2.

[1063] National Land Policy of 2009 (n 229) chapter 2, section 23, paragraph 2.2.3.

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> (c) An autonomous and producer controlled legal and administrative structure for the management of the European sector, as opposed to a coercive and government controlled structure for the African areas; and
>
> (d) A policy environment designed to facilitate the development of the European sector of the economy by under-developing its African counterpart.[1064]

The National Land Policy, 2009, then proposes land tenure reforms to formally recognize communal tenure systems that were practiced by African communities before colonialism.[1065] Section 3.1(33) under chapter 3 of the National Land Policy, 2009, describes Kenya's then proposed recognition framework for community land rights as follows:

> It adopts a plural approach, in which different systems of tenure coexist and benefit from equal guarantees of tenure security. The rationale for this plural approach is that the equal recognition and protection of all modes of tenure will facilitate the reconciliation and realisation of the critical values which land represents.[1066]

The proposed land tenure reforms therefore advocated for maintaining the dual tenure system while guaranteeing equality of the two tenure systems through anchoring the communal tenure system in the constitution and passing legislation to implement it.

4.6 COMMUNAL TENURE UNDER THE 2010 CONSTITUTION

The state found a unique opportunity to institute land tenure reforms through the constitutional review process that gained widespread political support in the period after the 2007-2008 post-election violence which led to the loss of approximately 1,133 lives, destruction of approximately 78,254 houses and displacement of approximately 663,921

[1064] As above.

[1065] National Land Policy of 2009 (n 229) chapter 3, section 33, paragraph 3.1.

[1066] As above.

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people.[1067] The political dialogue and reconciliation effort that resulted after the massive loss of life and destruction of property created a conducive atmosphere for land tenure reforms.

In a bid to resolve the root causes of the deepening polarization and divisions that had threatened Kenya's existence, on 28th February 2008, and under the auspices of the African Union Panel of Eminent African Personalities chaired by Mr. Kofi Annan, the state and the main opposition political party signed an agreement for dialogue and reconciliation, including a Statement of Principles on Long-term Issues and Solutions ("Statement of Principles").[1068] The Preamble of the Statement of Principles reads in part:

> "…we recognized that poverty, the inequitable distribution of resources and perceptions of historical injustices and exclusion on the part of segments of Kenyan society constituted the underlying causes of the prevailing social tensions, instability and cycle of violence."[1069]

The first principle in the Statement of Principles was an agreement on constitutional, institutional and legal reforms in Kenya. The second principle was land reform. It read as follows:

> "We recognize that the issue of land has been a source of economic, social, political and environmental problems in Kenya for many years. We agree that land reform is a fundamental need in Kenya and that the issue must be addressed comprehensively and with the seriousness it deserves. Towards this end, we agree to fully support

[1067] See section 2.4.3.2 of Chapter 2 for more a more detailed description of the 2007-2008 post-election violence in Kenya.

[1068] See The Panel of Eminent African Personalities (Chaired by H.E. Kofi Annan) 'Kenya National Dialogue and Reconciliation: Statement of Principles on Long-term issues and Solutions (23rd May 2008) United Nations, available at https://peacemaker.un.org/ (accessed 28 April 2020).

[1069] Kenya National Dialogue and Reconciliation Statement of Principles (n 1068 above) part I (Preamble).

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> efforts to establish the factors responsible for conflicts over land and to formulate and implement actionable short, medium and long-term recommendations on the issue."[1070]

The implementation agenda that was attached to the Statement of Principles included preparing a draft Constitution to be approved by the Kenyan Parliament and enacted by the people of Kenya through a referendum.[1071] It also included factoring land reform into the constitutional review process to address fundamental issues of land tenure and land use.[1072]

The Statement of Principles was formally enacted into law as the National Accord and Reconciliation Act 2008.[1073] The Schedule to the National Accord and Reconciliation Act set out the Principles of Partnership of the Coalition Government ("Principles of Partnership") that was formed following the crisis.[1074] The Preamble to the Principles of Partnership summarizes the existential threat that resistance by African community systems posed to the Kenyan state system as follows:

> "The crisis triggered by the 2007 disputed presidential elections has brought to the surface deep-seated and long-standing divisions within Kenyan society. If left unaddressed, these divisions threaten the very existence of Kenya as a unified country. The Kenyan people are now looking to their leaders to ensure that their country will not be lost."[1075]

[1070] Kenya National Dialogue and Reconciliation Statement of Principles (n 1068) section B (Land Reform).

[1071] Kenya National Dialogue and Reconciliation Statement of Principles (n 1068) pp. 5 et seq., (Agenda Item 4 Implementation Framework).

[1072] As above.

[1073] National Accord and Reconciliation Act (n 594).

[1074] National Accord and Reconciliation Act (n 594 above) section 9 (Schedule).

[1075] As above.

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On 4 August 2010, Kenyans participated in a constitutional referendum to accept or reject widespread socio-economic reforms to address deep-seated and long-standing divisions within Kenyan society.[1076] Kenyans overwhelmingly voted in favour of the new constitution which was officially promulgated on 27 August 2010.[1077]

The Constitution of 2010 has a whole chapter on land, Chapter 5, which includes Articles 60-68.[1078] Article 61 (1) is a major departure from the 1963 Constitution on who the land belongs to; whereas the Crown/Government owned all the land under the 1963 Constitution, Article 61(1) of the 2010 Constitution states that "[a]ll land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals".[1079] This also differs from the situation in Tanzania where all land is public property vested in the President as a trustee and all individuals legally occupy or use the land by way of right of occupancy, deemed or granted.[1080] The Tanzanian laws vesting all the land in the President is a continuation of colonial land laws in East Africa, generally, that vested all land in the German colonial state and the subsequent British Crown.[1081]

The 2010 Kenyan Constitution further classifies land into three main categories: private land, public land and community land. Private land is that which is owned by an individual under freehold or leasehold.[1082] Public land is vested in the government for the

[1076] The Constitution of Kenya Review Act (Referendum) Regulations, 2010, L. N. 66 of 2010 (23rd August 2010) The Kenya Gazette, Gazette Notice No. 10019.

[1077] 2010 Referendum Regulations (n 1076) (declaring that 68.55% of the total valid votes cast ratified the new constitution).

[1078] Constitution of Kenya of 2010 (n 1) chapter 5, articles 60-68.

[1079] Constitution of Kenya of 2010 (n 1) chapter 5, article 61 (1).

[1080] See The Land Act 1999, section 4, The United Republic of Tanzania (available at http://extwprlegs1.fao.org/docs/pdf/tan23795.pdf) (accessed on March 31, 2020).

[1081] See East Africa Order in council (n 762); The East Africa Protectorate Crown Lands Ordinance (Sept. 27, 1902) reprinted in 95 British and Foreign State Papers 1901 - 1902, at 528 (1905); 'Rules for the Purchase of Land under the Crown Lands Ordinance 1902 No. 76' (1903) The Official Gazette of the East Africa and Uganda Protectorates, East Africa Protectorate.

[1082] Constitution of Kenya of 2010 (n 1) art. 63.

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benefit of the people and managed by the National Land Commission on behalf of the national and county governments.[1083] Article 63 of the Kenya Constitution of 2010 recognizes communal tenure and also tasks Parliament with enacting legislation to give effect to it.[1084] Communal tenure means that community land is to be owned, used and managed by the communities that inhabit it.[1085] Unregistered community land, however, continues to be held in trust by county governments on behalf of the communities for which it is held.[1086] The Constitution of 2010 was the first constitutional recognition of African communal tenure systems in Kenya and provided for such recognition on the basis of ethnicity, culture or similar community of interest.[1087]

Kenya's constitutional recognition of communal tenure is similar to Canada's anchoring of indigenous peoples' rights in the constitution of 1982. Part II, sections 35 and 35.1 of Canada's Constitution of 1982 provide for the "rights of the aboriginal peoples of Canada" as follows:

> "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> …
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> …

Not only does the Canadian constitution recognize the rights of aboriginal peoples of Canada, but it also makes it difficult to amend the relevant constitutional provisions. Any

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[1083] Constitution of Kenya of 2010 (n 1) art. 67.

[1084] Constitution of Kenya of 2010 (n 1) art. 63.

[1085] See Community Land Act (n 19) section 2.

[1086] Community Land Act (n 19) section 6.

[1087] Constitution of Kenya of 2010 (n 1) art. 63. See also Patricia Kameri-Mbote and Others 'Ours by Right: Law, Politics, and Realities of Community Property in Kenya' (2013) Nairobi: Strathmore University Press (discussing communal tenure in Kenya).

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such amendment would require a constitutional conference involving the Canadian Prime Minister, First Ministers of all Canadian provinces and representatives of the aboriginal peoples.[1088] To further guarantee Aboriginal rights in Canada, section 25 of the Canadian Charter of Rights and Freedoms provides as follows:

> Aboriginal rights and freedoms not affected by Charter
>
> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.[1089]

Similarly, the Kenyan Constitution of 2010 recognized communal tenure and made it difficult for communal tenure rights to be abrogated or derogated from except through a difficult and complicated constitutional amendment.[1090] However, in Kenya, article 63 of the Constitution of 2010 mandated that a legislative framework be enacted to implement the new communal tenure system.

The Community Land Act, No. 27 of 2016 (hereinafter "the Act") came into force on 21 September 2016 to give effect to article 63 of the Constitution of 2010, meaning to provide for recognition, registration and management of African communal tenure systems within the formal state legal system.[1091] The Act repealed the Land (Group Representatives) Act (Chapter 287 of the Laws of Kenya) and the Trust Lands Act (Chapter 288 of the Laws

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[1088] See Canada Act 1982, Schedule B Constitution Act, 1982, section 35.1 (UK Public General Acts1982 c. 11) available at http://www.legislation.gov.uk/ (accessed 31 March 2020).

[1089] Canadian Constitution of 1982 (n 1088) section 25.

[1090] See Constitution of Kenya of 2010 (n 1) arts. 255, 256 and 257 (providing for amendment of the Kenya Constitution only through a referendum or an absolute majority (at least two-thirds of all members) of both the National Assembly and Senate).

[1091] Community Land Act (n 19).

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of Kenya) which also allowed for group ownership of land as trustees on behalf of the African communities inhabiting the land.[1092] The Act establishes a Community Land Management Committee which shall be elected by a community assembly consisting of all adult members of the community to run the day to day functions of the community and administer the registered community land on behalf of the community.[1093] The Cabinet Secretary for Land and Physical Planning passed the Community Land Regulations, 2017 to implement the Community Land Act of 2016 pursuant to section 48 of the Act.[1094]

The Community Land Act of 2016 and Regulations of 2017 formally recognized customary land rights that had hitherto been unrecognized under state statutory law so that the communities themselves could own, use and manage their land.[1095] The term "customary land rights" is defined in the Act to mean rights conferred by or derived from African customary law, customs or practices, provided that such rights are not inconsistent with the Constitution or any written law.[1096] The Act gives these customary land rights equal footing in law as freehold and leasehold tenure.[1097]

The Community Land Act is an example of the state's statutory recognition of communal tenure which is similar to the statutory recognition of communal tenure that occurred in Australia[1098] and South Africa.[1099] South Africa and Australia have also

[1092] Community Land Act (n 19) section 45.

[1093] Community Land Act (n 19) part III, section 15.

[1094] Community Land Regulations (n 19).

[1095] See Kameri-Mbote et al (n 1087) (discussing communal tenure in Kenya).

[1096] Community Land Act (n 19) section 2.

[1097] As above.

[1098] See Native Title Act 1993 (Australian Government), No. 110, 1993, section 3(a), available at https://www.legislation.gov.au/Details/C2019C00054 (accessed 31 March 2020) (stating its main object as being "to provide for the recognition and protection of native title").

[1099] See Interim Protection of Informal Land Rights Act 31 of 1996 (South Africa) available at https://www.gov.za/sites/default/files/gcis_document/201409/act31of1996.pdf (accessed 31 March 2020) (with its main object described as being "to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law; and to

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judicially recognized communal tenure.[1100] Unlike the problems of unregistered community land in Kenya and Tanzania, South Africa's problem relating to land is primarily inequitable land distribution.[1101] In 1994, whites owned 87% of the land in South Africa despite representing less than 10% of the population.[1102] In contrast, the black African population, which remains the majority in South Africa, also continued to own disproportionately less acreage than their white counterparts.[1103] On 17 November 1994, President Nelson Mandela assented to the Restitution of Land Rights Act No. 22 of 1994 "[t]o provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices".[1104] This is the legislation that the Richtersveld Community relied on to successfully claim that their indigenous land rights had been contravened in the 1920s when diamonds were discovered on their land.[1105] The Supreme Court of Appeal and the Constitutional Court both agreed that the state had

provide for matters connected therewith").

[1100] In South Africa, the South African Supreme Court of Appeal and the Constitutional Court recognized the Richterveld Community's indigenous land rights in the Richtersveld Community case (n 184). In Australia, the Supreme Court of Australia in Mabo v Queensland (n 22), created a new legal doctrine in property law called "Native Title" based primarily on land rights under indigenous customary law.

[1101] Justin Hunter 'Native Title in Australia and South Africa: A Search for Something that Lasts' (Spring, 2015) 22 U. Miami Int'l & Comp. L. Rev. 233, 235-236.

[1102] As above.

[1103] As above.

[1104] Restitution of Land Rights Act 22 of 1994 (South Africa) available at https://www.justice.gov.za/lcc/docs/1994-022.pdf (accessed 28 April 2020) (quoting verbatim the Act's long title).

