

## CHAPTER SIX

# TOWARDS A SUITABLE LEGAL FRAMEWORK THAT VINDICATES INDIGENOUS PEOPLES' LAND RIGHTS IN KENYA

### 6.1 Introduction

While the existing legal framework in Kenya can be utilized to protect indigenous peoples' rights to land through progressive interpretation, it is important to reform the law for the benefit of all marginalized communities, including indigenous peoples. Progressive interpretation of the legal framework, as discussed in chapter four of this thesis, is dependent on a progressive judiciary which can not be guaranteed. In light of these constraints, this chapter makes a case for some legal reforms to redress the historical and continued land injustices committed against indigenous peoples by the Kenyan State. However, as the South African and Namibian case studies illustrate, legal reforms are dependent on the prevailing political environment. Although ideally states should adopt legal measures that equitably accommodate the rights of all their peoples including the marginalized, the two case studies illustrate that a political catalyst may be required to influence such reforms.

In Kenya, such a catalyst can be located in the post-December 2007 presidential elections crisis. The attendant conflict that arose out of the contested elections and previous ethnic and land clashes highlighted that there exist fundamental underlying issues that demand a comprehensive resolution. Some of those deep-rooted concerns include but are not limited to historical land injustices, inequitable land resource distribution and security of land tenure. In a bid to resolve that crisis, it is imperative and indeed it has been acknowledged that it is an opportune moment

for past and continued land injustices to be redressed. The focus of this chapter is on possible reforms that would undoubtedly address some of those concerns for the majority of Kenyans and inevitably those of indigenous peoples. The proposed reforms include legal mechanisms for land restitution, equitable land redistribution and the recognition of African customary law. It is imperative that Kenya's Constitution expressly provide for restitution, land redistribution and security of tenure reform. With regard to security of tenure reforms, the chapter makes a case for the amendment of the Constitution and legislation to remove the repugnancy clauses in the application of African customary law relating to the recognition of indigenous peoples' land rights. Such reforms will provide legitimacy for vindicating indigenous peoples' land rights.

As discussed in chapter three, Kenya's legal framework, is in need of reform if it is to recognize and protect indigenous peoples' land rights. The proposed reforms include amendments to the constitutional protection from deprivation of property to legitimize land restitution, redistribution and tenure reform. Kenya's legal framework has continued to favour the ruling and dominant communities over indigenous peoples who on the basis of their minority status lack the political clout to drive legislative and constitutional reforms. They also lack adequate legal capacity to challenge discriminatory laws and policies.<sup>1005</sup> Selective application and interpretation of the law to suit the whims of the political establishment has additionally compromised the rule of law despite constitutional and institutional safeguards.<sup>1006</sup>

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<sup>1005</sup> OHCHR Kenya Report (n 1 above); HRW (n 6 above) 12-14; Ndung'u Report (n 1 above) 140-142.

<sup>1006</sup> See Kenya APRM Report (n 2 above) 65, 68, and 71.

The problem is exacerbated by the strong institution of the Presidency in Kenya. While the notion of separation of powers between the three arms of government (the executive, legislature and judiciary) exists in the law books, it is generally absent in practice.<sup>1007</sup> The President still retains excessive powers to hire and fire members of Cabinet, despite the adoption of the National Accord and Reconciliation Act in 2008.<sup>1008</sup> The President also appoints judicial officers. While such appointments should be made in accordance with the advice of the Judicial Service Commission, it is hardly the case in Kenya. It was therefore not surprising that members of the opposition, after the December 2007 presidential elections, refused to petition the presidential elections in courts of law despite allegations of serious irregularities, on the grounds that the courts were compromised and would accordingly not afford them justice.<sup>1009</sup> They instead opted to pursue extra-judicial interventions such as strikes and mass action that resulted in loss of life and destruction of property. While the use of such extra-judicial measures is an indictment of the rule of law in Kenya, it points to the general level of mistrust in democratic institutions on the part of Kenyans.

Legal reform in Kenya should commence by limiting the powers of the executive and providing checks and balances, such as through an independent judiciary, which will ensure that the law, including land reforms, is implemented equitably. ‘An independent judiciary is a condition precedent for effective enforcement of fundamental human rights’.<sup>1010</sup> It would also be useful for

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<sup>1007</sup> As above.

<sup>1008</sup> See the National Accord and Reconciliation Act No 4 of 2008.

<sup>1009</sup> See Kagwanja (n 8 above).

<sup>1010</sup> See Kibwana & Ambani (n 410 above) 56.

Kenya's Constitution to entrench socio-economic rights in the Bill of Rights. While socio-economic rights are not a panacea for the problems faced by marginalised communities, they provide a basis for the state's progressive realisation of its positive obligations.<sup>1011</sup> That would ensure that fundamental rights relevant to the improvement of indigenous peoples' livelihoods are protected. Indigenous peoples would therefore be able to invoke more direct fundamental rights in the Bill of Rights when their rights to land are violated rather than the more cumbersome right to life provision as discussed in chapter four. Indeed, in South Africa, where socio-economic rights are part of the country's Bill of Rights,<sup>1012</sup> Currie and De Waal are of the view that 'socio-economic rights appear to codify the state's positive constitutional obligations to make life liveable'.<sup>1013</sup>

The jurisprudence of the Constitutional Court of South Africa so far seems to support this view and its interpretation of socio economic rights has drawn a link with the 'right to life, human

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<sup>1011</sup> On positive state duties relative to socio economic rights see *SERAC* case (n 470 above) para 44-47; see discussion of implementation socio-economic rights under the African Charter on Human and Peoples' Rights in CA Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights in Evans and Murray (n 396 above) 178-209; For a detailed discussion on socio economic rights especially in the South African context see S Liebenberg 'The interpretation of socio economic rights' in S Woolman et al *Constitutional Law of South Africa* (2003 2<sup>nd</sup> ed) 33:1-66; see also the South African Court jurisprudence in *Government of the Republic of South Africa v Grootboom* 2001(1) SA 46 (CC); *Soobramoney v Minister of Health, Kwa Zulu Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

<sup>1012</sup> See sec 26, 27 & 28 Constitution of South Africa; For a discussion of the application of these rights see Currie & de Waal (n 443 above) 566-598; see also Liebenberg (n 1011 above) 33:1-66-According to Liebenberg citing the Technical Committee IV Memorandum on sections 25 and 26 of the Working Draft of the Constitution (14 February 1996) 2 -the entrenchment of socio economic rights in the South African Bill of Rights was heavily influenced by international law and seems to have been an attempt to 'facilitate consistency between South Africa's domestic law and international human rights norms'.

<sup>1013</sup> See Currie and de Waal (n 454 above) 290.

dignity and equality'.<sup>1014</sup> Entrenchment of socio-economic rights in the Bill of Rights is therefore crucial to the realisation of indigenous peoples' land rights given the close nexus these entitlements have with the right to life.<sup>1015</sup> According to Bennett, socio-economic rights such as the 'right to housing, food, employment, health are directly related to land'.<sup>1016</sup> Given the high levels of poverty amongst indigenous peoples in Kenya, a constitutional obligation on the state to adopt reasonable measures to guarantee socio-economic rights can not be overemphasised. That is particularly so given the continued disparity and inequality in the distribution of State resources in Kenya based on political considerations.<sup>1017</sup> Therefore, sole reliance on political structures to determine the distribution of the State's resources is bound to continue marginalising indigenous peoples, most of whom do not have access to political structures. Recourse to judicial interventions presents a suitable avenue for ventilating marginalised communities' fundamental rights especially when such rights are located in the supreme law of the State.

International standards and norms which Kenya is bound to uphold, such as the International Covenant on Economic Social and Cultural Rights<sup>1018</sup> and the African Charter on Human and

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<sup>1014</sup> As above; see for example *Government of the Republic of South Africa v Grootboom* 2001(1) SA 46 (CC) para 23; *Khosa and others v Minister of Socio Development and others* 2004 (6) SA 505 (cc) para 41; *Makwanyane* (n 427 above) para 327.

<sup>1015</sup> See Bennett (n 806 above) 151.

<sup>1016</sup> As above.

<sup>1017</sup> Kenya APRM Report (n 2 above) 14, 22, 48.

<sup>1018</sup> Ratified by Kenya on 1 May 1972.

Peoples' Rights,<sup>1019</sup> require the State to adopt positive measures to implement socio-economic rights. It is therefore imperative that the country adopts a constitution that domesticates such international obligations. As discussed in chapter four, while certain states such as India have not entrenched socio-economic rights in their Bill of Rights, their courts of law have invoked and linked their countries' Directive Principles of State Policy with other fundamental rights to accord marginalised groups protection.<sup>1020</sup> According to Kibwana and Ambani, although Directive Principles of State Policy are often not binding in the same way as constitutional provisions in the Bill of Rights, 'they could help to develop jurisprudence in courts of law'.<sup>1021</sup> They have argued that 'a set of directive principles would also enable Kenya to apply international obligations without necessarily going through the rigours of the domestication process as has been the case in India'.<sup>1022</sup> Such a possibility may indeed exist but as in case of progressive interpretation of the legal framework, discretion remains with individual judges to link directive principles to fundamental human rights. Given that such an exercise is not guaranteed, it would be preferable if socio-economic rights were entrenched in Kenya's Bill of Rights.

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<sup>1019</sup> Ratified by Kenya on 23 January 1992.