[1105] See the *Richtersveld Community case* (n 184) sections 1, 10. See also Dr. Morad Elsana 'Legal Pluralism and Indigenous Peoples Rights: Challenges in Litigation and Recognition of Indigenous Peoples Rights' (2019) 87 U. Cin. L. Rev. 1043; Justin Hunter 'Native Title in Australia and South Africa: A Search for Something that Lasts' (Spring, 2015) 22 U. Miami Int'l & Comp. L. Rev. 233, 235-236 (for more discussion of the *Richtersveld Community case*).

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discriminatorily expropriated the Richtersveld community's land after the passing of the Native Lands Act of 1913 and that the community was entitled to restitution.[1106]

The Supreme Court of Australia applied the "Native Title" doctrine to recognize the Meriam community's indigenous land rights to Murray Island in Queensland, a state in the northeast of Australia.[1107] Following the apex court's recognition of customary or indigenous land rights in Australia the state enacted legislation to give statutory recognition to the Courts' decisions, the Native Title Act of 1993.[1108] In both the Australian and South African state systems, therefore, the judicial system recognized pre-existing community land rights based on a common law doctrine, the Native Title doctrine, or an existing statutory framework, the Restitution of Land Rights Act, 1994.

In Kenya, the Community Land Act is a statutory legal framework to implement the state's constitutional recognition of communal tenure. Under the Community Land Act, pre-existing customary land rights remain valid following enactment of the new legislative framework so that any pre-existing group rights may also be recognized and documented. Section 46 (1) and (2) of the Act deals with pre-existing communal tenure systems and provides as follows:

> "[u]nless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation provisions acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall be deemed to have been acquired under this Act."[1109]

[1106] The South African courts also acknowledged, as stated in the Constitutional Court's Order in sections 102-103 in the *Richtersveld Community case* (n 184), that African communities had property rights based on exclusive occupation and use of the land and that were not were not extinguished at the time of annexation.

[1107] *Mabo v Queensland* (n 22).

[1108] Hunter, J (n 1105) p. 242.

[1109] Community Land Act (n 19) section 46(1) & (2).

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The same assurance of validity of existing communal tenure systems is echoed in section 2 of the Transitional Provisions of the Community Land Act to make it clear and unambiguous that all unregistered community land rights before the Act may be deemed to be rights of the newly registered communities once properly documented in accordance with the Act.[1110] Accordingly, section 47 of the Act provides that respective group representatives of former group ranches together with the communities they represent may be registered as communities.[1111] Customary land trusts may also be registered as community land under the Act.[1112]

The Community Land Act and Regulations allow for conversion of community land to either public land or private land and vice versa.[1113] Section 25 of the Act and section 17 of the Regulations provide that private land may be converted to community land by transfer, surrender or operation of law.[1114] Section 24 of the Act and section 18 of the Regulations allow for conversion of public land into community land by the National Land Commission.[1115] However, for conversion of any community land into either public land or private land, the approval of the community is required.[1116] Under section 16(1) of the Regulations, a community may convert whole or part of its land to private land through transfer with the approval of at least two thirds of the community assembly.[1117] Besides the compulsory acquisition process involving the National Land Commission, community land may also be converted into public land through transfer and surrender with the approval at least two thirds of the community assembly.[1118] Section 19 of the Regulations allows the

[1110] Community Land Act (n 19) (transitional provisions) section 2.

[1111] Community Land Act (n 19) section 47.

[1112] Community Land Act (n 19) section 5(2).

[1113] Community Land Act (n 19) sections 24, 25; Community Land Regulations (n 19) sections 17, 18.

[1114] As above.

[1115] As above.

[1116] As above.

[1117] Community Land Regulations (n 19) section 16(1).

[1118] Community Land Regulations (n 19) section 19.

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community, through the resolution of at least two thirds of the community assembly, to set aside land for an identified public purpose in a process involving the county government and the National Land Commission.[1119]

The act of registration remains the key to formal recognition of customary land rights under the Constitution of 2010 and Community Land Act of 2016. The Act defines "registered community" to mean a community that has completed the registration processes and is recognized in accordance with its provisions and the provisions of the Land Registration Act, 2012.[1120] Under section 16 of the Community Land Act, 2016, the registration of a community as the proprietor of land vests in that community the absolute ownership of that land, while the registration of a community as the proprietor of a lease vests in that community the leasehold interest described in the lease.[1121] The effect of non-registration of any parcel of community land is that it remains unregistered community land to be held in trust by the county governments on behalf of the communities.[1122] However, the trustee role of the relevant county government ceases upon registration of any unregistered community land.[1123] The act of registration is therefore key to formal recognition of a community's customary land rights under the new legislative framework.

Under the new communal tenure system, county governments perform an overall trustee role, especially with respect to unregistered community land.[1124] The Act provides that county governments will hold in trust all unregistered community land on behalf of the respective communities and maintain a special interest-bearing account for any monies payable as compensation for compulsory acquisition of any such unregistered community land.[1125] Such monies are to be released to the community upon registration of the

[1119] As above.

[1120] Community Land Act (n 19) section 2.

[1121] Community Land Act (n 19) section 16.

[1122] Community Land Act (n 19) section 6.

[1123] As above.

[1124] As above.

[1125] As above.

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community land.[1126] County governments are legally prohibited from selling, disposing, transferring, and converting for private purposes or in any other way disposing of any unregistered community land that they are holding in trust for a community.[1127] County governments also review and approve community land development and use plans and physical development plans for setting aside community land for a public purpose.[1128] County governments, therefore, perform the same trustee role with respect to community land that was performed by the Crown in the colonial era and the county councils after Kenyan independence in 1963.[1129]

The Regulations outline steps for identifying community land, which begins with an inventorying exercise by the County government.[1130] Before commencing the inventorying exercise, the county governments are tasked with sensitizing the communities inhabiting these community lands on the new communal tenure system.[1131] Although section 27 of the Regulations places the onus on the Cabinet Secretary to develop and roll out a national programme for public education and awareness on provisions of the Act and the rights of communities over community land, such a program should be done in consultation with the county governments and with their participation.[1132] The awareness programme should also be implemented continuously by county governments and the national government.[1133]

Section 14(1) of the Regulations requires the maintenance for each registration unit, a community land register in accordance with section 8 of the Land Registration Act, 2012.[1134] The Chief Land Registrar is required to designate a qualified registrar to be the

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[1126] As above.

[1127] As above.

[1128] As above.

[1129] Community Land Act (n 19) section 6. See also Onalo, PL (n 198) p. 42.

[1130] Community Land Regulations (n 19) section 12.

[1131] Community Land Regulations (n 19) section 27.

[1132] As above.

[1133] As above.

[1134] Community Land Regulations (n 19) section 14(1).

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Community Land Registrar responsible for registration of community land.[1135] Under section 18 of the Act, a certificate of title issued by the Community Land Registrar is prima facie evidence that the person named as proprietor of the land – in this case, the community - is the absolute and indefeasible owner of the land.[1136] This certificate of title may not be challenged, except on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.[1137] Following is a diagram summarizing the new communal tenure recognition framework:

[1135] Community Land Act (n 19) Section 9.

[1136] Community Land Act (n 19) Section 18.

[1137] As above.

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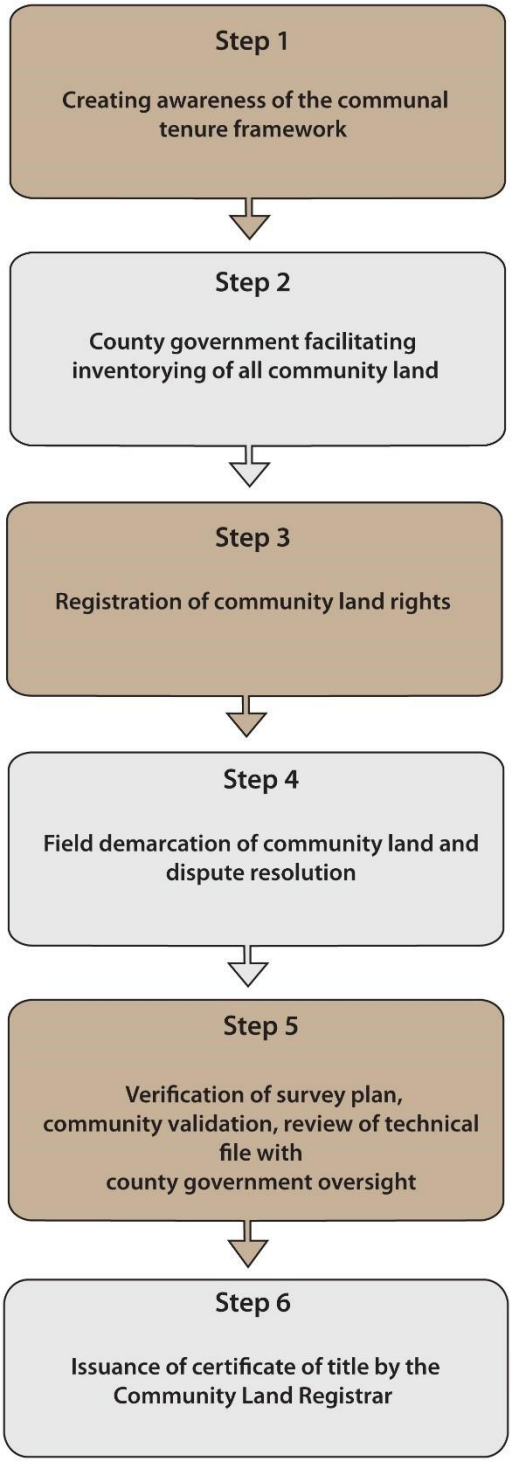

Source: Flow chart designed by author based on the Community Land Act 27 of 2016, KENYA GAZETTE SUPPLEMENT No. 148 § 39 (Published by the National Council for Law Reporting) and the Community Land Regulations, 2017, Legislative Supplement No. 87, KENYA GAZETTE SUPPLEMENT No. 178 (Published by the National Council for Law Reporting).

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The land registration system envisioned by the Community Land Act of 2016 is similar to the land registration system advocated under the Swynnerton Plan.[1138] The main difference between the two, however, is that whereas the Swynnerton Plan encouraged individuals to register their land rights,[1139] the Act encourages communities (and not individuals) to register similar land rights.[1140] Similar to the Swynnerton Plan, the communal tenure system also has its imperfections. Some of the criticisms of the new communal tenure recognition framework include: (1) continuing perception of inequality of the two land tenure systems; (2) scarcity of high-potential and semi-potential land that can be registered or converted into community land; (3) inability to address historical land injustices and the state's continuing domination of community systems; (4) vague language and conflicting legislation that may lead to enforcement challenges; and (5) budget limitations that may negatively impact implementation of the new framework.[1141]

The first issue is whether the new communal tenure system that has been recognized under the 2010 Constitution and the Community Land Act of 2016 provides the same tenure security that a person would obtain under individual tenure.[1142] This issue is critical to the

[1138] Swynnerton Plan (n 688) and Community Land Act (n 19).

[1139] Swynnerton Plan (n 688) p. 24 - 25.

[1140] Community Land Act (n 19) section 2.

[1141] See Kameri-Mbote et al (n 1087) (on communal tenure); NLC Advisory on Registration of Title (n 1015); Kameri-Mbote, P (n 1012) (World Bank); Klopp, JM & Lumumba, O (n 828); Liz Alden Wily 'The Community Land Act in Kenya Opportunities and Challenges for Communities' (19 January 2018) Van Vollenhoven Institute, Leiden Law School; Collins Odote 'The Dawn of Uhuru? Implications of Constitutional Recognition of Communal Land Rights in Pastoral Areas of Kenya' (2013) Nomadic Peoples, vol. 17, No. 1, pp. 87-105.

[1142] P.L. Onalo, an advocate of the High Court of Kenya, Jacqueline M. Klopp, a research scholar, and Odenda Lumumba, a land rights activist, have all identified the risk of continuing inequality of tenure rights between the formal statutory tenure and the informal communal tenure system. See Onalo, PL (n 198 above), chapter 9; Klopp, JM & Lumumba, O (n 828 above), pp. 5-6. See also NLC Advisory on Registration of Title (n 1015) p. 51 (stating that "[t]he vast majority of Kenyans in the unregistered areas prefer registration of individual titles to registration of Community land").

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long-term viability of the new communal tenure system because a lesser form of tenure security than individual tenure will result in individuals gravitating toward individual tenure to the detriment of the new communal tenure system. This was the main reason behind the failed attempt to introduce a communal reserve for both African communities and Arabs in the coastal strip during the colonial era. The attempt failed because the Arab community viewed such a communal reserve as an inferior type of tenure and wanted, instead, recognition of their freehold interest in the land and individual titles that would be confirmed by certificates of ownership issued by the colonial state.[1143]

The new communal tenure recognition framework addresses the perceived inequality of communal versus individual tenure under section 5 of the Land Act, No. 6 of 2012, that makes it clear that "[t]here shall be equal recognition and enforcement of land rights arising under all tenure systems and non-discrimination in ownership of, and access to land under all tenure systems." However, the statutory declaration of equality of the two tenure systems does not sufficiently address the perceived inequality. More assurances are needed from the state system that it will recognize and protect community land rights in the same manner that it recognizes and protects individual land rights.

Tanzania has experimented longer than Kenya with its statutory recognition framework for communal tenure and has faced the same problem of inequality of communal versus individual tenure.[1144] The Tanzanian experience in dealing with the inequality problem can offer valuable lessons to the new Kenyan communal tenure framework. In Tanzania, the state enacted a statutory recognition framework for communal tenure in 1999 following conflicts over land in the 1980s.[1145] This formal communal tenure system was preceded by a report of a National Commission in 1992 that called for land reforms.[1146] A

[1143] See Hansard (n 800) (for records of proceedings in the Kenya National Assembly relating to the Digo-Shimoni Reserve).

[1144] Stephan Schmidt and Edmund Zakayo 'Land formalization and local leadership in Moshi, Tanzania' (April 2018) 74 EHABIN 18 - 26.

[1145] Village Land Act, 1999, The United Republic of Tanzania, available at http://extwprlegs1.fao.org/docs/pdf/tan53306.pdf) (accessed 31 March 2020).

[1146] The United Republic of Tanzania 'Report of the Presidential Commission of Inquiry into Land

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National Land Policy was issued in 1995 and Tanzania passed new land laws in 1999, including the 1999 Village Land Act.[1147] The 1999 Village Land Act required community lands to be surveyed, titled and the communities issued with a Certificate of Village Land (CVL).[1148] Within the village, the 1999 Village Land Act also provided for the possibility of individual rights to be recognized and certified by means of a Certificate of Customary Right of Occupancy (CCRO).[1149]

After over 15 years of implementation of Tanzania's property formalization programmes, including MKURABITA, the African communities failed to integrate the state programs into their community systems.[1150] Tanzania recognized that informality has many forms and causes, but it is both structured by and conducted in accordance with social norms rather than a legal framework.[1151] For a state program to be successfully integrated into a community system, individual members of the community should be convinced to participate in the program so that they can convince other members of their community to join the program.[1152] When the program gains widespread acceptance by community members, it starts to function like a customary practice of the community.[1153] When a critical

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Matters: Land Policy and Land Tenure Structure' (1994), vol. 1 (published by Scandinavian Institute of African Studies. Uppsala. Sweden).

[1147] Tanzanian Village Land Act (n 1145).

[1148] Tanzanian Village Land Act (n 1145) part IV.

[1149] As above.

[1150] See Robin Biddulph 'The 1999 Tanzania land acts as a community lands approach: A review of research into their implementation' (December 2018) 79 ELAUSP 48-56.

[1151] Michal Lyons 'Pro-Poor Business Law? On MKURABITA and the Legal Empowerment of Tanzania′s Street Vendors' (1 March 2013) Hague Journal on the Rule of Law, 5: 74 – 95, 2013, p. 3 (Suggests that the pro-poor business reforms have foundered from lack of interest among both donors and senior government figures.)

[1152] Lyons, M (n 1151) pp. 4-8 (highlighting the fact that legal reform does not necessarily result in cultural changes and discussing strategies for effecting such changes).

[1153] As above. See C Juma and JB Ojwang (eds) 'In land we trust: Environment, private property and constitutional changes' (1996) Initiatives Publishers, Nairobi (discussing strategies for effecting cultural changes).

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mass of the community participates in the program over a period of time, then the community may incorporate it into the community's customary practices and obligate its members to participate in it.[1154]

MKURABITA failed to gain the communities' acceptance as a customary practice.[1155] The outcome of the state's implementation of MKURABITA was the extremely-limited roll-out of land titles to the poor.[1156] In urban areas, the proportion of land covered by a formal title that is transferrable and usable as collateral in the formal credit market was less than 15% and the share of actual parcels covered was much smaller.[1157] A study of state tenure formalization programs in two neighborhoods in Moshi, Tanzania, that was published in April 2018, concluded that good governance and implementation of land formalization can increase the community's participation in the land formalization program.[1158] The Tanzanian experience teaches that good governance, broad access to information, competent and impartial state institutions and community participation through public meetings, education and outreach, local leadership and local partnerships, are critical for the success of state formalization programs.[1159]

Canada's legal recognition framework for Aboriginal land rights as provided for in sections 35 and 35.1 of the Canadian Constitution of 1982 and the Canadian Charter of Rights and Freedoms has been in place longer than Kenya and Tanzania.[1160] However, this legal framework has been unable to escape the shackles of inequality of Canada's dual tenure

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[1154] As above.

[1155] Schmidt & Zakayo (n 1144) pp. 18 - 26.

[1156] See also Lyons, M (n 1151).

[1157] Elizabeth Fairley 'Upholding Customary Land Rights through Formalization: Evidence from Tanzania's Program of Land Reform' (April 23 – 26, 2012) Annual World Bank Conference on Land and Poverty, Washington, D.C. available at https://conservancy.umn.edu/handle/11299/144790) (accessed 20 March 2020).

[1158] Schmidt & Zakayo (n 1151) pp. 18 - 26.

[1159] Biddulph, R (n 1150).

[1160] See Canadian Constitution of 1982 (n 1088) sections 35 and 35.1.

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framework.[1161] Before enactment of the Canadian Constitution of 1982, the Canadian state system did not view the Aboriginal peoples in Canada as equal to the European settlers.[1162] The settlers viewed Aboriginal peoples as an inferior race, with inferior rights to land, dependent on the good will of the sovereign.[1163] After enactment of the Canadian Constitution of 1982, the Aboriginal rights and interests in land remain sui generis.[1164] They are neither rights to own in fee simple, nor rights to govern, but merely rights of use and occupancy.[1165] They can be described as rights and interests that are only "personal and usufructuary", which makes them lesser rights than individual tenure rights enjoyed by other Canadians.[1166]

This inequality of tenure rights in Canada has resulted in conflicts and instability between the Canadian state and the Aboriginal communities.[1167] The *Idle No More* movement in Canada, for example, is a network of Aboriginal communities that are struggling for recognition of Aboriginal rights.[1168] The movement arose out of revelations of abject poverty in an Indian reserve community in the northern part of Ontario, a Canadian

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[1161] See Indian Act Amendment and Replacement Act, S.C. 2014, c. 38 (assented on 16 December 2014) available through the Canadian government's Justice Laws Website: https://laws.justice.gc.ca/ (accessed 28 April 2020) (states in its preamble that "[w]hereas the Indian Act is an outdated colonial statute, the application of which results in the people of Canada's First Nations being subjected to differential treatment; Whereas the Indian Act does not provide an adequate legislative framework for the development of self-sufficient and prosperous First Nations' communities").

[1162] LaForme, HS et al (n 617) pp. 687 – 740.

[1163] As above.

[1164] Canadian Constitution of 1982 (n 1088).

[1165] As above.

[1166] As above.

[1167] Mark Mancini 'Wandering Without a Torch: Federalism as a Guiding Light' (2016) 67 UNBLJ 369 - 394 / (2016) 67 R.D. U.N.-B. 369 – 394, at sections 58 - 65.

[1168] Victoria Freeman 'In Defence of Reconciliation' (2014) 27 Can. J.L. & Juris. 213–223 (describing the Idle No More movement and its potential contribution to the push for reconciliation between the Canadian state and the Aboriginal communities in Canada).

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province.[1169] This poverty formed the backdrop to a series of demands by the movement, including a call on the Government of Canada, along with the provinces and territories, to "[c]ease its policy of extinguishment of Aboriginal Title and recognize and affirm Aboriginal Title and Rights, as set out in section 35 of Canada's constitution, and recommended by the Royal Commission on Aboriginal Peoples."[1170] The perceived or actual inequality of communal versus individual tenure in Canada, as in Kenya, needs to be addressed effectively for dual tenure systems in the two countries to remain viable in the long-term.

The second issue that has also been identified by the National Land Commission (NLC Advisory on Registration of Title (n 1119) is whether land exists that can be subjected to the communal tenure regime, particularly in high potential and semi potential areas found mostly in the Rift Valley region. By 1979, there were no more parcels of land in high potential and semi-potential areas, mostly in the Rift Valley region that could be purchased to resettle African communities.[1171] Even group ranches under the Land (Group Representatives) Act (Cap. 287), were established mostly in arid and semi-arid areas because that is where sufficient land could be found. However, section 25 of the Act and sections 17 - 18 of the Regulations allow for conversion of private and public land to community land, so such lands in the Rift Valley region may be converted into community land.[1172] Conversion of private land to community land can be achieved on a large scale if the state system is willing to address comprehensively and seriously the historical injustices that have been the underlying causes of social tensions, instability and cycles of violence in Kenya.

The new communal tenure recognition framework fails to comprehensively and seriously address historical land injustices and the state's tendency to hoard a disproportionate share of political power, authority and resources to maintain its dominance

[1169] Mancini, M (n 1167) sections 58-65.

[1170] LaForme, HS et al (n 617) pp. 687 – 740.

[1171] TJRC Report (n 2) vol. IIB, section 723, p. 299.

[1172] Community Land Act (n 19) section 25; Community Land Regulations (n 19) sections 17-18.

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over African communities.[1173] Section 3.6.2 of the National Land Policy, 2009, describes historical land injustices as follows:

> "Historical land injustices are grievances which stretch back to colonial land administration practices and laws that resulted in mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date. Sources of these grievances include land adjudication and registration laws and processes, and treaties and agreements between local communities and the British. The grievances remain unresolved because successive post-independence Governments have failed to address them in a holistic manner."

The National Land Policy, 2009 called for the state to establish mechanisms to resolve historical land claims arising in 1895 or thereafter because 1895 is the year when Kenya became a protectorate under the British East African Protectorate with the power to enact policies and laws that formed the genesis of the mass disinheritance of various Kenyan communities of their land.[1174] South Africa also had a similar cut-off date in its Restitution of Land Rights Act No. 22 of 1994, which allowed for persons or communities that were dispossessed of property after ratification of the Native Lands Act in 1913.[1175] However, unlike the situation in Kenya, many African communities were dispossessed of their land before 1913 when Dutch and British settlers were spreading outside of the Cape of Good

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[1173] See Kameri-Mbote, P (n 1087) pp. 75-76 (on communal tenure) (highlights the following weakness in Kenya's current land reform framework in general: "Access to justice in land matters for poor and rural communities remains a mirage and there is also need to speed up the disposal of land cases"); Kameri-Mbote (n 2) p. 17 (conclusion) (warns against the danger of instability to the state if historical land injustices are not addressed); Klopp, JM & Lumumba, O (n 828) p. 14 (describing factors that have weakened the functioning and legitimacy of the National Land Commission, which was the body meant to create some checks and balances needed to effectively address Kenya's deeply entrenched 'mischief' around land and, in particular, historical land injustices).

[1174] National Land Policy of 2009 (n 229) section 3.6.2(179).

[1175] See Act 22 of 1994 (South Africa) (n 1104).

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Hope.[1176] The British Crown annexed South Africa in 1847 and started dispossessing Africans of their land as early as that time.[1177] The black Africans who lost their land earlier than 1913 have no redress in the formal state statutory system.[1178] However, the South African courts also acknowledged in the Richtersveld Community case that African communities had property rights based on exclusive occupation and use of the land and that such property rights were not extinguished at the time of annexation.[1179] As a result, the South African state system is making progress toward addressing historical injustices related to land, albeit at a slow pace. Some advocates for immediate land reform in South Africa have even proposed nationalization of the land.[1180]

The 1895 cut-off date proposed by the National Land Policy, 2009 will not result in the same injustice that occurred in South Africa because, unlike in South Africa where many communities were dispossessed of property after ratification of the Native Lands Act in 1913, dispossessions in Kenya started after 1895.[1181] Most of the legislative instruments that

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[1176] Yvette Trahan 'Recent Development: The Richtersveld Community & Others v. Alexkor Ltd.: Declaration of a "Right in Land" Through a "Customary Law Interest" Sets Stage for Introduction of Aboriginal Title into South African Legal System' (Spring, 2004) 12 Tul. J. Int'l & Comp. L. 565.

[1177] As above.

[1178] See Act 22 of 1994 (South Africa) (n 1104) (allowing claims for restitution by persons or communities that were dispossessed of property after ratification of the Native Lands Act in 1913).

[1179] See *Richtersveld Community case* (n 184) section 69 in the Constitutional Court Judgment (holding as follows: "[t]he SCA adopted the rule that indigenous rights to private property in a conquered territory were recognised and protected after the acquisition of sovereignty and concluded that the rights of the Richtersveld Community survived annexation").

[1180] See for e.g. Peter Leon 'Creeping Expropriation of Mining Investments: an African Perspective' (November 2009) 27 JERL 597 (discussing the nationalization debate within the context of mining).

[1181] See British East African Land Regulations (n 647); East Africa Order in council (n 762); Crown Lands Ordinance Land Purchase Rules (n 1081); East Africa Protectorate Crown Lands

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the colonial state used to dispossess Africans of their land in Kenya were enacted after the British government formally assumed administration of the Protectorate of East Africa, including Kenyan territory, in 1895.[1182] The National Land Policy recommended the establishment of a suitable legal and administrative framework to investigate, document and determine historical land injustices and recommend mechanisms for their resolution.[1183] The National Land Policy's specific recommendation was for the state to establish suitable mechanisms for restitution of historical land injustices and claims and to specify a time period within which land claims should be made.[1184] This recommendation for addressing historical land injustices should have been implemented as part of the communal tenure's legal recognition framework.

However, neither the constitutional provision concerning communal tenure nor the statutory framework and regulations address the issue of historical land injustices. Instead, article 67(1) of the Constitution of 2010 establishes the National Land Commission with the mandate of investigating historical land injustices and making recommendations for redress.[1185] Whenever issues of historical land injustices are brought before the Environment and Land Court, it declines jurisdiction to hear such matters and refers them to the National Land Commission.[1186] The Court's often-stated rational is that the appropriate organ to carry out the investigation and/or inquiry with respect to historical land injustices is the National Land Commission and where the law has made provision for a state organ or institution to

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Ordinance (n 1081) (showing some of the earliest legal instruments that were used by the colonial state to dispossess African communities of their land).

[1182] As above.

[1183] National Land Policy of 2009 (n 229) section 3.6.2(179).

[1184] As above.

[1185] Constitution of Kenya of 2010 (n 1) article 67(1).

[1186] *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR, Civil Appeal No. 51 of 2016, paragraphs 68, et seq. (discussing historical injustice and the mandate of the National Land Commission"). See also Constitution of Kenya of 2010 (n 1) article 67(2)(e) (outlining the mandate of the National Land Commission).