<sup>1020</sup> See *Paschim Banga Khet Mazdoor Samitty v State of West Bengal* AIR 1996) SC 2426 where the court positively interpreted the right to include provision of emergency medical treatment which is argued to have been an extension of the interpretation of the directive principles state policy in conjunction with the right to life enshrined in its constitution case cited in Kibwana & Ambani (n 410 above) 54; see also *Tellis and others v Bombay Municipal Corporation and others* (n 465 above).

<sup>1021</sup> Kibwana & Ambani (n 410 above) 55.

<sup>1022</sup> Kibwana & Ambani (n 410 above) 56.

Kenya has been undergoing a comprehensive constitutional reform process since 2000. However, eight years on, the process is yet to be completed.<sup>1023</sup> In November 2005, the Proposed Draft Constitution of Kenya sponsored by the Government was rejected during a national referendum. The Draft Constitution had sought to retain excessive powers in the presidency. It also failed to devolve power<sup>1024</sup> to the people and instead concentrated such powers in the central government. The scope of this thesis is limited to the question of indigenous peoples' land rights and therefore does not go into the detail of that Draft Constitution, although it is imperative to reiterate that the land reforms in Kenya will need to emanate from the Constitution. Constitutional entrenchment of land reforms is important in order to insulate them from potential legal challenges that could be based on existing protection of fundamental human rights such as that against deprivation of property. Land tenure reforms in Kenya would therefore require constitutional support lest they be challenged on the grounds that they flout the constitutional Bill of Rights. Indeed, Kenya's Draft Land Policy acknowledges and envisages that 'land reforms should be accompanied by constitutional changes if they are to be effective'.<sup>1025</sup>

In South Africa and Namibia, the Constitution is the basis for all land reform.<sup>1026</sup> Given its expansive constitutional legitimization of land restitution, equitable access and tenure security, South Africa's constitutional framework provide perhaps the best example for Kenya to

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<sup>1023</sup> See the Constitution of Kenya Review Act Cap 3A of 2000 of the Laws of Kenya.

<sup>1024</sup> For some of the concepts of devolution and the constitutional debate on this issue see CKRC Report (n 525 above) 271-297.

<sup>1025</sup> See para 34 Kenya Draft Land Policy.

<sup>1026</sup> See sec 25 of the Constitution of South Africa and secs 16, 102, and Schedule 5 Constitution of Namibia.

follow.<sup>1027</sup> While an ideal property rights regime in Kenya would have to reflect the particular circumstances obtaining in the State, South Africa's dispensation provides guidance. It is useful to note that South Africa's property clause emerged after protracted negotiations and compromise.<sup>1028</sup> Similarly, in Kenya, changing the *status quo* is bound to elicit heated arguments for and against enacting provisions in the Constitution that legitimize land reforms.

The recently appointed Minister of Lands (2008), James Orengo, issued a decree that all land leases would not be automatically renewed and that the state would repossess lands that had illegally been acquired.<sup>1029</sup> Private land owners lamented and protested against that decision leading to President Mwai Kibaki stating that the directive would not be carried out.<sup>1030</sup> It is therefore of paramount importance that there be reasonable accommodation and balancing of interests of all parties. That is necessary in order to ensure that the rights of property holders as well as those of people who have been dispossessed of their lands as a result of discriminatory laws are treated equitably.

This chapter proposes three specific land reform initiatives (land restitution, land redistribution and access and security of land tenure through equal application of African customary law). All three require constitutional legitimization.

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<sup>1027</sup> See sec 25 of South African Constitution.

<sup>1028</sup> See T Roux *Constitutional property rights review in South Africa: A civil society model*, unpublished PHD dissertation submitted to the University of Cambridge 127-128.

<sup>1029</sup> See Orengo must tread carefully on land ownership issues, Commentary on 4 June 2008 <[http://www.nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=25&newsid=124638](http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=25&newsid=124638)> accessed on 5 June 2008.

<sup>1030</sup> As above.



## 6.2 Land restitution

Like South Africa and Namibia, Kenya underwent massive land dispossession of her indigenous peoples through a racially discriminatory legal framework.<sup>1031</sup> Through the instrumentality of the law under colonial rule African peoples were disinherited of their land.<sup>1032</sup> After independence, colonial laws governing land tenure were all virtually retained.<sup>1033</sup> Indigenous peoples' land that was lost during the colonial administration did not revert to their ancestral owners but was rather alienated to groups and individuals through the market.<sup>1034</sup> Consequently, a significant number of indigenous peoples remain disinherited from their traditional lands.<sup>1035</sup> Indigenous peoples who were disinherited by the colonialists and did not get back their land continue to agitate for the return of their ancestral land. They decry the fact that some communities who are considered non-indigenous to the territories they now inhabit benefited from the retention of the colonial landholding structure. This has led to recurrent tribal clashes over land.<sup>1036</sup>

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<sup>1031</sup> See HWO Okoth Ogendero, Legislative approaches to customary tenure and tenure reform in East Africa in Toulmin and Quan (n 853 above) 123-124; see also Okoth-Ogendero (n 18 above) 44; see also Ghai & McAuslan (n 18 above) 27-28.

<sup>1032</sup> Ghai & McAuslan (n 18 above) 28.

<sup>1033</sup> See Okoth-Ogendero (n 1031 above) 124.

<sup>1034</sup> See Gutto (n 534 above) 246; see also Historical injustices and land reforms in Kenya, Kenya Land Alliance and the Kenya Human Rights Commission Sourced at <http://www.kenyalandalliance.or.ke/Historical%20Injustices%20PDF.pdf> accessed on 2 June 2008.

<sup>1035</sup> As above.

<sup>1036</sup> See HRW (n 6 above) 14.

Land dispossession in Kenya may be traced back to the imposition of colonial rule through the declaration of a protectorate on 15 June 1895.<sup>1037</sup> In 1896, the British applied the Indian Land Acquisition Act of 1894, which is still applicable to date, to acquire freeholds within the ten-mile Coastal strip and land adjacent to the Kenya-Uganda railway.<sup>1038</sup> By 1915, through the promulgation of orders in council and ordinances, the British had completely dispossessed Africans of their land in Kenya.<sup>1039</sup> As already stated, the basis of this dispossession was the erroneous assumption that land held by Africans was *terra nullius*.<sup>1040</sup> On the basis of this doctrine, which has since been rejected,<sup>1041</sup> colonial authorities expropriated indigenous land without compensation. According to the authorities, no compensation was required because such land was either unoccupied or occupied by ‘savage tribes’ who had no cognizable land rights.<sup>1042</sup>

In Kenya, the imposition of racially discriminatory laws and their entrenchment by the post-colonial State hampers indigenous peoples’ efforts to reclaim their land. This is due to the fact that the state ‘provided for an elaborate protection of private property without reference to the

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<sup>1037</sup> See Ghai & McAuslan (n 18 above) 3.

<sup>1038</sup> Kibwana (n 114 above) 234.

<sup>1039</sup> Mweseli (n 229 above) 9.

<sup>1040</sup> See the ICJ ruling on the invalidity and erroneous application of the doctrine in *Western Sahara, Advisory Opinion* (n 170 above); see also the *Mabo v Queensland* (n 72 above) where the High Court in Australia the doctrine was declared unjust and discriminatory and therefore unacceptable; CERD Ninth Periodic Report of Australia (n 507 above) para 540.

<sup>1041</sup> See *Western Sahara* Advisory Opinion (n 170 above).

<sup>1042</sup> See Law officers to Foreign Office, 13 December. 1899, Foreign Office Confidential Print, 133 cited in Mweseli (n 229 above) note 9.

history of its acquisition'.<sup>1043</sup> The decision to retain the *status quo* was due to the fact that the 'the decolonization process of the country represented an adaptive, co-optive and pre-emptive process which gave the new power elites access to the European economy'.<sup>1044</sup> The Constitution of Kenya additionally limits the applicability of African customary law, which is the legal regime that most indigenous peoples rely upon as proof of their traditional land rights. Indigenous peoples are thus marginalized since their lands rights are not adequately recognized and protected. The recent post-election violence in Kenya demonstrated that there is a serious problem related to the question of lands that will not disappear until some of the root causes of the problem are resolved. It is therefore crucial that the concerns of indigenous peoples who remain aggrieved by the lack of comprehensive resolution of their land claims are addressed.

The clamour for the return of ancestral lands in Kenya by some of the indigenous communities continues to yield internal conflicts. The Maasai, for example, have vowed to press for the restitution of their lands rights that were alienated during the infamous Anglo-Maasai treaties of 1904 and 1911.<sup>1045</sup> As discussed in chapter three, these agreements had envisaged 99-year leases. Although the Maasai continue to maintain that they were fraudulent,<sup>1046</sup> in 2004, they launched

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<sup>1043</sup> Kenya Land Alliance (n 1034 above).

<sup>1044</sup> See the Kenya Draft National Land Policy para 25.

<sup>1045</sup> See copies of the 1904 and 1911 Maasai agreements in Carter Report (n 252 above) Appendix VIII; For a detailed expose of the Maasai treaties see MPK Sorrenson *Origins of European Settlement in Kenya* (1968) 190-209; see also Hughes (n 241 above) 178-182; see also Ghai & McAuslan (n 18 above) 20-25.