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carry out a specific function, that institution should be allowed to carry out its mandate.[1187] The National Land Commission is another state organ that has every incentive to continue the state's suppression and domination of African community systems and has failed to adequately address historical land injustices.[1188]

Here, Kenya can draw lessons from the South African and Canadian experiences. The South African Constitution allows individuals and communities to seek restitution or equitable redress for historical land injustices.[1189] Section 25(7) of the Constitution of the Republic of South Africa No. 108 of 1996, provides as follows:

> "A person or community dispossessed of property after June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."[1190]

South Africa experimented with a communal tenure regime, the Community Land Rights Act No. 11 of 2004 ("CLARA"), that was never implemented and was declared unconstitutional by the Constitutional Court in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10.[1191] The South African Constitutional Court invalidated CLARA because Parliament followed an incorrect procedure in enacting it.[1192] South Africa's current statutory framework for an individual or

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[1187] As above.

[1188] Klopp, JM & Lumumba, O (n 828) p. 14 (describing factors that have weakened the functioning and legitimacy of the National Land Commission, which was the body meant to create some checks and balances needed to effectively address Kenya's deeply entrenched 'mischief' around land and, in particular, historical land injustices).

[1189] See 'The Constitution of the Republic of South Africa, 1996' (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005).

[1190] The Constitution of the Republic of South Africa, 1996 (n 1189) section 25(7).

[1191] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) at paragraph 114, section 96 [2010] ZACC 10.

[1192] The *Tongoane case* (n 1191).

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community to seek restitution for historical land injustices is through the South African Restitution of Land Rights Act No. 22 of 1994, which establishes a Commission on Restitution of Land Rights and a Land Claims Court.[1193] The mandate of the Commission on Restitution of Land Rights is to assist claimants in submitting their land claim, receive and acknowledge all claims lodged and advise claimants on the progress of their land claim.[1194] Under section 28B of the Restitution of Land Rights Act, all hearings in the Land Claims Court shall, except in limited cases, be conducted in open court.[1195] Initially and like the current situation in Kenya with the National Land Commission, individual and community claimants in South Africa had to first lodge their land claims with the Commission on Restitution of Land Rights.[1196] However, in 1998 an amendment of the Restitution of Land Rights Act introduced section 38B that allowed "any person who or the representative of any community which is entitled to claim restitution of a right in land" to lodge a claim directly with the Land Claims Court without having to first go through the Commission on Restitution of Land Rights.[1197] The *Richtersveld Community's case*, for example, was lodged by the Richtersveld community in the local Land Claims Court then appealed to the Supreme Court of Appeal before ending up at the apex court, the Constitutional Court.[1198] The South African option of lodging claims for restitution or equitable redress directly with the Land Claims Court can be useful for addressing historical land injustices in Kenya.[1199]

[1193] Act 22 of 1994 (South Africa) (n 1104).

[1194] As above.

[1195] Act 22 of 1994 (South Africa) (n 1104) section 28B.

[1196] See Act 22 of 1994 (South Africa) (n 1104) (before amendment).

[1197] See text of See Act 22 of 1994 (South Africa) (n 1104) section 38B (as amended in 1998).

[1198] See Richtersveld Community case (n 184).

[1199] See The Chief Land Registrar case (n 1186), paragraphs 68, et seq. (dismissing court claims of historical land injustices based on the constitutional mandate of the National Land Commission").

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In addressing historical injustices committed toward Aboriginal peoples, the Canadian state has publicly apologized for its policy of assimilation.[1200] On June 11, 2008, Canadian Prime Minister Stephen Harper publicly apologized from the floor of the House of Commons for the state policy of assimilation that was implemented through the Indian residential school system.[1201] An apology by the Kenyan state for historical land injustices would be a welcome acknowledgement of the dispossession and displacement of African communities by the colonial state and its successor Kenyan state.

Another example of the Kenyan state's domination and suppression of African community systems that has posed a challenge to implementation of the new communal tenure framework is the repeal of statutory provisions allowing for compensation of communities in resource-rich areas.[1202] The Community Land (Amendment) Regulations, 2018, Legal Notice No. 180 deleted sections 23 and 24 of the Community Land Regulations that provided a mechanism for payment of royalties, rent, compensation and any other payments to the community for expropriation of natural resources on community land.[1203] Under the deleted provisions, the community land management committee was responsible for record-keeping and facilitating development of a benefit sharing plan approved by two thirds of the community assembly to ensure sustainable use and equitable distribution of benefits including the minority groups, women and persons with disability.[1204] The community land management committee was also charged with the responsibility of monitoring compliance with relevant laws when it came to prospecting for minerals or mining on community land.[1205] The state can thus expropriate natural resources from

[1200] Mahoney, K (n 846) pp. 198 – 232 (discussing Prime Minister Harper's public apology to the Canadian Aboriginal or Indian or First Nations community).

[1201] As above.

[1202] The Community Land (Amendment) Regulations, 2018, Legal Notice No. 180 (Published by the Government Printer, Nairobi).

[1203] As above. See also Community Land Regulations (n 19) sections 23 and 24 (before amendment).

[1204] As above.

[1205] As above.

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community land without a clearly-prescribed mechanism for compensating the relevant community.

The fourth criticism of the new communal tenure framework is the vague terminology used and conflicting legislation that may lead to enforcement challenges.[1206] Dr. Liz Alden Wily, for example, has suggested that one of the indicators of a state's achievements in recognizing communal tenure is where "communities are legal persons for the purposes of land ownership; that is, they are not required to register companies, cooperatives, or other legal entities to own land on their behalf".[1207] The issue of what constitutes a community is crucial because the community is supposed to identify the community land and to elect a community land management committee, made up of its members, that will register the community and manage the community land on behalf of that community.[1208] The definition of "community" in the current communal tenure legal framework is problematic because it requires communities to register a legal entity before it can be recognized.[1209] Furthermore, it allows communities to self-identify on the basis a vague category known as "community of interests".[1210] The Community Land Act gives a definition in the interpretation section of "community of interests" as "the possession or enjoyment of common rights, privileges or interests in land, living in the same geographical area or having such apparent association", which adds to the vagueness of the "community of interests" basis for creating a community.[1211]

[1206] See Liz Alden Wily (n 1141); Patricia Kameri-Mbote and Others 'Ours by Right: Law, Politics, and Realities of Community Property in Kenya' (2013) Nairobi: Strathmore University Press (discussing communal tenure in Kenya); Odote, C (n 1141).

[1207] See Liz Alden Wily (n 1141) section 2.3 (discussing the need for progressive recognition frameworks to recognize the rights of communities that already exist).

[1208] Community Land Act (n 19) section 7.

[1209] Constitution of Kenya of 2010 (n 1) art 63(1) (provides that communities may be identified on the basis of "ethnicity, culture or similar community of interest"). The same definition of "community" is contained in the Land Registration Act No. 3 of 2012.

[1210] As above.

[1211] Community Land Act (n 19) section 2.

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Kenya's current communal tenure legal framework remains vague on the status of such pre-existing communities as exist in the Rift Valley region.[1212] The National Land Policy of 2009 proposed a definition that was closer to recognizing pre-existing communities when it defined a community to include users of the land who hold customary land rights.[1213]

The new community land tenure system will only succeed if it allows a constitutionally-identifiable group of persons to own constitutionally-identifiable land that is also capable of constitutional protection.[1214] The case of *Anarita Karimi Njeru vs. The Republic* settled the principle that a person alleging contravention of a constitutional right must set out the right infringed and the manner in which the right is alleged to have been infringed.[1215] While the recognition of communal land tenure is a useful step, the challenge is to find a comprehensive definition of 'community' that also recognizes pre-existing communities and to find procedures for identifying all these communities for the purposes of registration.[1216]

Another shortcoming of the overall communal tenure recognition framework is the failure to repeal all pre-existing legislation concerning community land, especially those that may conflict with the new statutory framework.[1217] For instance, the Land Adjudication

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[1212] Liz Alden Wily (n 1141) section 2.3 (discussing the need for progressive recognition frameworks to recognize the rights of communities that already exist).

[1213] See National Land Policy of 2009 (n 229) p. 63 (GLOSSARY OF TERMS) (proposes the following definition: "Community refers to a clearly defined group of users of land, which may, but need not be, a clan or ethnic community. These groups of users hold a set of clearly defined rights and obligations over land and land-based resources.")

[1214] *Anarita Karimi Njeru vs. The Republic* (1976-1980) KLR 1272.

[1215] As above.

[1216] Liz Alden Wily, The Community Land Act in Kenya Opportunities and Challenges for Communities, at section 2.3 (Van Vollenhoven Institute, Leiden Law School, published: 19 January 2018).

[1217] NLC Advisory on Registration of Title (n 1015) pp. 25-26, 51 (discussing the conflicting legislation applicable to community land matters).

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Act[1218] and the Land Consolidation Acts,[1219] which could still impact unregistered community land, have not been repealed and continue to provide for a system of land adjudication of titles in trust lands.[1220] Both legislations provide adjudication by an Administrative Arbitration Board which is different from the communal tenure framework's adjudication process that is led by the Cabinet Secretary[1221]. The adjudication process under the Land Adjudication Act and the Land Consolidation Acts provides a legal tool for the state system to adjudicate community land rights outside the communal tenure framework.[1222] The overall legislative framework needs to be clarified so that the communal tenure framework is not undermined when registering unregistered community land such as trust land.[1223]

The last criticism of the new communal tenure recognition framework that has been highlighted in an assessment by Prof. Patricia Kameri-Mbote, has to do with its failure to articulate a clear implementation plan and budget allocation by the state.[1224] For comparison, the British gave the colonial state a grant of approximately five million British pounds (£5M)

[1218] Land Adjudication Act (n 303) (where consolidation is necessary).

[1219] Land Consolidation Act, Cap 283 (commencement on 28th July 1959) available at www.kenyalaw.org (accessed 31 March 2020) (where consolidation is not necessary).

[1220] Onalo, PL (n 198) pp. 49 - 50.

[1221] See Land Adjudication Act (n 303) and Land Consolidation Act (n 1219) (providing for administrative arbitration as a form of dispute resolution); see Community Land Act (n 19) section 8 (providing for adjudication by the Cabinet Secretary).

[1222] As above.

[1223] See Community Land Act (n 19) (Section 45(b) repeals the Trust Lands Act Cap 288 and section 6(1) requires the Counties to hold unregistered community land in trust on behalf of the communities).

[1224] Patricia Kameri-Mbote in her report, 'Kenya Land Governance Assessment Report' see Kameri-Mbote, P (n 1012 above) p. 6 (Executive Summary) identifies the implementation failure as her first weakness of the new communal tenure framework with the following observation: "there is an existing legal framework for the recognition and protection of rights but the implementation; enforcement and compliance mechanisms are not effective"). See also Community Land Act (n 19) and Community Land Regulations (n 19).

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to implement the Swynnerton Plan.[1225] Today this would be approximately fifty million British pounds (£50M) due to inflation.[1226] The new communal tenure policy and legal framework did not cite any similar financial support.[1227] As a result, the implementation of the new framework has been slow due to legislative and institutional constraints.[1228] This is similar to the failed implementation of MKURUBITA, a property formalization program in Tanzania that was enacted in 2004.[1229] A possible explanation for MKURUBITA's failure was the lack of sufficient resources to implement the program nationally.[1230] There was speculation that only 1% of the implementation funding was available from state sources and the rest was donor-financed.[1231] As a result, the costs of formalization and survey standards became exorbitantly high, thereby placing the formalization program out of reach of the majority of the urban poor.[1232]

In Australia, implementation of the Native Title Act of 1993, the statutory communal tenure framework that was enacted after the Mabo v. Queensland decision, has also been slow.[1233] For example, in Western Australia from 1993 to 2005, only eleven native title determinations had been made.[1234] The slowness in Australia to implement the communal

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[1225] See Swynnerton Plan (n 688) part XII (Summary), XI (discussing the cost of the plan).

[1226] See the Bank of England's inflation calculator available at https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator (accessed on 31 March 2020).

[1227] See Community Land Act (n 19) and Community Land Regulations (n 19).

[1228] Kameri-Mbote et al (n 1087); Liz Alden Wily (n 1141).

[1229] Biddulph, R (n 1150).

[1230] Lyons, M (n 1151) (suggests that the pro-poor business reforms have foundered from lack of interest among both donors and senior government figures).

[1231] As above.

[1232] As above.

[1233] Maureen Tehan 'Critique and Comment: A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (August, 2003) 27 Melbourne U. L.R. 523.

[1234] As above.

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tenure framework has been attributed by the state and its officials to bureaucratic red tape.[1235] The lesson learnt from the Australian experience and the MKURUBITA experience is the need for goodwill and commitment from the state and state officials to ensure smooth implementation of similar property formalization programs and reforms.[1236] The state must provide an enabling policy environment through the establishment of essential institutions and provision of sufficient financial support.[1237]

4.7 REVIEW

In this chapter I analyse the clash between state statutory law and the African customary law systems. Using social dominance theory, I demonstrate that when two systems such as the colonial state and African community systems interact, they tend to hierarchize. The colonial state system ends up using institutional and individual discrimination and asymmetrical behaviours to ensure that it dominates and suppresses the African communities. This hierarchization was the reason behind the colonial state's use of the theory of *terra nullius* to expropriate African community land and to create a modern economy for the colony that relegated African communities to the fringes of the integrated African socio-economic system. The socio-economic marginalization of African communities in Kenya is similar to the exclusion of Indian communities of Canada and Aboriginal communities of Australia.