<sup>1046</sup> See the Maasai Court challenge of the treaties in 1913 in the *Ole Njogo and others v Attorney General of the E. A Protectorate* (1914) 5 EALR 70-The case is analysed at depth in Hughes (n 241 above) 89-104; see also AW Kabourou 'The Maasai land case of 1912: A reappraisal (1988) 17 *Transafrican Journal of History*.

fresh bids to seek restitution of their land on expiry of the lease period.<sup>1047</sup> The Maasai have since handed a petition to both the Kenyan and the British Governments demanding compensation for the loss of their land and its return to the community.<sup>1048</sup> The British Government rejected the Maasai claims and stated that ‘the legal position today is quite clear: at the time of independence, the Government of Kenya inherited any obligations that formerly rested on us as the sovereign power’.<sup>1049</sup> The Kenyan Government has equally rejected the Maasai claims on the grounds that it did not recognise the colonial era treaties entered into with the community.<sup>1050</sup> Like the 1913 verdict of the *Ole Njogo case*,<sup>1051</sup> where colonial political expedience trumped the legality of the treaties,<sup>1052</sup> the position of the Kenyan Government appears to be more political than legal.<sup>1053</sup> Patrick McAuslan is of the view that the decision in the *Ole Njogo case* was ‘hypocritical and political’, and continues to hamper the Maasai’s claim for land reparations.<sup>1054</sup>

Despite the odds, the Maasai have not relented in their struggle to seek recognition and possible restitution of their land rights. While still keeping the option of a legal challenge open, the

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<sup>1047</sup> Hughes (n 241 above) xiv.

<sup>1048</sup> As above xiv; see also Maasai land claims rejected by the Government (August 2004) <<http://www.ogiek.org/faq/maasai-info.htm>> accessed 4 June 2008.

<sup>1049</sup> C Mullin MP, Parliamentary Under Secretary of State, Foreign and Commonwealth Office, to Lord Averbury, 23 March 2005( in response to Lord Averbury’s attempts to seek a response on the status of the Maasai petition demanding compensation from the British) cited in Hughes (n 241 above) 181, note 20.

<sup>1050</sup> As above.

<sup>1051</sup> See *Ole Njogo and others v the Attorney General and others* (n 1046 above).

<sup>1052</sup> Ghai & McAuslan (n 18 above) 20-25; see also Kabourou (n 1046 above) 8.

<sup>1053</sup> As above; Hughes (n 241 above) 178-182.

<sup>1054</sup> McAuslan views on the case stemming from personal correspondences with Lotte Hughes are reflected in Hughes (n 241 above) 179-180; see also Ghai & McAuslan (n 18 above) 20-25.

Maasai have also pursued various other measures aimed at demanding the return of their land. The alternative initiatives include public demonstrations and private ranch invasions that occasionally result in violent clashes with the State.<sup>1055</sup> The greatest hurdle the Maasai would face in a legal challenge demanding restitution of their ancestral lands in Kenya is the constitutional property clause.<sup>1056</sup> As discussed in chapter four, since the property clause in the Kenyan Constitution protects current owners against deprivation of their property, the Maasai would have to show that they already possess rights to the claimed land. This they cannot do. Instead, the property clause protects the new freehold and leasehold title holders against uncompensated expropriation of their rights, considerably increasing the costs and therefore the feasibility of any land restitution process.

In the case of the Ogiek, members of the community remain in the Mau forest despite repeated attempts to evict them and continue to demand the return and recognition of their ancestral land rights.<sup>1057</sup> The Ogiek are among the first inhabitants of modern Kenya and were progressively displaced by migrating tribes until they eventually settled in the region around Mau forest.<sup>1058</sup> They continued facing evictions in the Mau forest to encourage them to assimilate with tribes that were thought to have a close affinity to them, mainly the Kalenjin and the Maasai.<sup>1059</sup> ‘The Ogiek held their land communally with individual members and families exercising rights of use and

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<sup>1055</sup> Hughes (n 241 above) xiv.

<sup>1056</sup> Sec 75 Constitution of Kenya

<sup>1057</sup> See TJ Kimaiyo *The Mau Forest complex on the spotlight: The many reasons for opposition to ‘the Forest Excision Scheme’* 2002; see also Kimaiyo (n 120 above); see also *Ogiek* case (n 3 above).

<sup>1058</sup> See n 13 above.

<sup>1059</sup> Carter Report (n 252 above) 259, para 977-985.

occupancy'.<sup>1060</sup> However, due to the constant evictions and forced assimilation with their neighbouring tribes, most of the Ogiek communities are at the brink of extinction with only about 20 000 people remaining.<sup>1061</sup>

The case of *Francis Kemai and others v the Attorney General and others*,<sup>1062</sup> discussed in chapter three, sought to assert the Ogiek community's right to occupy the Mau forest and protection of their fundamental human rights including land rights.<sup>1063</sup> Although the community lost the case in the High Court, an appeal is still pending<sup>1064</sup> in which the community maintains it has rights over the Mau forest by virtue of Ogiek customary law.<sup>1065</sup> Some of the members of the community continue to occupy parts of the forest without legal authority.<sup>1066</sup> In 2007, the Ogiek community leaders adopted a declaration that states, among other things, 'that we have the right to our ancestral land, territories and resources which we have traditionally owned, occupied, used and managed and therefore demand the return and restoration of our land taken illegally or lost'.<sup>1067</sup> Although the Kenyan Government has on various occasions allocated title deeds to individuals to occupy parts of the Mau forest, this has largely been seen as a political gesture. In

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<sup>1060</sup> See Kimaiyo (n 1057 above) 7.

<sup>1061</sup> As above; see also <<http://www.ogiek.org/>> accessed 4 June 2008.

<sup>1062</sup> See *Ogiek* case (n 3 above).

<sup>1063</sup> As above.

<sup>1064</sup> See also <<http://www.ogiek.org/>> accessed on 4 June 2008.

<sup>1065</sup> See Kimaiyo (n 120 above) 3.

<sup>1066</sup> As above; see also <<http://www.ogiek.org/>> accessed 4 June 2008.

<sup>1067</sup> See The Ogiek Declaration July 2007 sourced at <<http://www.ogiek.org/>> accessed 4 June 2008.

reality, beneficiaries of such title deeds have included non-indigenous peoples.<sup>1068</sup> Indeed, while the Ogiek people have been evicted from the forest, certain politically connected individuals have acquired land rights to the same lands, including private logging companies.<sup>1069</sup>

From the foregoing, it is evident that indigenous peoples in Kenya are aggrieved due to the alienation of their ancestral lands and the continued lack of recognition of their land rights. The increased demand for the return of their lands is buoyed by recent trends across the world where indigenous peoples have succeeded in finding protection of their ancestral land rights.<sup>1070</sup> Indigenous peoples in other jurisdictions rely on their domestic legal framework and international norms and standards to assert their fundamental human rights.<sup>1071</sup> These communities have sought legal recognition for their indigenous land rights as well as restitution of those rights where they are alienated. The case of *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community*,<sup>1072</sup> discussed in chapter five, is one such case where an indigenous community's land rights were vindicated. The community relied upon its African customary law to prove the existence of rights in land and succeeded in their claim for land

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<sup>1068</sup> See Ogiek oppose Kibaki's directive on title deeds sourced at at <<http://www.ogiek.org/>> accessed 4 June 2008.

<sup>1069</sup> See FAQs, What is the real threat to the Mau forest, para 4 sourced at at <<http://www.ogiek.org/>> accessed 4 June 2008.

<sup>1070</sup> n 72 above.

<sup>1071</sup> As above.

<sup>1072</sup> *Alexkor v Richtersveld Community* (n 72 above).

restitution based on South Africa's constitutional and legislative provisions designed to facilitate such a process.<sup>1073</sup>

International norms and standards equally provide for land restitution. The African Charter on Human and Peoples' Rights provides that 'in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property and to an adequate compensation'.<sup>1074</sup> Indigenous peoples, whose land rights have been dispossessed, may seek an interpretation of Kenya's Bill of Rights in line with this international standard, which is binding on Kenya. Article 28 of the UN Declaration on the Rights of Indigenous Peoples equally provides for restitution of land rights. Such restitution could include compensation, where it is not possible to physically return indigenous peoples' lands.<sup>1075</sup> However, as discussed in chapter four, given that Kenyan courts do always have regard to international norms and standards, it is important to provide for restitution in the domestic legal framework.

Like South Africa, Kenya should provide an opportunity to communities to reclaim their lost lands. This is only possible through reforms to the legal framework to provide for restitution or another appropriate remedy, which could include compensation or alternative land. A solution similar to that of Namibia, which elected to reject demands for restitution but instead instituted land tenure reforms based on market forces is bound to be inadequate in Kenya given the high levels of agitation for return of ancestral lands. While it will also be useful to accord indigenous

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<sup>1073</sup> *Alexkor v Richtersveld Community* (n 72 above).

<sup>1074</sup> Art 21(2) African Charter on Human and Peoples' Rights.

<sup>1075</sup> Art 28(1) UN Declaration on the Rights of Indigenous Peoples.



peoples' rights of access and control of their lands through land redistribution and security of tenure, the issue of land restitution in Kenya is crucial for peace to prevail.

Land restitution or another appropriate remedy, such as alternative lands and compensation, has significant benefits. It would resolve the recurrent tribal conflicts that are based on historical land dispossessions. Such an option calls for coordination and extensive consultation to determine competing claims over ancestral lands. South Africa's legal framework provides guidelines that could be used to design a suitable legal framework in Kenya.<sup>1076</sup>

To legitimize and facilitate land restitution a constitutional amendment to the current property clause is required. It is important to expressly provide for the restitution process in the Constitution in order to iron out any contradictions with the constitutional property clause. Apart from avoiding contradictions in the law, an express restitution clause in the Constitution would also accord dispossessed communities a right to claim restitution.<sup>1077</sup> To assert this right, claimants would need to prove that they met the conditions set out by an Act of Parliament. The Constitution and the implementing statute would stipulate the individuals or groups entitled to claim restitution and the procedures for lodging such claims. On the basis of African customary law, communities would be entitled to claim restitution as long as they met the requirements of the legal framework designed for that purpose. In Kenya, land dispossession can be traced back

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<sup>1076</sup> See Cousins (n 743 above) 281–315; 282.