In Kenya, the African communities continue to remain resilient and to resist their marginalization as they did under colonial rule and continue to do under independent Kenyan state rule. Their resistance against the colonial state climaxed in the Mau Mau uprising of 1952-1960. The colonial state realized the existential threat posed to it by these resistance movements and sought creative ways of creating an equilibrium within the state system. The colonial state then developed and implemented a policy of assimilation known as the Swynnerton Plan. The Swynnerton Plan encouraged individual African participants to grow

[1235] As above.

[1236] Tehan, M (n 1233); Lyons, M (n 1151) pp. 74 – 95.

[1237] As above.

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cash crops in high potential and semi-potential areas mainly in the Rift Valley region just as European settlers had done in the White Highlands/Scheduled Areas. The aim was to integrate a critical mass of Africans into the colonial state's socio-economic system.

The flaw in the colonial state's policy of assimilation was its tendency to ignore whole African communities. Instead of integrating the African communities, as communities, into the integrated socio-economic system, the Swynnerton Plan targeted select Africans that were described in the Plan as "the progressive African farmer", "able, energetic or rich African", or "a good and well trained African".[1238] Indeed, the Swynnerton Plan advocated for extinguishment of African customary practices, including communal tenure, through formal registration of individual land rights. African communities remained resilient and resisted the Swynnerton Plan and its hostility toward their customary practices. The clamour for land tenure reforms grew as the state continued to implement the Swynnerton Plan. The independent Kenyan state then realized that the colonial policy of assimilation had failed to create an equilibrium that would ensure the state system's survival or long-term stability. The state then sought creative ways of building a pipeline for transitioning whole African communities from the fringes to the core of Kenya's integrated socio-economic system.

In 2009, the state enacted the Kenya National Land Policy, Sessional Paper No. 3 of 2009, that called for, inter alia, formal state statutory recognition of communal tenure regimes that pre-existed the state system. Such recognition came through a constitutional referendum on 4 August 2010 in which Kenyans voted overwhelmingly in favour of a new constitution that was promulgated on 27 August 2010. The Constitution of 2010 was the first constitutional recognition of African communal tenure systems in Kenya. The Community Land Act, No. 27 of 2016 was then enacted to implement the new communal tenure system and implementing regulations were also passed in 2017 with some amendments in 2018.

The chapter concludes with a discussion of some of the criticisms of the new communal tenure recognition framework in Kenya. The criticisms are directed at the state and its duty to provide goodwill and commitment to ensure smooth implementation of the

[1238] See Swynnerton Plan (n 688) p. 24 - 25.

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new communal tenure system. In the next chapter I explore options for addressing these criticisms in more detail.

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CHAPTER 5 TRANSFORMATIVE LAND TENURE REFORMS

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5.1 INTRODUCTION

In this Chapter, I return to the fundamental question of this thesis; exploring an ideal interface between the formal state statutory system and the customary law systems of the Maasai, Kikuyu, Nandi and Kipsigis as representative communities of the Rift Valley region of Kenya. The ideal interface between the Kenyan state system and the Rift Valley communities should result in effective state recognition and enforcement of the customary land rights of these community systems as a path toward a stable coexistence between the multiple legal systems.[1239] The United Nations General Assembly and the African Union have both called for state recognition of customary land rights as an appropriate balance between the communities' right of self-determination and state sovereignty.[1240] However, there are scholars, mostly in Canada, who have rejected this politics of recognition as a waste of Aboriginal communities' time and called for a more aggressive assertion of self-determination rights, including civil disobedience.[1241] The Canadian scholars view the

[1239] I refer to the state statutory system and the community legal systems as 'multiple legal systems' in line with the legal anthropologist/naturalist approach to legal pluralism that bases the legitimacy of customary law upon its wide acceptance by members of the community. See Croce, M (n 37) pp. 27 – 47 (summarizing the position taken by legal anthropologists and naturalists).

[1240] See 'United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)' (2007) U.N.Doc.A/RES/47/1 U.N. General Assembly resolution 61/295 (stating the rights of indigenous peoples, including the "right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired"). See also See Philip C. Aka 'Introductory Note to African Commission on Human and Peoples' Rights v Republic of Kenya (August 2017) (AFR. CT. H.P.R.), 56 I.L.M. 726 (discussing the Ogiek community's struggle to continue inhabiting the Mau Forest).

[1241] Some of these authors base their rejection of recognition politics on the writings of Franz Fanon. See Fanon, F (n 31) (arguing that recognition is a tool used by the dominating social system to maintain its dominance and suppression of other social systems).

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politics of recognition as another tool for domination and suppression of community systems by the state system.[1242]

I discuss this delicate balance between the right of self-determination and state sovereignty before concluding that the win - win option for both systems is rooted in effective recognition. I first rely on Professor Luhmann's systems theory[1243] to acknowledge that a community, as a system, tends to self-define or self-identify. This self-definition or self-identity characteristic of systems denotes the system's ability to become independent of its environment and to understand the external environment from the system's own internal frames of reference.[1244] The Maasai, Kikuyu, Nandi and Kipsigis communities have lived in the Kenyan Rift Valley as community systems for hundreds of years.[1245] A comparison of community systems in the Rift Valley with the Indian and Aboriginal community systems in the United States of America, Canada, and Australia shows that self-definition or self-identification is a major character trait of community systems.[1246]

The self-definition or self-identification characteristics is also tied to the community system's struggle to maintain its integrity and stability as a community. It is the capacity of a system to self- reorganize while undergoing change, in order to retain essentially the same function, structure, identity, and feedback loop mechanisms before the change occurred.[1247] This is a separate systemic characteristic of a community that enables it to use feedback loop

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[1242] See Wilson, EK (n 15) (for an explanation of social dominance theory that supports the argument that the state system may use the politics of recognition as a tool of dominating and suppressing community systems).

[1243] See King, M (n 85) (explaining that systems theory, as borrowed from biological systems, posits that systems are essentially units which repeatedly self-produce and thus become independent of their environment).

[1244] As above.

[1245] See Chapter 2 (for a discussion of the customary land rights of the communities inhabiting the Kenyan Rift Valley).

[1246] As above.

[1247] See King, M (n 85) (explaining that systems theory, as borrowed from biological systems, posits that systems are essentially units which repeatedly self-produce and thus become independent of their environment).

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mechanisms[1248] and communication[1249] to respond to disruptions emanating from its environment. Such disruptions interfere with the system's stability and causes it to experience stress. The ethnic strife that has occurred in the Rift Valley region because of disruptive colonial and neo-colonial state policies, is a symptom of the stress experienced by the community systems in a struggle to maintain their integrity and stability.[1250] For example, in Chapter 2, I describe how widespread ethnic violence led to one thousand one hundred thirty three (1,133) deaths, seventy-eight thousand two hundred fifty four (78,254) houses destroyed country wide and some six hundred sixty three thousand nine hundred twenty one (663,921) people displaced following disputed results of the presidential elections of December 27, 2007.[1251]

Through struggles rooted in their customary practices, the Maasai, Kikuyu, Nandi and Kipsigis and other communities living in the Kenyan Rift Valley have continued to fight to repossess the land that they lost when European settlers decided to create a European reserve and to push the African communities into native reserves or to become squatters or labourer-tenants on European farms.[1252] The attempts by state resettlement programs to correct the instabilities occasioned upon community systems through colonial disruption have failed to restore the land to these communities and, instead, rewarded political cronies and relatives, thereby creating more ethnic tension and more instability in the Rift Valley.[1253] So long as

[1248] See Hugh Baxter (n 46) (discussing the system's use of feedback loop mechanisms to re-generate itself to ensure its own survival as a system).

[1249] Cassuto, DN (n 9) (discussing communication as a systemic characteristic).

[1250] See as above. As I discuss in Chapter 2, the Rift Valley communities have used every election cycle to express their dissatisfaction with their dispossession and displacement from their community land. Relying on the systems theory notion of autopoiesis as I explain in section 1.4.2 of Chapter 1 and borrowing from the New Science of Niklas Luhmann (n 39), I analyse the communities' expressions of dissatisfaction as efforts to regenerate and transform the conditions of their validity to ensure their survival as communities.

[1251] See CIPEV Report (n 5), chapter 9 (detailing the extent and consequences of the 2007-2008 post-election violence: deaths, injuries and destruction of property).

[1252] This is discussed in more detail in Chapter 3.

[1253] As above.

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the Rift Valley communities remain unstable, according to systems theory,[1254] they will continue struggling to maintain their integrity and stability. If left with no other options for self-corrective measures, the African communities will naturally resort to their pre-colonial customary practices of violence as a response to the continuing disruption.[1255] Indeed, this systemic characteristic of self-identification or self-definition is the basis of scholarship rejecting the politics of recognition; that the struggle should continue until the system maintains its integrity and stability.[1256] It is also at the root of a recognition by the international community of a community's right to self-determination.[1257]

However, as discussed in Chapter 4, the systemic characteristic of self-definition or self-identification is also in inherent conflict with the principle of state sovereignty; if a community system is able to assert its character trait of self-identification and self-definition against the state, then that community would be sovereign and, hence, become a state.[1258] If an individual's status determination by a community in exercise of its right of self-definition or self-identification is at variance with the same individual's status determination by a state in exercise of its sovereign power, the community must, therefore, yield out of a sense of self-preservation.[1259] A community system's characteristic of self-definition or self-determination is therefore subject to state validation through recognition.[1260]

[1254] Aguirre, BE (n 219) p. 41 (describing resilience as "an example of morphostasis--that is, a process directed to preserve the social system"); Ruhl, JB (n 219) (also discussing resilience).

[1255] As above. See also Maloba, WO (n 222) (introduction) (describing the Mau Mau uprising as the majority Kikuyu community's struggle against a state system that maintained white Europeans at the top of the hierarchy in Kenya. The white Europeans maintained their dominance through access to the rich resources of the Rift Valley and Central Province and control over the state machinery, while many Kenyan communities remained marginalized).

[1256] Coulthard, GS (n 28) (arguing that the politics of recognition does not create partnerships but continues the suppression and domination of indigenous community systems by the state).

[1257] See UN Declaration (n 1240).

[1258] *Love v Commonwealth* (n 12) (the Australian High Court recognized the centrality of land to the identity and existence of Aboriginal communities in Australia).

[1259] As above.

[1260] As above.

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Fortunately, as also discussed in Chapter 4, the Kenyan state system has chosen to recognize communal tenure under the 2010 Constitution, the Community Land Act of 2016 and its implementing regulations.[1261] The challenge in this thesis has, therefore, been to test whether Kenya's communal tenure recognition framework is effective. As I state in the review section of Chapter 3, my goal has been to examine this new interface between the formal Kenyan state statutory system and the informal African customary legal systems to test the state's effectiveness in affording communities genuine options for self-corrective measures to mitigate the risk of instability in the Rift Valley region.[1262]

In chapter 4, I rely on the analysis of Kenya's new communal tenure framework by Colins Odote, Liz Alden Wily and Patricia Kameri-Mbote to identify the following three (3) broad issues that Kenya's new communal tenure framework should address in order for it to be more effective: (1) Conflicting legislation and vague terminology, especially concerning the definition of "Community"; (2) lack of a clear implementation plan; and (3) failure to seriously and decisively address historical land injustices and other excesses of the state system.[1263]

In this chapter I first discuss the partnership-based recognition model[1264] as an effective interface between the Kenyan state statutory system and the community legal systems of the Rift Valley region. A partnership-based recognition framework, as

[1261] See Constitution of Kenya of 2010 (n 1) art. 63; Community Land Act (n 19).

[1262] See Chapter 3 (REVIEW section).

[1263] See Kameri-Mbote et al (n 1087) (discussing communal tenure in Kenya); Liz Alden Wily (n 1141).

[1264] For examples of partnership-based models of interface between two systems, see The Two Row Wampum of 1613, text available at www.peacecouncil.net (accessed 2 April 2020). See also Larry Chartrand 'Indigenous Peoples: Caught In a Perpetual Human Rights Prison' (2016) 67 UNBLJ 167 - 186 / (2016) 67 R.D. U.N.-B. 167 – 186 at paragraph 38 (describing the interface based on the Two Row Wampum of 1613 as follows: "[i]t is said that the Two-Row Wampum confirms a treaty between the Mohawk and the Dutch, where the two rows of purple represent the ship of the European and the canoe of the Mohawk sailing down the same river in peace but that "neither of us will make compulsory laws or interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel.")

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exemplified by The Two Row Wampum of 1613, ought to be founded on consensus, friendship, mutual respect, mutual dignity and mutual integrity between the formal state and the African customary systems.[1265] A partnership-based model of recognition will pivot the state system away from the tendency to dominate and suppress Rift Valley community systems and, instead, integrate them into the state's socio-economic system, including formally recognizing their customary land rights.[1266] A partnership-based model will also require the state system to develop a clear implementation plan for the new communal tenure system in the same way that the colonial state did for the Swynnerton Plan that advocated individual tenure rights.[1267] Kenya's constitutional and legislative framework for communal tenure is not the ideal partnership-based model. However, it is a step in the right direction and a departure from the colonial state's land expropriation and assimilationist models. In the last part of this chapter, I discuss the need for the state system to further demonstrate its commitment and resolve to recognize communal tenure by agreeing to subject itself to the court system for adjudication of any disputes arising in its interface with the customary legal systems, including allowing for historical land injustices to be submitted directly to the Environment and Land Court.

5.2 PARTNERSHIP-BASED MODEL OF RECOGNITION

In this section, I explore the possibility of a partnership-based model of interaction between the Kenyan state statutory system and the community legal systems of the Rift Valley region. At the outset, I acknowledge that such a model would require the state system, in particular, to reconceptualize its interface model with community systems within its borders, generally. State officials will need to first appreciate the existential threat that the continued dispossession and displacement of the Rift Valley communities poses to the Kenyan state itself. The state will need to then pivot away from intervention strategies aimed

[1265] As above.

[1266] As above.

[1267] See Swynnerton Plan (n 688) part XII (Summary), XI (discussing the cost of the plan and speculating that the approximately five million British pounds (£5m) or fifty million ((£50m) today if adjusted for inflation, would not be enough to implement the Swynnerton Plan).

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at suppression and domination of African community systems and, instead, involve the communities themselves into the state economy, including formally recognizing communal tenure.[1268] The colonial state, in the application of its assimilationist policies, tended to dismiss African customary systems summarily.[1269] The circumstances that led to the colonial state's assimilationist policy no longer exist because the current Kenyan state should no longer view members of African communities and their resources only as labour and capital for building a modern economy.[1270] As illustrated by the descriptions of their traditional tenure systems in Chapter 2, these African communities are systems that are resilient and will resist external disruption for as long as they exist as communities. A rethinking of existential risks to the state itself around a deeper understanding of community resilience is therefore essential and requires fundamental changes to the Kenyan state's mitigation strategies for instability risks in the Rift Valley. Effective recognition should thus involve interventions in the Rift Valley that will help the currently unstable communities to achieve stability.

As demonstrated throughout this study, the best recognition framework for Kenya would be a state system that creates an effective pipeline for African communities to transition from the fringes to the core of the integrated Kenyan socio-economic system.

[1268] I acknowledge that this is contrary to social dominance theory's prediction that systems will naturally seek to dominate and suppress each other when they interact. See Sidanius J et al (n 611) (explaining social dominance theory as the notion that human societies tend to be structured as systems of group-based social hierarchies). However, even the colonial state itself acknowledged the need to change its social domination tendencies in its interaction with the African community for long-term stability in the state. See Swynnerton Plan (n 688) p. 8 (the Plan's authors recognized that "in the long term, the greatest gain from the participation of the African community in running its own agricultural industries will be a politically contented and stable community".)

[1269] See Swynnerton Plan (n 688) pp. 9-10, 58, section 113 (outlining reasons why African customary practices were hostile to economic development of the then Kenya colony).

[1270] See Foreign Jurisdiction Act 1890 (n 758) (legislation used by the colonial government to apply the apply the doctrine of terra nullius and to declare Kenyan land "waste and unoccupied).

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"Recognize" as a legal term means "to acknowledge the legal validity of something."[1271] For recognition to be relevant, it has to have the force of law.[1272] Since a system is a whole being, the ideal recognition framework for two or more systems should be based on the partnership model. Partnerships between human beings are formed on the basis of personal relationships and involve mutual trust and confidence. The existence of a partnership, therefore, requires consensus between the partners. Because the partnership is based on consensus, where there is no personal relationship, mutual trust or confidence, the partnership is unsustainable and untenable. In other words, if the terms of any agreement between two partners are such that it is technically possible for a party to dominate and suppress the other, the relationship between those parties is not one of partnership. The ultimate test of the existence of a partnership between two communities is the intention by both communities to create an integrated socio-economic system as co-owners. [1273]

In Kenya, the colonial state's domination and suppression of African communities through the doctrine of *terra nullius*, land expropriation and assimilation policies resulted in the socio-economic marginalization of the African communities.[1274] Example of treaties that exemplified the colonial state's domination and suppression of African communities include the Anglo-Maasai Agreements of 1904 and 1911 that the British used to dispossess and displace the Maasai from their land.[1275] The British treaties with the Maasai community is an examples of the asymmetrical behaviours of a dominant social system and not a partnership based on mutual trust and confidence.[1276] The colonial state's treaty-based

[1271] See Bryan A. Garner (Editor-in-Chief) 'Black's Law Dictionary' (1996) West Publishing Co., (defines 'recognition' as "[t]he formal admission that a person, entity, or thing has a particular status; esp., a nation's act in formally acknowledging the existence of another nation or national government".)

[1272] As above.

[1273] See Chartrand, L (n 1264) paragraph 38 (describing the ideal partnership model using the imagery of two communities sailing down the same river in peace without either community seeking to dominate the other).

[1274] See Chapter 4 (discusses the Swynnerton Plan).

[1275] See TJRC Report (n 2) vol. IIB, section 56 et seq., p. 181, et seq.

[1276] As above.

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recognition frameworks in Kenya ended up dispossessing and displacing the African communities and marginalizing them from the state's socio-economic system.[1277] Such recognition frameworks were not sustainable in the long term. The colonial state eventually acknowledged that "in the long term the greatest gain from the participation of the African community in running its own agricultural industries will be a politically contented and stable community."[1278] The recognition frameworks that are based on suppression and domination are, therefore unsustainable and untenable.

The Canadian Aboriginal communities have had a customary practice of treaty making for generations that is based on the partnership recognition framework. An example of an old partnership-based treaty that the Aboriginal communities entered into with European settlers was "Two Row Wampum" of 1613 between the Iroquois Confederacy and the Dutch.[1279] The term "Wampum" refers to "Wampum belts" that were customarily used by the Iroquois to document a treaty. The Two Row Wampum of 1613 was a treaty of peace, friendship, mutual respect, mutual dignity and mutual integrity. It stressed the importance of non-interference with each other's laws, customs and traditions. This treaty was later repeated with the British. The *Idle No More* movement, a network of Aboriginal communities in Canada struggling for recognition of Aboriginal rights, has called on the Canadian state system to "[h]onour the spirit and intent of the historic Treaties … officially repudiate the racist Doctrine of Discovery and the Doctrine of Terra Nullius, and abandon their use to justify the seizure of Indigenous Nations lands and wealth."[1280]

Another example of a mutual recognition framework that takes into account the validity and existence of both parties was the Treaty of Ghent that ended the war of 1812 between the United States and Great Britain concerning Canada.[1281] The Treaty of Ghent was signed on December 24, 1814 and entered into force on February 17, 1815.[1282] The first

[1277] As above.

[1278] Swynnerton Plan (n 688) p. 8.

[1279] LaForme, HS et al (n 617) pp. 687 – 740.

[1280] As above.

[1281] 'Treaty of Ghent' (signed on December 24, 1814), text available through the Library of Congress website at www.loc.gov (accessed 2 April 2020).

[1282] As above.

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article of the Treaty of Ghent, with very limited exceptions, restores without delay or destruction all territory, places and possessions whatsoever taken by either party from the other.[1283] Under subsequent articles of the Treaty, the U.S. and Britain agreed on an amicable process, consisting of two Commissioners appointed by each side, to determine the ownership of the territory that fell within the limited exceptions cited in the first article.[1284] Under article 9, the U.S. and Britain agreed to end hostilities against all Tribes or Nations of Indians and to restore to such Tribes or Nations all the possessions, rights and privileges which they may have enjoyed or been entitled to before the War, provided that the Tribes or Nations of Indians also agreed to end hostilities against the U.S. and Britain.[1285]

The Two Row Wampum of 1613 and the Treaty of Ghent of 1814 were entered into between communities that had agreed to enter into consensual relationships based on friendship, mutual respect, mutual dignity and mutual integrity.[1286] The key to such a treaty-based partnership between communities is their intention to create a new socio-economic system as co-owners.[1287]

A partnership-based relationship can also exist between a state and communities inhabiting the state.[1288] Taiaiake Alfred, a supporter of the *Idle No More* movement championing Aboriginal rights in Canada, has argued that federalism in Canada can and should recognize a constitutionally entrenched inherent Aboriginal self-government.[1289] Such a partnership-based recognition framework includes co-management systems which effectively recognize the autonomy of community managers and their participation with equal authority, legal standing, resources and respect as the state managers.[1290] The formal

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[1283] See Treaty of Ghent (n 1281) (ARTICLE THE FIRST).

[1284] See Treaty of Ghent (n 1281).

[1285] See Treaty of Ghent (n 1281) (ARTICLE THE NINTH).

[1286] As above. See also Chartrand, L (n 1264) paragraph 38 (describing the relationship of the parties under The Two Row Wampum of 1613).

[1287] As above.

[1288] Alfred, T (n 30).

[1289] As above.

[1290] See also Chartrand, L (n 1264) paragraph 38 (describing the relationship of the parties under The Two Row Wampum of 1613).

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state laws in such a system are generally compatible with the communities' customary laws like a ship (state statutory system) and a canoe (customary law system) sailing down the same river in peace but neither making compulsory laws or interfering in the internal affairs of the other by trying to steer each other's vessel.[1291]

As discussed at the end of Chapter 4 and at the beginning of this chapter, Kenya's current communal tenure framework is not ideal and does not represent "a ship and a canoe" sailing down the same river in peace without seeking to "steer each other's vessel".[1292] Kenya's communal tenure framework fails to acknowledge pre-existing communities, as I highlighted in the previous section, and remains vague on the status of such communities.[1293] The National Land Policy of 2009 proposed a definition that was closer to recognizing pre-existing communities when it defined a community to include users of the land who hold customary land rights.[1294] Dr. Liz Alden Wily has also suggested that one of the indicators of a state's achievements in recognizing communal tenure is where "communities are legal persons for the purposes of land ownership; that is, they are not required to register companies, cooperatives, or other legal entities to own land on their behalf".[1295] The issue

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[1291] This imagery of a ship and a canoe sailing down a river side-by-side to exemplify the ideal partnership-based interaction framework between two legal systems is adapted from Chartrand, L (n 1264) paragraph 38 (describing the partnership model as follows: "[i]t is said that the Two-Row Wampum confirms a treaty between the Mohawk and the Dutch, where the two rows of purple represent the ship of the European and the canoe of the Mohawk sailing down the same river in peace but that "neither of us will make compulsory laws or interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel.")

[1292] As above. The 'ship and canoe' metaphor are used to represent the state statutory system and the customary legal systems and the imagery of "sailing down the river" represents coexistence between them.

[1293] See Chapter 4.

[1294] See National Land Policy of 2009 (n 229) p. 63 (GLOSSARY OF TERMS) (proposes the following definition: "[c]ommunity refers to a clearly defined group of users of land, which may, but need not be, a clan or ethnic community. These groups of users hold a set of clearly defined rights and obligations over land and land-based resources.")

[1295] Liz Alden Wily (n 1141).

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of what constitutes a community is crucial because the community is supposed to identify the community land and to elect a community land management committee, made up of its members, that will register the community and manage the community land on behalf of that community.[1296]

The definition of "community" in the current communal tenure legal framework is problematic because it requires a governance body elected by the community to apply to a Community Land Registrar to register their community using a Form CLA 3.[1297]. This procedure apparently applies to the 'Maasai', 'Nandi', 'Kipsigis', 'Kikuyu' and other Rift Valley communities as well.[1298] This definition of community is problematic because it fails to "recognize" the pre-existing communities but appears to require their "creation" as legal entities.[1299] Recognition of a community is not the same thing as the creation of a community in the way that a state system does when it allows for the registration of companies, cooperatives, or other legal entities.[1300] As discussed in chapter 4, this requirement of "legal creation" of Group Ranches was a contributing factor to their failure as a form of communal tenure in 1968 because the community representatives simply registered themselves as individual owners of the land.[1301]

The 'Maasai', 'Nandi', 'Kipsigis', 'Kikuyu' and other Rift Valley communities already exist as customary legal systems as discussed in chapter 2. The Rift Valley communities have no doubt that they exist as unitary and coherent social realities because there are essential characteristics defined by their members that have led to them being referred to by those ethnic labels or identity markers. Accordingly, the Kenyan state system ought to recognize their existence as customary legal systems in much the same way that the

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[1296] Community Land Act (n 19) section 7.

[1297] Community Land Regulations (n 19) section 8.

[1298] As above.

[1299] Requiring creation of communities was what Dr. Liz Alden Wily warned about in Liz Alden Wily (n 1141).

[1300] As above.

[1301] See the Group Representatives Act (n 301) (repealed) (the "legal creation" requirement was for members of the Group ranch to elect between three to ten group representatives in whose name the ranch was registered).

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United States and Canada have acknowledged the pre-existence of Indian and Aboriginal communities in their laws.[1302] This may necessitate an amendment of the Community Land Act of 2016 and its implementing regulations, but may also be achievable in the short term through an amendment to section 8 of the Community Land Regulations of 2017 by the Cabinet Secretary to the effect that "registration shall not be required for a clearly defined group of users of land, which may, but need not be, a clan or ethnic community".[1303]

Recognition of pre-existing communities does not mean doing away with the current framework's requirement for a community to first define itself as a socially collective landowner before acquiring formal tenure rights. However, the new communal tenure framework can go further and incorporate the customary practices of the Rift Valley communities into the recognition framework.

The partnership-model of interaction also requires the state to study and understand the customs and traditions of the communities that it interacts with. The state should study and understand the Rift Valley communities' resilience by mapping their key structural attributes, essential dynamics, interdependencies and feedback loop mechanisms in order to create and sustain interventions in the Rift Valley that will help these communities to achieve stability. State policies that arise out of the community's value system and behaviours are also easier to implement as the community would consider such policies as better serving their needs and interests. An example of a state practice coinciding with the customary practice was observed in the drawing of colonial administrative boundaries in the Rift Valley region.[1304] Instead of drawing arbitrary administrative boundaries for members of the Nandi community, the colonial state drew such locational boundaries to coincide with the Bororiet

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[1302] See U.S. Const. art. I, § 8, clause 3 (creating a special relationship between the federal government and the Indian community); Canadian Constitution of 1982 (n 1088) sections 35 and 35.1.

[1303] See suggestion by Dr. Liz Alden Wily, see Liz Alden Wily (n 1141) p. 6 (stating that progressive communal tenure legal frameworks should ensure that "[c]ommunities are legal persons for the purposes of land ownership; that is, they are not required to register companies, cooperatives, or other legal entities to own land on their behalf").

[1304] Archived Documents (n 188) (writing about all Kenyan communities).