<sup>1077</sup> See Tong (n 742 above) 63.

to the imposition of colonial rule through the declaration of the East African Protectorate on 15 June 1895. This date could serve as a possible cut-off date.<sup>1078</sup>

Presently, there is a political window of opportunity to tackle the issue of historical land dispossession by adoption of effective laws and amendments to the Constitution. This window can be found in the National Accord and Reconciliation Act 4 of 2008, which was enacted to legitimise a government of national unity after the disputed 2007 presidential elections.<sup>1079</sup> The Act acknowledges that ‘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’.<sup>1080</sup> One of the principal aims of the enactment of this law is to ‘provide the means to implement a coherent and far reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all’.<sup>1081</sup> It is therefore imperative to harness the momentum and desire to address past injustices that threaten to tear Kenyan society apart. This would entail redressing the root causes of violence and recurrent conflicts, identified as historical land injustices and continued inequitable distribution of land and state resources.<sup>1082</sup> It is instructive that the idea of land restitution in Kenya is currently under consideration. Although still in draft form, the Draft National Land Policy recognizes that certain

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<sup>1078</sup> See Ghai & McAuslan (n 18 above) 3.

<sup>1079</sup> See First Schedule to the National Accord and Reconciliation (Cap 4) of 2008.

<sup>1080</sup> As above.

<sup>1081</sup> As above.

<sup>1082</sup> OHCHR Kenya Report (n 1 above); HRW (n 6 above); Ndung’u Report (n 1 above) 140-142.

communities, including indigenous peoples, were deprived of their lands due to historical injustices as a result of unfair policies and legislations.<sup>1083</sup> It rightly proposes that the Government should ‘review all previous acquisitions of community land to facilitate restitution for the affected communities’.<sup>1084</sup>

### 6.3 Land redistribution and access

Land dispossession of indigenous peoples in Kenya continued even after independence. The ruling elites amassed large pieces of land throughout the country, some of which had been left behind by the departing colonialists. These pieces of land were located in areas originally inhabited by indigenous peoples. Emerging from the politics of patronage, land redistribution became heavily skewed in favour of a few politically powerful individuals.<sup>1085</sup> Indeed, certain individuals own vast amounts of land in the country, some of which remains idle land, at the expense of their original inhabitants. Land ownership in Kenya remains characterised by serious inequitable ownership patterns.<sup>1086</sup> In recognition of such inequitable distribution of land, the Kenya Draft Land Policy acknowledges that there is a need for land tenure reform and redistribution.<sup>1087</sup>

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<sup>1083</sup> Kenya Draft National Land Policy para 53.

<sup>1084</sup> Para 68 (c) as above.

<sup>1085</sup> See Gutto (n 534 above) 246.

<sup>1086</sup> As above.

<sup>1087</sup> Draft National Land Policy para 52.

As discussed in the preceding section, while land restitution may provide a mechanism to return and compensate for land taken from indigenous peoples on the basis of discriminatory laws, the accumulation by a few individuals of vast amounts of land at the expense of the majority remains a huge injustice.<sup>1088</sup> While some individuals continue to hold huge pieces of land, some of which remains idle, the majority of the indigenous peoples and others who did not reap the fruits of ‘uhuru’ (freedom) remain landless due to overpopulation and diminished land resources.<sup>1089</sup> In view of the need to ensure equitable distribution of land resources in Kenya, it is crucial that the State adopts laws that legitimize a land redistribution programme. This would ensure that communities and individuals that do not have access to land do so through State assistance.

It is acknowledged that the problem of land ownership in Kenya cannot be resolved without addressing concerns over the inequitable distribution of the land resource.<sup>1090</sup> Some of the expansive pieces of land currently occupied by influential individuals as well as private corporations were traditionally occupied by indigenous peoples. Such lands should be acquired by the State for redistribution to their entitled claimants. The current legally recognised owners of the land should be offered compensation using established legal processes. The funds and budget for such compensation could be sourced from international and domestic development partners.

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<sup>1088</sup> See HRW (n 6 above) 12-14.

<sup>1089</sup> Kenya National Commission on Human Rights and Kenya Land Alliance, *Unjust Enrichment: The making of Land-Grabbing Millionaires*, *Living Large Series*, Vol.2, No. 1, 2006, 1.

<sup>1090</sup> See Kenya Draft National Land Policy para 52.

Although, the current Constitution provides for circumstances when the State may expropriate land in the public interest,<sup>1091</sup> land redistribution is not expressly mentioned as one of the purposes for which land may be compulsory acquired by the State. The Constitution of Kenya provides that land may be compulsorily acquired if such ‘acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and county planning or the development or utilization of property so as to promote the public benefit’.<sup>1092</sup> While land redistribution to ensure equitable sharing of the land resource may be construed as fitting within the ground of ‘utilization of property so as to promote the public benefit’ it is unlikely that courts in Kenya will accord it such a meaning. As discussed in chapter four, given the tendency by Kenya’s courts to follow a narrow interpretation of the provisions of the Bill of Rights, it would be useful to expressly legitimize acquisition of private land rights for purposes of redistribution. That would require an additional ground as an exemption to the protection from deprivation of property provision. It would for instance list ‘land redistribution’ as a justification for compulsory acquisition of land by the State.

Expressly providing for redistribution would ensure that there are no doubts that the State can compulsorily acquire private land rights for purposes of redistribution. South Africa opted for this route in section 25(4) of its Constitution.<sup>1093</sup> Namibia’s Constitution, on the other hand, provides for the rights of all persons ‘to acquire, own and dispose of all forms of immovable and movable

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<sup>1091</sup> Sec 75(1) (a) Constitution of Kenya.

<sup>1092</sup> As above.

<sup>1093</sup> Sec 25 (4) South Africa Constitution provides: ‘For purposes of this section— (a) the public interest includes the nation’s commitment to land reform and to reforms to bring about equitable access to all South Africa’s natural resources...’

property individually or in association with others and to bequeath their property to their heirs or legatees'.<sup>1094</sup> While this provision does not expressly mention land redistribution as a ground for expropriation, the clause goes on to say that an Act of Parliament may be enacted to provide for compulsory acquisition of property in the public interest.<sup>1095</sup> On the basis of this provision and the additional provisions that legitimize adoption of laws to redress the effect of apartheid,<sup>1096</sup> various laws have been enacted to provide for land redistribution.<sup>1097</sup>

As discussed in chapter five, South Africa and Namibia's land redistribution programmes have thus far largely been market-driven.<sup>1098</sup> However, as noted in that chapter, while reliance on market forces in both countries has been cited as a possible reason for the slow pace of their land redistribution programs, it is increasingly accepted that lack of political will and institutional weaknesses are at least contributing factors.<sup>1099</sup> In Kenya, where land redistribution would be an equally emotive issue, it would be prudent to make express legislative provisions for market-based land redistribution and compulsory expropriation where the market fails to achieve the desired outcomes.

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<sup>1094</sup> See sec 16 (1) Constitution of Namibia. The only limitation on this right is with regard to non-citizens in accordance with legislation.

<sup>1095</sup> As above sec 16 (2) Constitution of Namibia.

<sup>1096</sup> See sec 23 (2) Constitution of Namibia which provides inter alia that Parliament may enact 'legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices.'

<sup>1097</sup> See for example the Agriculture Land Reform Act 6 of 1995.

<sup>1098</sup> See Hall (n 784 above) 98; see also Ntsebeza (n 784 above) 107-131; see also De Villiers (n 783 above) 51.

<sup>1099</sup> See Hall (n 784 above) 99; *see also* see Van der Walt (n 538 above) 307; see also De Villiers (n 783 above) 35.

Importantly, when dealing with land claimed by indigenous peoples who may not have the economic capacity to acquire land held by politically influential individuals, the state is entitled to intervene. In such cases, the law should expressly provide for state-aided, land acquisition processes in accordance with established legal procedures as well as for payment of prompt and full compensation. Indigenous peoples may equally be paid compensation for the historical loss of their land where the land in question is being well utilized. However, monetary compensation should only be offered as a solution of last resort, after appropriate consultation with indigenous peoples.<sup>1100</sup> Indeed, it is to be noted that sometimes compensation in monetary form may not redress the historical injustices and in fact may just postpone land-related conflicts.<sup>1101</sup> In addition, most indigenous peoples would rather have the return of their ancestral land whose cultural value transcends any monetary value. Individuals holding large pieces of land often have the means to compensate claimants in monetary terms, instead of having to return the land they hold. Therefore, it is crucial that any law reform targeted at land redistribution should also limit the size of land an individual or corporation may hold, particularly if not under gainful use. Such restrictions would ensure that land is put to good use and wherever possible that it is equitably shared amongst individuals and groups seeking the resource.

Wanjala proposes a more radical approach and argues that in order to facilitate dynamic land redistribution in Kenya all land should vest in the State.<sup>1102</sup> According to Wanjala, freehold tenure, where individuals own rights in land in perpetuity, should be replaced with leaseholds,

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<sup>1100</sup> See CERD General Recommendation 23 (n 71 above) para 4 (d).

<sup>1101</sup> See for example the case of South Africa in see De Villiers (n 771 above) 3; see also LG Robinson 'Rationales for rural land redistribution in South Africa' (1997) *Brooklyn Journal of International Law* 485.

<sup>1102</sup> See Wanjala (n 21 above) 40.

which would still guarantee individual land title for those who prefer such tenure and still secure ascertainable land rights.<sup>1103</sup> The State would then be able to redistribute and allocate land on the basis of need.<sup>1104</sup> While such a model presents a viable alternative and is akin to Namibia's case, where all communal lands vest in the State, it has limitations. While vesting all land rights in the State may enable the government to distribute land equitably; such a model is bound to fuel corruption and may still result in inequitable land distribution. Additionally, influential private land holders are unlikely to support such a move since they would lose control of their land to the State. A compromise, where the land redistribution process is guided by market forces, coupled with the state's power to expropriate land upon payment of full and prompt compensation, is more likely to gain acceptance.

It is imperative that land rights are secured, recognized and accorded equal protection by the law. This ensures that legal reforms adopted to facilitate land restitution and redistribution benefit all peoples and protect the land rights of the most vulnerable indigenous peoples. Such reforms would require the recognition and equal application of African customary law, which governs and regulates the land rights of indigenous peoples.<sup>1105</sup>

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<sup>1103</sup> See Wanjala (n 21 above) 40.

<sup>1104</sup> As above.

<sup>1105</sup> See Gilbert (n 34 above) 610.



#### **6.4 Security of tenure reforms through recognition and equal application of African customary law**

While there are a number of legal reform measures that can guarantee indigenous peoples' security of tenure, the focus of this section is on the status of African customary law. Although the discussion in the South African and Namibian case studies focused on constitutional and legislative measures adopted by those states, the overarching theme in each case was the recognition and protection of historically marginalised communities' traditional land tenure systems. Therefore, it would be important to adopt various laws that secure and upgrade indigenous peoples' land tenure systems, particularly as has been done in South Africa. However, in the Kenyan context, one of the crucial issues that hamper security of land tenure and protection of land rights of indigenous peoples' is the inferior status of African customary law. This section identifies the subjugation of indigenous peoples' African customary laws by other written laws as one of the principal reasons why indigenous peoples' land rights are not accorded adequate protection.

Indigenous peoples continue to hold and claim their land rights based on their customary and traditional laws.<sup>1106</sup> This is notwithstanding numerous attempts to suppress and subvert African customary law through the elevation of written laws.<sup>1107</sup> However, due to the imposition of

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<sup>1106</sup> See HWO Okoth-Ogendo, The tragic African commons: A century of expropriation, suppression and subversion, Keynote Address delivered at a workshop on Public Interest Law and Community-Based Property Rights organized by the Lawyers Environmental Action Team, Tanzania and the Centre for Environmental Law, USA, in collaboration with the World Resources Institute, and the International Association for the Study of Common Property, held at the MS-TSC DC Danish Volunteer Centre, Arusha Tanzania, August 1-4, 2000, 7(In file with the author).

<sup>1107</sup> As above; see also Kameri-Mbote (n 354 above) 7.

colonial and post-colonial land laws in Kenya, most of these communities have been deprived of these lands.<sup>1108</sup> This is due to the subjugation of customary laws to written laws and its limited application subject to repugnancy clauses.<sup>1109</sup> Wanjala points out that ‘when the colonial government had accomplished the task of acquiring land from the Kenyan people it aggressively set out to destroy African customary land tenure because the latter was viewed as inhibiting the main goal of economically exploiting all the natural resources found in the colony.’<sup>1110</sup> Okoth-Ogendo holds a similar view and asserts that ‘attempts were made throughout the colonial period to suppress the development and adaptation of customary land tenure regimes. This was effected primarily through legal and administrative contempt of customary law’.<sup>1111</sup>

The destruction and exclusion of African customary law from the land law regime of the time had the effect of dispossessing Africans of their lands. However, while some communities embraced the new land tenure arrangements, most indigenous communities retained their traditional ownership patterns.<sup>1112</sup> To indigenous peoples, customary land tenure provides tenure security to members of the group.<sup>1113</sup> Where African customary land tenure is not accorded legal recognition or is subjugated to other forms of property regime, these communities suffer some of the greatest land injustices legitimized through foreign-imposed land laws. Consequently, they face insurmountable legal challenges in realizing their land rights. This is due to the fact that while

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<sup>1108</sup> See Okoth-Ogendo (n 18 above) 63-65.

<sup>1109</sup> Sec 115(2) Constitution of Kenya.

<sup>1110</sup> See Wanjala (n 26 above) 173.

<sup>1111</sup> See Okoth-Ogendo (n 1106 above) 5; see also Okoth-Ogendo (n 18 above) 63-65.

<sup>1112</sup> See Wanjala (n 26 above, 173).

<sup>1113</sup> See World Bank, *Land policies for growth and poverty reduction* (2003) 54.

legally one may rely on African customary law, its application is limited. According to Okoth-Ogendo, ‘even today, the official policy of the Kenya Government is to achieve the extinction of customary tenure, through systematic adjudication of rights and registration of title, and its replacement with a system akin to the English freehold tenure system’.<sup>1114</sup> The Kenya Judicature Act legitimises such contempt as follows:

The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.<sup>1115</sup>

The exclusion of the application of African customary law on the basis of repugnancy clauses and inconsistency with any written law<sup>1116</sup> limits its scope. This is despite certain written laws being incompatible with community needs and way of life. According to the UN Special Rapporteur on the Rights of Indigenous Peoples, Kenya’s indigenous peoples’ commitment to maintaining their distinct economic, social and cultural characteristics has been a basis of discrimination and subjugation by the State based on the misconception that they hinder modern development.<sup>1117</sup>

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<sup>1114</sup> See HW Okoth-Ogendo, Legislative approaches to customary tenure and tenure reform in East Africa in Toulmin & Quan (n 853 above) 126.

<sup>1115</sup> Sec 3(2) The Kenyan Judicature Act.

<sup>1116</sup> See sec 115(2) Constitution of Kenya.

<sup>1117</sup> Stavenhagen Kenya Mission Report (n 35 above) para 11.

In order to accord indigenous peoples equal protection of law relative to their land rights, it is imperative that their customary laws are treated on a par with other written laws.<sup>1118</sup> The justification for equating African customary law to other written laws, rather than subjugating it, is to eliminate discrimination and ensure equality as enshrined in Kenya's constitutional principles and values as well as international norms and standards.<sup>1119</sup> Indeed, according to the Committee on the Elimination of Racial Discrimination, failure to recognize and respect indigenous customary land tenure is a form of racial discrimination incompatible with the Convention.<sup>1120</sup> The Committee has called upon states 'to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories'.<sup>1121</sup>

The Kenyan Constitution protects against discrimination on the basis of tribe.<sup>1122</sup> Such protection could be construed to mean that any law or provision that discriminates against the laws of a particular community is inconsistent with the Constitution therefore invalid. Accordingly, the subjugation of African customary law to other written laws, which is the basis of indigenous peoples' proof of their land rights, is discriminatory. According equal status in terms of Kenya's

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<sup>1118</sup> Lenaola et al (n 169 above) 231-256; Gilbert (n 34 above) 610.

<sup>1119</sup> See CERD General Recommendation 23 (n 71 above) para 5.

<sup>1120</sup> As above.

<sup>1121</sup> As above.

<sup>1122</sup> Sec 82 Constitution of Kenya.

sources of law would guarantee that indigenous peoples who elect to rely on their African customary laws rather than written laws are not dispossessed of their lands on the grounds that a written law supersedes African customary law. African customary law and the traditions of the indigenous peoples would therefore be sufficient to prove title to their lands.

While the Constitution remains the supreme law, it should take account of the fact that certain communities are still governed by African customary law. To that extent, their preferred laws should not be subjugated to other written laws in as much as these laws are consistent with the principles and values of the Constitution. The values of the Kenya Constitution can be inferred from the Bill of Rights, which prohibits discrimination on listed grounds.<sup>1123</sup> This would entail that indigenous peoples own lands on the basis of their African customary laws so long as the interpretation of those laws conforms to the values of the Bill of Rights. For instance, in the event that customary laws discriminate against women in owning or access to traditional lands, such laws could be found to be inconsistent with the Constitution.<sup>1124</sup> Indeed, the South African Constitutional Court has held that the customary law rule of primogeniture is unjustifiable for unfair discrimination against women.<sup>1125</sup> An indigenous woman who as a result of such

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<sup>1123</sup> See sec 82(3) of the Constitution of Kenya.

<sup>1124</sup> See *Bhe & others v Magistrate, Khayelitsha; Shibi v Sithole and others; SAHRC & another v President of the RSA & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('Bhe'); see also *Tinyiko Shilubana & others v Sidwell Nwamitwa & others* Case CCT 03/07(2008) ZACC 9, <<http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/20080605083932/SIRSI/0/520/J-CCT3-07C>>. In this case the Constitutional Court of South Africa upheld the legitimacy of traditional authorities from develop their customary laws in conformity with the principles and values of the Constitution.

<sup>1125</sup> See *Bhe & others* as above para 179-191.

discrimination is denied the right to own or be part of the management of traditional land resources on which she depends, would find recourse in the constitutional provisions.<sup>1126</sup>

To give effect to such recognition and protection would inevitably require a review of relevant customary laws and practices that are related to such land tenure systems.<sup>1127</sup> This entails a constitutional amendment to purge any ambiguities about the equal status of African customary law in dealing with specific indigenous peoples' issues. It is therefore imperative that the Constitution explicitly provides that African customary law shall apply with equal force to issues dealing with their ancestral lands where the relevant communities so elect.