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which is the area where members of different Nandi clans traditionally lived together.[1305] The state renaming of each Bororiet as a "location" led to the location boundary being accepted by members of the Nandi community.[1306] Another example of state incorporation of a community's customary practices would be allowing the Kikuyu community to confer tenure rights to their members as closely as possible to the Gethaka or Githaka system that is more familiar to the community. Similarly, the new communal tenure recognition framework should improve upon the failed group ranches form of tenure and enable the pastoral communities to interact with their environment through a framework that is more familiar to them.

The new communal tenure recognition framework should also recognize that communities are dynamic and, with the passage of time, will develop customary practices that are more suitable for the environment that they inhabit. As we discuss in chapter 2, some of the pastoral communities in the Rift Valley had begun practicing some form of mixed farming and pastoralism before the arrival of the Europeans in some of the fertile and well-watered areas of the Rift Valley. The trajectory of these communities was toward sedentary agriculture. The new communal tenure framework should, therefore, recognize this dynamism of communities and allow them to practice sedentary agriculture or to adopt individual forms of tenure according to each community system's legal and institutional structures.

The constitutional and legislative recognition frameworks for communal tenure in Canada, Australia, South Africa and Tanzania are far from the ideal partnership-based model that Taiaiake and other members of the *Idle No More* movement in Canada are advocating.[1307] In Canada, although sections 35 and 25 of the Canadian Constitution of 1982 recognize Aboriginal rights, the Canadian Parliament can still unilaterally alter its

[1305] As above. See also Huntingford, GWB (n 239).

[1306] As above.

[1307] Alfred, T (n 30). See also Indian Act Amendment and Replacement Act (n 843) (states in its preamble that "Whereas the Indian Act is an outdated colonial statute, the application of which results in the people of Canada's First Nations being subjected to differential treatment; Whereas the Indian Act does not provide an adequate legislative framework for the development of self-sufficient and prosperous First Nations' communities").

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relationship with Aboriginal peoples and legislate to modify the exercise of their rights without their consent.[1308] In Tanzania, the 1999 Village Land Act recognises a community's rights to manage its land, as well as extending the possibility of individualised tenure within that community land.[1309] However, Tanzania's communal tenure framework lacks a sufficiently-resourced implementation plan by the state.[1310] Australia and South Africa both passed legislation recognizing pre-existing community land rights; the Native Title Act of 1993 in Australia[1311] and the Restitution of Land Rights Act of 1994 in South Africa[1312], but have both been slow and ineffective in addressing historical land injustices. Kenya's constitutional and legislative framework for communal tenure is also not ideal but may create a viable path for including African communities in the socio-economic system with a sufficiently-resourced implementation plan.

5.3 COMMUNAL TENURE IMPLEMENTATION PLAN

The communal tenure legal framework should have included a requirement for the national government to publish a comprehensive document setting forth an implementation plan for the new communal tenure system similar to the colonial state's Swynnerton Plan. Each county should also be required by legislation or regulation to have a County Implementation Plan to identify how that County will implement the new communal tenure system. Kenya's communal tenure framework, therefore, urgently needs a well-articulated and well-resourced state and county government implementation plan. The implementation plan should cover at least five elements: (1) financial resources; (2) short-term and long-term priorities; (3) timelines and milestones (4) education and training; and (5) oversight through public participation.

[1308] See Canadian Constitution of 1982 (n 1088).

[1309] See Tanzanian Village Land Act (n 1145).

[1310] Lyons, M (n 1151) (suggests that the pro-poor business reforms have foundered from lack of interest among both donors and senior government figures.)

[1311] See also Hunter, J (n 1105).

[1312] As above.

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The new communal tenure framework needs a budget with sufficient funds for its implementation. The British gave the colonial state a grant of approximately five million British pounds (£5M) in the 1950s to implement the Swynnerton Plan, which would be approximately fifty million British pounds (£50M) today due to inflation.[1313] The funds would be used to recruit and train sufficient numbers of Community Land Registrars to be responsible for the registration of community land as required under the new communal tenure framework. The funds would also enable county governments to participate effectively in developing and rolling out education and awareness campaigns on communal tenure. Similar to the Swynnerton Plan, the new communal tenure framework should also include an education and training component that will enable the recruitment and training of qualified staff to perform the inventorying of land, the surveys and demarcation and, generally, participate in the registration process. The training and awareness campaigns should also extend to the general public as envisaged under section 27 of the Community Land Regulations of 2017.

Education and awareness of the new communal tenure framework alone will not encourage community participation without loan incentives to individual community members and groups to organize themselves into communities and to take advantage of the new tenure system. Furthermore, county governments are supposed to be facilitating inventorying of all community land within their borders, but most counties have a cash flow problem and constantly have to cut budgets for crucial services. The end result is an unclear inventorying exercise without adequate public participation.

The communal tenure implementation framework suffers from lack of funding similar to the village land system in Tanzania in 2013 where only 1% of the funding required to implement their communal tenure framework was available from state sources. The Tanzanian government relied on foreign donors to fund implementation programs such as MKURABITA, which enjoyed limited success. The Tanzanian experience proves that the communal tenure framework cannot be implemented successfully without sufficient funding. Both Kenya's national and county governments, therefore, need to set aside sufficient funds for implementing the new communal tenure framework.

[1313] See Swynnerton Plan (n 688) (opening note).

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The communal tenure implementation plan must also develop priority areas with clear timelines and milestones. One priority area is knowing the extent of all unregistered community land within each county. Section 12(1) of the Community Land Regulations of 2017 provides that within eighteen months, from their commencement, every county government shall, in consultation with communities, prepare and submit to the Cabinet Secretary an inventory of all unregistered community land within the county. The inventories of unregistered community land should now be with the Cabinet Secretary who should develop and publish a comprehensive adjudication programme that should lead to demarcation, survey and registration of community land. This inventorying process is critical because the National Land Commission is yet to finalize the registration and mapping of public land, meaning unregistered community land may end up being registered as public land and therefore out of reach of the communities.[1314] The state and county governments should publicize each county's inventory of community land and provide clear timelines for the Cabinet Secretary to also publish its comprehensive adjudication programme as a priority. To safeguard community land during the inventorying exercise, the state should take measures to ensure that the Land Consolidation Act of 1959, Cap 283, and the Land Adjudication Act of 1968, Cap 284, are not used to adjudicate unregistered community land. Indeed, these two pieces of legislation should eventually be repealed under the new communal tenure system.

A second priority area is the Chief Land Registrar's designation of Community Land Registrars. Without Community Land Registrars, the process of registration of community land, including the issuance of a Certificate of Title; cannot lawfully proceed. The Chief Land Registrar should therefore designate community land registrars in each county and have their names gazetted. The registration exercise will be followed by a dispute resolution process and verification, validation and review before the Certificate of Title is issued. The implementation plan needs to spell out clear timelines for these crucial steps in the registration process.

The implementation process should not be left to the national and county governments alone but also subjected to effective oversight through facilitated public participation. Article 201(a) of the Constitution of 2010 and section 115 of the County Government Act

[1314] NLC Advisory on Registration of Title (n 1015).

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of 2012 require public participation in finance matters at the national and county level. Article 196 (b) of the Constitution of 2010 requires the county assembly to facilitate public participation. For effective implementation of the new communal tenure framework, more is required than public meetings and the publication of information. The national and county governments need to establish mechanisms that create conditions for public participation and that build the capacity of communities to participate in the community land registration process. The state also needs to reintroduce a mechanism for payment of royalties, rent, compensation and any other payments to the community for expropriation of natural resources on community land so that the communities participate effectively in decision-making processes regarding their natural resources. The state and counties must, therefore, allocate sufficient resources to facilitate public participation and to ensure that the political and other structures established by the communal tenure legal framework are employed to meet the objectives of effective participation.

5.4 ACCESS TO JUSTICE FOR COMMUNITIES

Effective implementation of the new communal tenure system in Kenya should also include addressing historical land injustices and other land-related disputes through the judicial system. The Kenya National Land Policy of 2009 called on the national government to address historical land injustices in the Rift Valley region to resolve issues of land registration, especially injustices done to African communities through the Crown Land Ordinance of 1915 that led to their dispossession and displacement.[1315] Section 3.6.2 of the National Land Policy, 2009 provides:

> "Historical land injustices are grievances which stretch back to colonial land administration practices and laws that resulted in mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date. Sources of these grievances include land adjudication and registration laws and processes, and treaties and agreements between local communities and the British. The grievances

[1315] National Land Policy of 2009 (n 229) section 3.6.2.

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remain unresolved because successive post independence Governments have failed to address them in a holistic manner."[1316]

The Truth, Justice and Reconciliation Commission (TJRC) that was established on 22 July 2009 to promote peace, justice, national unity, healing, reconciliation and dignity among the people of Kenya also found that historical grievances over land constitute the single most important driver of conflicts and ethnic tension in Kenya.[1317]

Article 67 (2) (e) of the Constitution of 2010 mandates the National Land Commission to initiate investigations on its own initiative or on a complaint into historical land injustices and to recommend appropriate redress. To give effect to this Constitutional requirement, section 15 (9 - 11) of the National Land Commission Act provides the legal framework for redressing historical land injustices as follows:

(9) The Commission, after investigating any case of historical land injustice referred to it, shall recommend any of the following remedies—

(a) restitution;

(b) compensation, if it is impossible to restore the land;

(c) resettlement on an alternative land;

(d) rehabilitation through provision of social infrastructure;

(e) affirmative action programmes for marginalized groups and communities;

(f) creation of wayleaves and easements;

(g) order for revocation and reallocation of the land;

(h) order for revocation of an official declaration in respect of any public land and reallocation;

(i) sale and sharing of the proceeds;

(j) refund to bona fide third party purchasers after valuation; or

(k) declaratory and preservation orders including injunctions.

(10) Upon determination of a historical land injustice claim by the Commission, any authority mandated to act under the redress recommended shall be required to do so within three years.

[1316] National Land Policy of 2009 (n 229) section 3.6.2., paragraph 178.

[1317] TJRC Report (n 2) vol. IV, section 31, p. 7.

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(11) The provisions of this section shall stand repealed within ten years.

Under the above provisions, the National Land Commission may only "recommend" remedies after investigating historical land injustices and "any authority mandated to act" shall be required to do so within three years.[1318] This redress is non-binding on the state and vague on responsibility for action.[1319] To add to its ineffectiveness, courts have shied away from dealing with historical land injustice matters using the rationale that the National Land Commission is the appropriate organ to investigate matters of historical land injustices.[1320]

This redress mechanism needs to be reformed, to at least allow the Environment and Land Court to hear and determine such matters. Kenya needs to learn lessons from South Africa in dealing with historical land injustices. Although South Africa also has a Commission on Restitution of Land Rights, similar to the National Land Commission, the South African Commission merely assists claimants in submitting their land claims.[1321] The claimants in South Africa still have the option of submitting their claims directly to the Land Claims Court and all hearings of that Court are conducted in open court with very limited exceptions.[1322] Kenyans should also have the option to submit their claims directly to the Environment and Land Court. Section 13(3) of the Environment and Land Court Act No. 19 of 2011 confers jurisdiction on the Environment and Land Court to hear and determine matters relating to breach or violation of rights or fundamental freedoms relating to the environment and land under Articles 42, 69 and 70 of the Constitution. The Community Land Act of 2016 or the National Land Commission Act No. 5 of 2012 should, therefore, be amended to clarify that matters of historical land injustices are matters touching on the violation and/or infringement of the fundamental bill of rights and freedoms and should be heard and determined by the Environment and Land Court. The African communities will

[1318] See The National Land Commission Act 5 of 2012. Revised Edition 2016 [2015] (Published by the National Council for Law Reporting) section 15 (9 - 11).

[1319] As above.

[1320] See The Chief Land Registrar case (n 1186) (discussing historical injustice and the mandate of the National Land Commission").

[1321] See Act 22 of 1994 (South Africa) (n 1104).

[1322] As above.

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then be able to participate effectively in implementation of the new communal tenure system through direct access to the Kenyan judicial system.

Besides helping to resolve historical land injustices, the courts can also act as arbiters of disputes between the state statutory system and customary legal systems and, thereby, provide a much-needed guardianship of the new interface model. An arbiter is needed between the state system and the community systems inhabiting the Rift Valley region because of the social dominance theory of systems tending to hierarchize whenever they interact.[1323] Recall that it was the actions of the colonial state and the subsequent Kenyan state that effectively dispossessed the communities of their land and displaced them.[1324] More recently, as the communal tenure system is being implemented, the Kenyan national government and county governments have exploited the lack of clarity between public and private land to declare unregistered community land as public land and to expropriate it.[1325] There is therefore a risk of the state system continuing to use tools of domination and suppression, including using the communal tenure system to continue dominating the Rift Valley community systems.[1326] The new communal tenure framework's redress mechanism needs to be reformed, to allow the Environment and Land Court to hear and determine claims by community legal systems to create some symmetry in the inherently asymmetrical relationship between the state and the communities.

5.5 REVIEW

In this Chapter, I discuss the partnership-based recognition model as an effective interface between the Kenyan state statutory system and the community legal systems of the Rift Valley region. A partnership-based recognition framework, as exemplified by The Two

[1323] See Wilson, EK (n 15) pp. 133 - 134 (describes social dominance theory as a 'theory of intergroup relations' that suggests that social groupings have the same basic human predisposition to form group-based social hierarchies).

[1324] See chapter 3 (for more in-depth discussion of the dispossession and displacement of Rift Valley communities).

[1325] See Liz Alden Wily (n 1141).

[1326] As above.