South Africa's Constitution affirms the important role of customary law in regulating the relationships of the vast majority of its peoples. This Constitution accords African customary law equal status with written laws when dealing with issues relevant to the applicability of customary law subject only to the Constitution.<sup>1128</sup> Like that of Kenya, Namibia's Constitution, subjugates African customary to all other written laws,<sup>1129</sup> but importantly reserves the administration of all

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<sup>1126</sup> As above.

<sup>1127</sup> Para 68 Kenya Draft National Land Policy calls on the Government to (a) Document and map existing customary land tenure systems in consultation with the affected communities, and incorporate them into broad principles that will facilitate the orderly evolution of customary land law; and (b) Establish a clear legislative framework and procedures for recognition, protection and registration of customary rights to land and land based resources. The envisaged legislative framework and procedures will in particular take into account multiple interests of all land users including women.

<sup>1128</sup> See sec 211(3) Constitution of South Africa.

<sup>1129</sup> See art 66 of the Constitution of Namibia.

communal land rights in Namibia to African customary law.<sup>1130</sup> Namibia's Constitution provides for traditional authorities to advise the President on the control and utilisation of communal lands.<sup>1131</sup> Accordingly, the governance of communal land in Namibia is based on African customary law. Traditional authorities in Namibia have gone a step further by requiring all communities under the jurisdiction of these authorities to restate their African customary law to ensure consistency and easily available rules when adjudicating on issues affecting these communities.<sup>1132</sup> As will be argued below, the process of restatement of African customary law is a useful undertaking for the recognition and equal treatment of African customary.

In Kenya, the application of customary law in dealing with the question of land is reserved to areas inhabited by local communities through what is known as trust lands.<sup>1133</sup> There are multiple customary land tenure systems reflecting Kenya's diverse ethnic composition of more than 42 tribes. This means that the applicable customary law would be for the particular community that is resident in the area in question. Furthermore, while there are as many different customary laws as there are diverse communities in Kenya, there are similarities.<sup>1134</sup> First, the rights of access and use to specific ancestral lands are reserved to related members of that particular

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<sup>1130</sup> See Communal Land Reform Act No 5 of 2002; see a discussion on that application in Hinz (n 933 above) 76.

<sup>1131</sup> See sec 102(5) Constitution of Namibia.

<sup>1132</sup> See Hinz (n 933 above) 85.

<sup>1133</sup> See sec 115(2) Constitution of Kenya.

<sup>1134</sup> See TO Elias *The Nature of African customary law*, Manchester University Press (1956) 3 citing C Dundas, Native Laws of some Bantu Tribes of East Africa (1921)51 *Journal of Royal Anthropological Institute* 217-78 whose observed: In all these tribes I observed a similarity in their conceptions of law and practice which suggest to me that certain principles might be common to all Bantu of these countries.

community.<sup>1135</sup> The relationship can either be through blood, marriage or such other special connection as determined by the community.<sup>1136</sup> Second, the community leadership, which normally comprises of elders, is vested with the right to land resources.<sup>1137</sup> They govern and determine the community and individual needs in order to ensure sustainable management of the resources.<sup>1138</sup>

There is evidence of the existence of clear customary laws governing various relations among the different communities in Kenya.<sup>1139</sup> According to Laurence Juma, ‘the traditional African legal systems comprised, not only of rules derived from customs, but also legislation and precedents of important previous cases.’<sup>1140</sup> Indeed, pre-colonial African societies had elaborate rules and laws that governed almost every aspect of their communities.<sup>1141</sup> According to Olawale Elias, while undoubtedly there were applicable laws and customs governing African relations before colonialism, they have become subjugated to foreign-imposed laws.<sup>1142</sup> He states:

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<sup>1135</sup> See HWO Okoth-Ogendo ‘Some issues of theory in the study of tenure relations in African Agriculture’ (1989) 59 (1) *Africa* 6–17, 11.

<sup>1136</sup> C Waiganjo & PE Ngugi ‘The effects of existing land tenure systems on land use in Kenya today’ in *International Conference on Spatial Information for Sustainable Development Nairobi, Kenya 2–5 October 2001*, 3 (in file).

<sup>1137</sup> As above.

<sup>1138</sup> As above.

<sup>1139</sup> Juma (n 5 above) 470.

<sup>1140</sup> As above.

<sup>1141</sup> See Elias (n 1134 above) 2.

<sup>1142</sup> As above, 5.



All too often, one finds that the majority of persons in the legal world of Europe and America entertain curious notions regarding African legal ideas and institutions, varying from the vague scepticism of those who think that there were no such thing as laws in Africa before the advent of Europeans to those who while admitting that there were such laws, yet demand a wholesale eradication of what exists and the substitution therefore of imported European legal concepts. This narrow attitude stems from the approach which judges everything African in terms of European standards and values which dismisses out of hand anything that does not conform to such patterns.<sup>1143</sup>

Upon independence, Kenya adopted wholesale most colonial laws, which have been retained to date. These are laws and legal principles that continue to disregard the application of African customary law, or, where they do, treat it as inferior to the borrowed legal concepts. Therefore, despite the existence of clear customary laws, their application and acceptance in court is fraught with difficulties. For instance, most customary laws have been passed on orally from one generation to the next or through practice and are generally not recorded.<sup>1144</sup>

Courts of law in Kenya require that whoever relies on custom proves his/her case by adducing sufficient evidence to prove the existence of the customary law.<sup>1145</sup> This requirement applies

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<sup>1143</sup> Elias (n 1134 above) 5.

<sup>1144</sup> See Ogot (n 13 above) ix; see Elias (n 1134 above) 2.

<sup>1145</sup> See Juma (n 5 above) 505; see also *Kimani v Gikanga*, (1965) E. A. 753: The Court held that: As a matter of necessity, the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done, but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of present apparent lack in Kenya, of authoritative text books on the subject, or of any relevant case law, this would in practice usually mean that the party propounding customary law would have to prove that customary law, as he would prove the relevant facts of his case. Case cited in Laurence Juma as above. That position remains to date as seen in the *John Kiraithe Mugambi v Director of Land Adjudication & Settlement & 3 Others* Civil suit 1011 of 1998 reported in 2005 (eKLR) 7 The court held that ‘ it is now part of the jurisprudence of Kenya’s superior courts that customary law propositions must be proved by evidence’.

despite the fact that the Evidence Act, which governs what can be adduced in court to prove one's case, provides that judicial officers 'should take judicial notice of . . . all written laws, and all laws, rules and principles, written or unwritten, having the force of law.'<sup>1146</sup> Customary law would fall within the 'unwritten laws, rules and principles' that have the force of law in certain matters governing traditional lands and personal laws.<sup>1147</sup> One therefore expects that courts of law would take judicial notice of existing customary laws governing particular relationships, especially with regard to land claims based on customs and traditions.

However, while Kenyan courts have at times taken judicial notice of customs related to certain types of personal dispute,<sup>1148</sup> such inheritance and marriage, they have not done so with regard to land disputes involving indigenous peoples.<sup>1149</sup> Indeed, where indigenous communities have sought to rely on their customary laws to prove title to land, courts have insisted on strict evidentiary proof of such customary law.<sup>1150</sup> The requirement of sufficient evidence by courts to support an assertion of customary law is not in itself in issue. The problem arises where such evidence is treated as insufficient on the basis that it is not corroborated by archival records or

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<sup>1146</sup> Sec 60(a) Evidence Act Laws of Kenya, Cap 80 (1989).

<sup>1147</sup> Sec 13 as above provides that evidence of custom and practices are relevant and admissible.

<sup>1148</sup> The application of customary in Kenya is with regard to personal law. According to sec 2 Kenya Magistrate's Courts Act (1967) a 'claim under customary law is ' as any claim concerning; Land held under Customary tenure; Marriage divorce, maintenance or dowry; Seduction or pregnancy of unmarried woman or girl; Enticement of or adultery with a married woman; Divorce under African Customary Law.

<sup>1149</sup> See *Gichuru v Gachuhi*, Civil Appeal No. 76 of 1998 (where the court held that "[I]t is settled law that under the Kikuyu custom land is inherited by sons."): Contrast with the *Ogiek* case (n 3 above) 1, 15 where the court held that the community did not adduce sufficient evidence as to its entitlement under their customary law.

<sup>1150</sup> See *Ogiek* case (n 3 above) 15.

experts.<sup>1151</sup> As the court acknowledges, such documentary evidence and verifiable expertise is generally lacking in Kenya.<sup>1152</sup> Therefore, proof of customary law is reliant on witnesses, whose interpretations may vary.<sup>1153</sup> Although there are certain individuals who have through the years attained what would be regarded as expertise in the customary laws of the community, there is no guarantee that they will always be available to provide the required evidence.<sup>1154</sup> The problem of language is another factor to consider in that most of the witnesses use their indigenous language and rely on an interpreter to relate their account to the courts.

These problems are bound to remain as long as courts continue to rely solely on oral evidence to prove the existence of customary law, especially in cases where they are not willing to take judicial notice of an established custom. One way of dealing with the problem of lack of documentary evidence of the existence of African customary law would be to restate<sup>1155</sup> and

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<sup>1151</sup> See *Kimani v Gikanga* (n 1145 above): The Court held that: As a matter of necessity, the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done, but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of present apparent lack in Kenya, of authoritative text books on the subject, or of any relevant case law, this would in practice usually mean that the party propounding customary law would have to prove that customary law, as he would prove the relevant facts of his case. That position remains to date as seen in the *John Kiraithe Mugambi v Director of Land Adjudication & Settlement & 3 Others* (n 1145 above) 7. The court held that ‘it is now part of the jurisprudence of Kenya’s superior courts that customary law propositions must be proved by evidence’.

<sup>1152</sup> As above.

<sup>1153</sup> On some of the dangers of relying on oral evidence of customary law see Ogot (n 13 above) ix-xi. These include but not limited to problems of translation, language and stereotyping by the recipient of the information; see also Elias (n 1134 above) 2.

<sup>1154</sup> See Elias (n 1134 above) 2.

<sup>1155</sup> The use of the term restatement of African customary law does not amount or intended to imply codification of African customary law. It is submitted that the two are different and while codification entails enactment of African customary laws into a formal Act of Parliament, restatement on the other hand for purposes of this thesis means the act of recording what is already known and indeed the practice, custom and tradition of communities for purposes of easy reference and use particularly as evidence and proof of land rights in

document the relevant African customary laws, as is being done Namibia.<sup>1156</sup> For purposes of this thesis, restatement of African customary is distinguished from codification, which entails drafting formal laws based on the rules, customs and traditions expressed by the community.<sup>1157</sup> A code inevitably reduces the various customary laws to legally expressed principles that may not reflect the spirit and intention of the custom.<sup>1158</sup> Restatement, on the other hand, merely expresses in writing the community's customs, traditions and rules as related to a particular subject without reducing them to a legal code.<sup>1159</sup>

The restatement of African customary laws should be the sole initiative of indigenous peoples and should be done in their own language.<sup>1160</sup> That way the customs, traditions and rules would not be altered by legal principles as would be the case in the case of codification.<sup>1161</sup> The restated African customary law would ensure that the laws are easily available and applicable for anyone relying on such laws. Courts of law would for instance revert to the restated laws while

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accordance with African customary law; see more detailed discussion and critics on restatement of African customary law as attempted by the Restatement of African Law Project of the School of Oriental Studies in London in AN Allot 'Codification and unification of laws in Africa, Colloquium on African Law' (1963) 7(2) *Journal of African Law* 73-83; see also CMN White 'African customary law: The problem of concept and definition' (1965) 9(2) *Journal of African Law* 87-89; see also Roberts-Wray 'The need for the study of native law' (1957) 1(2) *Journal of African Law* 82-86.

<sup>1156</sup> See Hinz (n 933 above) 85.

<sup>1157</sup> See Chanock (n 736 above) 248-249; see also Bennett (n 806 above) 46-47; 70; see Allot (n 1155 above) 77; see also L Cotula 'Introduction' in Cotula (n 273 above) 7.

<sup>1158</sup> As above.

<sup>1159</sup> See also Bennett (n 806 above) 62 citing examples of attempts of gathering information into texts by some scholars on certain African customary practices.

<sup>1160</sup> See Lavigne-Delville, P, 'Harmonising formal law and customary land rights in French-speaking West Africa' in Toulmin & Quan (n 853 above) 114-118.

<sup>1161</sup> Chanock (n 736 above) 248-249; see also Bennett (n 806 above) 46-47, 70; see also Allot (n 1155 above) 77.

determining cases invoking customary law. Such restatement would be particularly important for indigenous peoples whose customs may not have been invoked often enough to become established law. Such an exercise is not without its limitations and constraints. The main hurdle is that there are over 42 tribes in Kenya with an almost equal number of customary laws. It would be an arduous task restating all the applicable customary laws, which span the many facets of the communities' personal laws. The other obstacle with the process of restatement is the fact that most African customary laws remain largely unwritten.<sup>1162</sup> However, despite these laws being unwritten, they continue to govern indigenous peoples' relationship with their land.<sup>1163</sup> The process of restatement would therefore require massive coordination, support and resources.

While this would be an enormous task, the benefits, particularly for groups that rely on customary law, would be worth the effort. Restating relevant aspects of customary law will ensure that it is easily available for future generations and interpretation in courts of law whenever it is invoked by communities and individuals relying on such laws as proof of the existence of their rights, and that it conforms to the Bill of Rights. Customary law would no longer be treated as an inferior source of the law, whose interpretation varies with the evidence adduced and the judge presiding.<sup>1164</sup>

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<sup>1162</sup> See Elias (n 1134 above) 7.

<sup>1163</sup> Cotula (n 273 above) 6.

<sup>1164</sup> See generally E Cotran *Casebook on Kenya customary law* (1988); see also E Cotran 'The future of customary law in Kenya' in JB Ojwang & JNK Mugambi (eds) *The S.M. Otiemo Case: Death and Burial in Modern Kenya* (1989)149-164.

Arguments against restatement of customary law are normally made on the basis that culture is dynamic and evolving and, as such, with the passage of time, what was once regarded as custom may have become redundant.<sup>1165</sup> It is also argued that restating customary law would amount to codification of the rules and customary laws, which is contrary to the very nature of African customary law.<sup>1166</sup> It has been argued that restating African customary laws is akin to codifying African customary law, which would make it rigid and out of date as society changes.<sup>1167</sup> Indeed, an attempt to codify African customary law in KwaZulu-Natal was ‘derided for distortion of customary law’.<sup>1168</sup> While, the restatement of African customary laws may be seen as codification, it is not. The aim of restatement of the African customary law would be to put into writing what is already a known custom, practice or tradition as generally accepted by the community. It does not amount to enacting a law in the conventional legislative method. Rather, it is a community effort to state and put in writing what is generally considered their customary law with regard to particular issues.

It is not true that a written rule or custom, simply because it is recorded, loses the dynamism that is found in African customary law. While culture may change over time, restating what is already known does not mean it can not be updated to reflect any changes and that it would make culture become obsolete, as is often argued.<sup>1169</sup> Any changes that occur in any culture or

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<sup>1165</sup> Juma (n 5 above) 476.

<sup>1166</sup> See Bennett (n 871 above) 139; see some attempts at codification of African customary in Natal South Africa during the apartheid regime in Chanock (n 736 above) 246-250.

<sup>1167</sup> As above.

<sup>1168</sup> See A Costa ‘The myth of customary law (1991) 14 (4) *South African Journal of Human Rights*, 531.

<sup>1169</sup> Juma (n 5 above) 476.

traditions are normally to ensure that the cultural practices remain attuned to developments within the community, such as a variation in their economic and cultural practices.<sup>1170</sup> It would therefore not be difficult to update such developments in recorded customary laws to reflect such changes. Indeed some form of recording of African customary law is already evident when courts of law take judicial notice of certain customary laws through precedents.<sup>1171</sup> Where the custom has changed, courts of law are not bound to follow the precedents and will reflect the new custom.<sup>1172</sup> Similarly, where custom changes and submissions are made to that effect, the restated laws can be updated or amended to be in line with the changes.<sup>1173</sup> Although updating restated African customary laws may be problematic and difficult, if it is to be treated as equal to others written sources of law, no time and effort should be spared to ensure that it is done expeditiously.

Given that the application of African customary law is limited to particular and specific matters, restating such rules is possible. Additionally, the restatement of the laws would be done in accordance with the submissions of the communities that seek reliance on these laws and within the respective geographical locations. Indeed, according to Kenya's Constitution, the application of African customary law is reserved for trust lands.<sup>1174</sup> Such lands are held in trust by the local

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<sup>1170</sup> As above; see also D Fitzpatrick "Best practice" options for the legal recognition of customary tenure' (2005) 36 (3) *Development and Change* 455; see also HWO Okoth-Ogendo 'Legislative approaches to customary tenure and tenure reform in East Africa' in Toulmin & Quan (n 853 above) 133.

<sup>1171</sup> See Bennett (n 871 above) 138-9.

<sup>1172</sup> See *Alexkor v Richtersveld Community* (n 72 above) para 52 and 53.

<sup>1173</sup> See Fitzpatrick (n 1170 above) 455.

<sup>1174</sup> See sec 115(2) Constitution of Kenya.

authorities where specific communities ordinarily reside.<sup>1175</sup> Among the Maasai, for example, clear customary rules on land control, access and management exist.<sup>1176</sup> It is instructive that while the Maasai have lost most of their traditional lands to other communities, they still inhabit the remnants of their customary lands.<sup>1177</sup>

The applicable African customary law in such circumstances would be that of the community that is ordinarily resident within the jurisdiction of the local authority.<sup>1178</sup> It is worth noting that all Kenyans have a right to reside in any part of the country, including areas inhabited by indigenous peoples.<sup>1179</sup> However, the Constitution allows for limitations to that right if a law provides ‘for the imposition of restrictions on the acquisition or use by any person of land or other property in Kenya’.<sup>1180</sup> Such a restriction is relevant with regard to the application of African customary law in lands occupied by indigenous peoples. Presently, the legal framework does not place restrictions on other individuals owning or acquiring property belonging to indigenous peoples. According to some of the indigenous peoples’ customary laws, such lands are reserved exclusively for their own use.<sup>1181</sup> However, since customary laws are subject to written laws and

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<sup>1175</sup> Sec 115 Constitution of Kenya.

<sup>1176</sup> See *Lenaola et al* (n 169 above) 237.

<sup>1177</sup> As above.

<sup>1178</sup> As above.

<sup>1179</sup> See sec 81 (1) Constitution of Kenya: No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.

<sup>1180</sup> Section 81 (3) d Constitution of Kenya.

<sup>1181</sup> See for example the case of the Maasai in *Hughes* (n 241 above) 14; see also *Ngugi* (n 104 above) 328-330.



since they remain largely unknown, the restriction on who can acquire and own such land is disregarded.