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Row Wampum of 1613 between an Indian community and European settlers in Canada, is founded on consensus, friendship, mutual respect, mutual dignity and mutual integrity between the formal state and the community system.[1327] I use the imagery of a ship (state statutory system) and a canoe (customary law system) sailing down the same river in peace but neither trying to steer each other's vessel to describe the partnership-based model. I concede that Kenya's constitutional and legislative framework for communal tenure is not the ideal partnership-based model, but that it is a step in the right direction.

Kenya's new communal tenure framework is not partnership-based because its definition of "community" fails to "recognize" the pre-existing Rift Valley communities such as the Maasai, the Nandi, the Kipsigis, the Kikuyu, and others, but requires their "creation" as legal entities. This is problematic because the Maasai', the 'Nandi', the 'Kipsigis', the 'Kikuyu' and other Rift Valley communities already exist as customary legal systems as discussed in chapter 2. Therefore, these communities ought to be recognized and not legally created. This may be corrected through an amendment of the Community Land Act of 2016 and/or its implementing regulations.[1328]

Kenya's communal tenure framework will also not be effective in functioning as a partnership-based model of interaction between the legal systems of the Rift Valley without a sufficiently resourced implementation plan. Generally, the state and county systems should allocate sufficient resources to establish the political and other structures provided for in the communal tenure legal framework for it to be effective.

Lastly, the new communal tenure framework's redress mechanism needs to be reformed to allow the courts to hear and determine claims by community legal systems in order to create some symmetry in the inherently asymmetrical relationship between the state and the communities.[1329] With a well-articulated and well-funded implementation plan and

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[1327] See Chartrand, L (n 1264) (describing the partnership model as follows: "[i]t is said that the Two-Row Wampum confirms a treaty between the Mohawk and the Dutch, where the two rows of purple represent the ship of the European and the canoe of the Mohawk sailing down the same river in peace but that "neither of us will make compulsory laws or interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel.")

[1328] See Liz Alden Wily (n 1141).

[1329] See Wilson, EK (n 15) (explaining the inherent asymmetry in terms of social dominance theory).

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a court process for addressing historical land injustices and other disputes between the legal systems, the new communal tenure framework may be effective in creating a stable environment where the Kenyan state and Rift Valley communities sail in peace down the river of time like a ship and a canoe with neither trying to steer each other's vessel.

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CHAPTER 6 CONCLUSION

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This is a thesis about the interaction between the formal Kenyan state system and the customary land rights of the Maasai, the Nandi, the Kipsigis and the Kikuyu communities of the Rift Valley region of Kenya. The customary laws of these communities are not written down in any recognized monographs.[1330] However, they have been passed from generations to generations through oral traditions and practices and they are always evolving to meet the needs of the particular community. As summarized in Chapter 2, evidence of these customary laws and practices have been pieced together from case summaries, similar studies, journal and media articles and general literature.[1331] I use this evidence to describe the customs and traditions of the Maasai, the Nandi, the Kipsigis and the Kikuyu communities as illustrative examples to show that their customary practices are essentially autopoietic subsystems generated by the communities themselves to ensure their survival and continuity.[1332] These Rift Valley communities are systems, because they are composed of interactive individuals, their laws and customs, cultures, ancestors, land, waters, and other elements that they consider essential to their continuity and survival.[1333]

In Chapter 3, I discuss the colonial state's disruption of the customs and traditions of the Maasai, Kikuyu, Nandi and Kipsigis communities by dispossessing and displacing them from their most valuable resource; their land.[1334] This disruption happened because the European settlers were attracted to the rich resources of the Rift Valley and used the formal state system to acquire the communities' land for farming. I rely on social dominance theory – the tendency of systems to form group-based social hierarchies when they interact – to explain these disruptive actions by the European settlers against Rift Valley communities.[1335]

[1330] See Cotran, E (n 20) (summarizing customary law cases in Kenya).

[1331] Chapter 2. See also Cotran, E (n 20) (summarizing customary law cases in Kenya); Archived Documents (n 188).

[1332] See Paterson, J & Teubner, G (n 78) (explaining Professor Luhmann's systems theory notion of autopoiesis).

[1333] Chapter 2. See also Anthony J. Colangelo (n 86) (describing a system as being composed of, but greater than, its component parts.)

[1334] Chapter 3.

[1335] See also Wilson, EK (n 15) (for a snapshot of social dominance theory as the tendency of human societies to be structured as systems of group-based social hierarchies).

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The European settlers used formal legal and political processes to dispossess and displace the African communities, such as the creation of exclusive European areas known as the White Highlands, the signing of the Anglo - Maasai Agreements of 1904 and 1911, forced labour, forced eviction and confinement of Africans to native reserves.[1336] The domination and suppression of African communities by European settlers in Kenya is similar to the marginalization of Indian communities of Canada[1337] and Aboriginal communities of Australia.[1338] As viewed through the lens of Professor Luhmann's systems theory notion of autopoiesis,[1339] the colonial disruption of the Rift Valley community systems interfered with their stability and integrity as communities, thus forcing them to take corrective measures in search of that stability.

Using the lens of systems theory, the corrective measures used by Rift Valley communities to regain their stability and integrity can be viewed as self-help tactics rooted in their customary practices described in chapter 2. The corrective measures are a demonstration of resilience by these communities that have continued to struggle to assert their customary land rights. The Kalenjin community made up of majority Nandi and Kipsigis communities have repeatedly used tribal clashes to forcefully evict those that they considered foreigners from the Rift Valley region.[1340] The resort by these communities to their customary practices to regain their stability as systems is consistent with the systemic characteristics of self-definition, functional differentiation to self-produce and self-sustain, autopoiesis and communication to maintain integrity and continuity.[1341] In this chapter, therefore, I demonstrate how these systems respond to the disruption by invoking their systemic characteristics, basically of resilience and resistance to disruption. Some of the resilience and resistance offered by the African communities to disruption was instrumental in helping the Kenyan state to achieve independence in 1963 as discussed in Chapter 4.

[1336] Chapter 2.

[1337] Alfred, T (n 30).

[1338] See *Mabo v Queensland* (n 22) (details the struggles of Aboriginal communities in Australia).

[1339] See Paterson, J & Teubner, G (n 78) (explaining Professor Luhmann's systems theory notion of autopoiesis).

[1340] TJRC Report (n 2) vol. IIB.

[1341] See section 1.4.1 of Chapter 1 (for a discussion of these systemic characteristics).

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As the push for independence gained momentum, the state itself realized the existential threat that it faced as a state system from all the resilience and resistance by African communities. This was the reason for the state system, itself, recognizing the instability of the African community systems and taking measures to correct that instability. One of the measures was the development and implementation of resettlement programs to help the communities regain possession of their land as the European settlers left to return to their homeland. However, the successor Kenyan state failed to resettle the displaced and dispossessed Africans.[1342] The state's resettlement programs had lofty goals of settling landless communities, but ended up rewarding political cronies and relatives, thereby creating more ethnic tension in the Rift Valley.[1343]

The state's failure to correct the African communities' instabilities caused by colonial disruption was a failure in the interface between the formal state system and the African customary law systems. Besides the failed state resettlement programs following independence, the state's policy of assimilating individual Africans into the colonial socio-economic system known as the "Swynnerton Plan"[1344] that started in the pre-independence period was another failed interface experiment. The key tenet of the Swynnerton Plan's policy of assimilation was registration of land rights to give the Africans individual title to land on which they could grow cash crops and generate income for themselves and for the colonial state. The individual tenure system was in direct conflict with the communal tenure system practiced by African communities for generations. Instead of integrating the African communities, as communities, into the integrated socio-economic system, the Swynnerton Plan targeted select Africans. African communities remained resilient and resisted the Swynnerton Plan and its hostility toward their customary practices. The failure of state

[1342] The state resettlement programs are discussed in section 2.4.2.3 of Chapter 2.

[1343] See TJRC Report (n 2) Vol. IIB; Akiwumi Commission Report (n 2); CIPEV Report (n 5) (discussing the failed resettlement programs).

[1344] The Swynnerton Plan is discussed in Chapter 4. The Swynnerton Plan encouraged individual African participants to grow cash crops in high potential and semi-potential areas mainly in the Rift Valley region just as European settlers had done in the White Highlands/Scheduled Areas. The aim was to integrate a critical mass of Africans into the colonial state's socio-economic system.

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interactions with African community systems in Kenya was evidenced by the uprising referred to as the "Mau Mau", the most expensive and violent form of resistance against colonial rule in Kenya.[1345]

In Chapter 4, I explore this state interaction with African customary systems by focusing on their legal systems: the formal state legal system and the African customary legal system. In particular, I explore whether the state, through its formal legal system, recognizes that, if left with no other options for self-corrective measures, the African communities will naturally resort to their pre-colonial customary practices of violence as a response to the continuing disruption. The dispossession and displacement of African communities in the Rift Valley region and resulting resistance thus threatens the entire fabric of the Kenyan state. In recent history, the failure of Kenyan state interaction with African community systems has been demonstrated by the post-election violence of 2007 - 2008.[1346] The Kenyan state system continues to search for an interaction with community systems that will create a much needed equilibrium between the formal state statutory system and the informal customary legal systems to mitigate the risk of instability in the Rift Valley region and ensure long-term stability in the Kenyan state.[1347]

An opportunity to define a mutually beneficial interactive framework or interface between the formal state statutory system and the customary legal systems of the Rift Valley in particular, presented itself during Kenya's land tenure reform movement. The clamour for land tenure reforms in Kenya grew because the majority of African communities continued to use and possess their customary land without any tenure security. In the late

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[1345] See Maloba, WO (n 222) p. 2 (states that the Mau Mau uprising "cost the British government £60 million with the commitment of some 50,000 troops and police and result[ed] in 10,000 Africans killed and 90,000 others impounded in concentration camps under sometimes appalling conditions).

[1346] See CIPEV Report (n 5) chapter 9 (describing the post-election violence as widespread ethnic violence that begun following the disputed results of the presidential elections of December 27, 2007 and led to one thousand one hundred thirty three (1,133) deaths, seventy-eight thousand two hundred fifty four (78,254) houses destroyed country wide and some six hundred sixty three thousand nine hundred twenty one (663,921) people displaced.)

[1347] TJRC Report (n 2).

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1990s and early 2000s, the Kenyan state realized that its policy of assimilation was unsustainable and begun exploring ways of formally integrating whole African communities into Kenya's integrated socio-economic system. This was the genesis of calls for formal state recognition of communal tenure. The state finally enacted the Kenya National Land Policy, Sessional Paper No. 3 of 2009 that called for formal state statutory recognition of communal tenure regimes that pre-existed the state system. Kenyans subsequently overwhelmingly voted in a referendum in favour of a new constitution in 2010 that recognizes communal tenure. The Community Land Act, Not. 27 of 2016 is the legislative framework that was passed to implement the new communal tenure regime.

Kenya's new communal tenure framework is not an ideal partnership-based recognition framework founded on consensus, friendship, mutual respect, mutual dignity and mutual integrity. In Chapter 5, I discuss the partnership-based recognition model as an effective interface between the Kenyan state statutory system and the community legal systems of the Rift Valley region. A partnership-based recognition framework, as exemplified by The Two Row Wampum of 1613 between an Indian community and European settlers in Canada, is founded on consensus, friendship, mutual respect, mutual dignity and mutual integrity between the formal state and the community system.[1348] I use the imagery of a ship (state statutory system) and a canoe (customary law system) sailing down the same river in peace but neither trying to steer each other's vessel to describe the partnership-based model.[1349]

The new communal tenure recognition framework is not ideal, because its definition of "community" fails to "recognize" the pre-existing Rift Valley communities such as the Maasai, the Nandi, the Kipsigis, the Kikuyu, and others, but requires their "creation" as legal entities. These communities ought to be recognized and not legally created. Recognition of pre-existing communities does not mean doing away with the current framework's

[1348] Chartrand, L (n 1264) (describing the partnership model as follows: "[i]t is said that the Two-Row Wampum confirms a treaty between the Mohawk and the Dutch, where the two rows of purple represent the ship of the European and the canoe of the Mohawk sailing down the same river in peace but that "neither of us will make compulsory laws or interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel.")

[1349] As above.

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requirement for a community to first define itself as a socially collective landowner before acquiring formal tenure rights. However, the new communal tenure framework can go further and incorporate the customary practices of the Rift Valley communities into the recognition framework. It should also recognize that communities are dynamic and, with the passage of time, will develop customary practices that are more suitable for the environment that they inhabit. As we discuss in chapter 2, some of the pastoral communities in the Rift Valley had begun practicing some form of mixed farming and pastoralism before the arrival of the Europeans in some of the fertile and well-watered areas of the Rift Valley. The trajectory of these communities was toward sedentary agriculture. The new communal tenure framework should, therefore, recognize this dynamism of communities and allow them to practice sedentary agriculture or to adopt individual forms of tenure according to each community system's legal and institutional structures. These community legal and institutional structures should also be empowered to seek court intervention on behalf of their members through representative land claims in order to create some symmetry in the inherently asymmetrical relationship between the state and the communities.

In addition, Kenya's communal tenure framework, like Tanzania's communal tenure system, lacks a well-articulated and well-funded implementation plan that is necessary to establish the political and other structures needed for it to function. Unlike South Africa's communal tenure system, the Kenyan communal tenure framework's redress mechanism needs to be reformed to allow the courts to hear and determine claims by community legal systems in order to create some symmetry in the inherently asymmetrical relationship between the state and the communities.

However, it is a step in the right direction when compared with similar communal tenure recognition frameworks in Tanzania, South Africa, Canada and Australia. With a well-articulated and well-funded implementation plan and a court process for addressing historical land injustices and other disputes between the legal systems, the new communal tenure framework may be effective in creating a stable environment where the Kenyan state and Rift Valley communities sail in peace down the river of time like a ship and a canoe with neither trying to steer each other's vessel.

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