Another advantage of restating the rules is to ensure that they conform to the values and principles of the Bill of Rights.<sup>1182</sup> While admittedly such an exercise could be deemed as tantamount to legislating customary law- it is submitted that it is not legislation. The restatement process as proposed earlier would not follow the normal official legislation process of acts of parliament. The restatement process would be the preserve of the community and with appropriate advocacy and training, community members would determine and ensure conformity to the Bill of Rights. Such a process is imperative in order to guard against discriminatory practices being sanctioned as customary law, since that law – as is the case with other sources of law – is not immune to the values and norms of the Constitution. The restatement process would also ensure that there are no inconsistencies when applying African customary law to determine the rights sought by indigenous peoples. It also gives a voice to these communities to determine how best they want to be governed and in accordance with their preferred way of life, traditions and cultures. Closely related to the application of customary laws with regard to indigenous peoples' land rights are laws regulating trust lands. Given that most indigenous peoples occupy trust lands whose administration is primarily governed by customary laws, it is imperative that they are also reviewed.

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<sup>1182</sup> Fitzpatrick (n 1170 above) 467-469.

As discussed in chapter four, the concept of trust lands in Kenya has failed to protect indigenous peoples' rights to land based on African customary law.<sup>1183</sup> The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya noted that there was widespread breach of trust and failure by the Government to protect ancestral land.<sup>1184</sup> Most of this land, whilst falling within the ambit of trust lands and therefore ostensibly protected by the Constitution and the Trust Land Act, had illegally been alienated to individuals. According to that Commission, 'the illegal allocation of trusts lands and other lands reserved for the use of communities is a sad testimony of the dismal failure of local authorities in terms of governance. Instead of playing their role as custodians of local resources including land, county and municipal councils have posed the greatest danger to these resources'.<sup>1185</sup> It is apparent that local authorities are certainly not well positioned to protect the rights of the local communities through the trust relationship. Indeed, the Commission's inquiries revealed that the illegal allocations had been sanctioned by the council whose members were in fact some of the beneficiaries.<sup>1186</sup>

It is on this basis that a review of the Trust Land Act is called for.<sup>1187</sup> Given the inability by local authorities to protect land belonging to local inhabitants from illegal expropriation, it is imperative that land is vested directly in the indigenous communities.<sup>1188</sup> According to Daniel Fitzpatrick, 'the systematic imposition of individualized statutory titles in areas subject to

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<sup>1183</sup> See Ndung'u (n 1 above) 147; see also Kenya Draft National Land Policy para 65-71.

<sup>1184</sup> As above.

<sup>1185</sup> As above.

<sup>1186</sup> See Ndung'u (n 1 above) 147.

<sup>1187</sup> See Lenaola *et al* (n 169 above) 231.

<sup>1188</sup> Fitzpatrick (n 1170 above) 465.

customary tenure has generally failed to increase certainty and reduce conflict'.<sup>1189</sup> In Kenya it would be imperative to amend the Constitution and statutes to pave way for the recognition and equal application of customary law in governing indigenous peoples' land rights. A legal framework that accords such recognition and protection would equally guard against compromise through corrupt practices and political interference.<sup>1190</sup>

For instance, it could explicitly provide that only indigenous members of the community have rights to determine allocations through their established cultural and traditional leadership structures. That way the applicable indigenous peoples' African customary law would guard against encroachment of indigenous peoples' land rights by individuals who would otherwise be excluded by the African customary law of a particular indigenous community.<sup>1191</sup> The indigenous peoples' land rights would in such circumstances be properly recorded and if need be demarcated in the name of the community.<sup>1192</sup> That would also require state and legal recognition of traditional leadership and structures of indigenous communities.<sup>1193</sup> However, it is important to reiterate that traditional leaders should not be vested with all powers relative to the land rights of indigenous peoples but rather such powers as to ensure that community members enjoy their land

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<sup>1189</sup> Fitzpatrick (n 1170) 465.

<sup>1190</sup> See generally M Mamdani *Citizen and subject: contemporary Africa and the legacy of late colonialism* (1996) 42–6.

<sup>1191</sup> See Bennett (n 804 above) 152; see also DW Bromley DW 'Property relations and economic development: The other land reform' (1989) 17(6) *World Development* 867-877; see also Lenaola *et al* (n 169 above) 240; see also World Bank Policy Review Report on Land Policy (2003) 76.

<sup>1192</sup> See Fitzpatrick (n 1170 above) 465-466.

<sup>1193</sup> As above 458.

rights.<sup>1194</sup> The traditional leaders should exercise powers vested in them by African customary law and not statutory powers. Conferring statutory powers on traditional authorities, as illustrated by the South African case, may, instead of guaranteeing security of tenure, actually dilute indigenous peoples' land rights.<sup>1195</sup>

That said, it is important to provide for constitutional and legislative recognition of traditional leadership to govern issues relevant to indigenous peoples.<sup>1196</sup> This would ensure that, while they exercise powers based on African customary law, such powers must be consistent with the values and principles of the constitutional Bill of Rights. The Kenya Draft National Policy urges the government to 'incorporate customary mechanisms for land management and dispute resolution in the overall national framework for harnessing land and land based resources for development. It should also invest in capacity building for traditional land governance institutions'.<sup>1197</sup> The policy further proposes that the government 'develop procedures to govern community land transactions using participatory processes'.<sup>1198</sup> Should these recommendations be implemented, indigenous peoples will begin taking charge and control of their land rights.

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<sup>1194</sup> See Cousins (n 743 above) 308-309; see also Bennett & Murray (n 861 above) 26: 64-67

<sup>1195</sup> See Cousins (n 743 above) 308-309.

<sup>1196</sup> See sec 102(5) Constitution of Namibia; Namibia Council of Traditional Leaders Act, 13 of 1997; In South Africa see secs 211 and 212 of the Constitution; see also examples of traditional authorities (village councils) management of traditional resources in Tanzania, Botswana, Lesotho and Swaziland in Fitzpatrick (n 1170 above) 465; see also generally Cotula (n 273 above).

<sup>1197</sup> See paras 68(e) & (f) Kenya Draft National Land Policy.

<sup>1198</sup> Para 68 (d) as above.

## 6.5 Conclusion

This thesis has made a case for the protection of one of the core rights sought by indigenous peoples in Kenya, namely rights to their traditional lands. The thesis has revealed that indigenous peoples in Kenya continue to suffer from discrimination in fact and in law. The legal framework has been employed to marginalize these communities and dispossess them of their traditional lands. For instance, the Maasai case study illustrates how the law was employed ostensibly to ‘protect’ their land rights through the enactment of the group ranches scheme, but in reality it was reflective of the dominant groups’ and state’s assimilation policies. The group ranches scheme and eventual sub-division was from inception calculated to individualize the community’s lands.

The thesis has argued that to redress such discrimination and dispossession, courts of law have a duty to protect these marginalized groups through a progressive interpretation of the existing legal framework. The Ogiek case study highlights the narrow interpretation of the legal framework by Kenyan courts of law with regard to the question of indigenous peoples’ land rights. The thesis argues that a progressive interpretation of the law, evident in emerging jurisprudence from comparable jurisdictions, points to a growing recognition of indigenous peoples’ land rights.

The thesis also highlighted positive developments within the international standard-setting and monitoring mechanisms which accord protection to indigenous peoples’ rights. With recourse to international standards and comparative jurisprudence, the thesis has argued that indigenous peoples in Kenya are vested with rights to their traditional lands which deserve legal protection. The international legal framework has afforded previously non-represented peoples with a voice

to air and share their predicament and dire circumstances before international standard-setting bodies. It is therefore useful for groups self-identifying as indigenous peoples in Kenya, to identify with the global indigenous peoples' rights movement. Retention of such an association is important for indigenous peoples, given the benefits that could be derived, which include legal standards and social support to sustain their rights campaign.

However, while the current legal framework in Kenya has the potential to recognize and protect indigenous peoples' land rights, if progressively interpreted, there is no guarantee that courts will do so. It is therefore imperative to adopt legal reforms that would provide for express and unequivocal provisions that recognize and protect the land rights of historically and presently marginalised communities alongside those of indigenous peoples. As discussed in chapter five, South Africa and Namibia have adopted such legal reforms, some of which could inform a suitable legal framework in Kenya that vindicates indigenous people's land rights. In particular, Kenya's circumstances demand the adoption of reforms that include amendment of the laws to legitimize land restitution and land redistribution. The status and applicability of African customary law should also be reviewed to ensure that such laws are accorded equal status with written sources of law. It has been argued that such a process would entail restatement of applicable African customary laws in order to make them more readily available whenever they are invoked as proof of indigenous peoples' land rights. The political crisis in Kenya following the 2007 presidential elections has created a window of opportunity for the introduction of such legal reforms.

Indigenous peoples' lack of capacity to espouse their claims remains one of the key barriers to their realizing fundamental human rights. Beyond legal resources, indigenous peoples require the

economic means to survive which is hampered by their continued exclusion from state policies and development initiatives. The right to life, protection from deprivation of property, non-discrimination and equality clauses in most states' constitutions, as was argued in the thesis, provide clear legal resources which indigenous peoples can rely upon to espouse their land rights. However, these legal resources are dependent upon the marginalised peoples' capacity to invoke them before the relevant fora to give meaning to their land rights. Accordingly, while the availability of legal resources is important, it is certainly not an end in itself. It should be coupled with other socio-economic empowerment measures that include rights awareness, sensitization and the means to invoke rights when they are violated. Other possible means of achieving recognition of indigenous peoples' land rights include lobbying, negotiation, non-violent agitation and mass action.