

VINDICATING INDIGENOUS PEOPLES' LAND RIGHTS IN KENYA

By

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DECLARATION

I declare that this thesis which I submit for the degree: Doctor of Laws at the University of Pretoria is my own original work and has not previously been submitted by me for a degree at another University. All primary and secondary sources used have been duly acknowledged.

George Mukundi Wachira

Date



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DEDICATION

Kenya's indigenous peoples who continue to struggle for adequate legal recognition and protection of their ancestral land rights.

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SUMMARY

This thesis examines the extent to which Kenya's domestic legal framework vindicates indigenous peoples' land rights. The question of who is an indigenous person in Kenya is, of course, controversial. In order to avoid becoming enmeshed in this debate, this thesis adopts the approach of the African Commission on Human and Peoples' Rights, which is based on identifying the key concerns faced by marginalised communities who self-identify as indigenous peoples. Such an approach assumes that it really does not matter which label attaches to a group of people when vindicating their fundamental rights, provided that those rights are indeed available to be vindicated. In keeping with this assumption, the main argument of this thesis is that indigenous peoples' core claim to land rights in Kenya can be accommodated within the mainstream legal framework, including the Constitution, legislation, and judicial decisions.

In arguing thus, this thesis contradicts the common assumption, shared by numerous African states, that satisfying indigenous peoples' claims requires a special legal framework. This assumption is all too often used to deny indigenous peoples' claims on the basis that satisfying them requires preferential treatment. On the contrary, this thesis argues, it is possible to meet indigenous peoples' claims by adopting general legal measures aimed at redressing past injustices and continuing socio-economic deprivation and inequality.

This thesis further argues that measures aimed at redressing past injustices and alleviating current socio-economic inequality should take into account the particular circumstances of the groups targeted. In the case of indigenous peoples, who rely on their traditional lands for economic

sustenance, and for whom land has a special cultural and spiritual significance, this means that the restitution of land should be central to any attempt to redress their particular concerns.

As a practical matter, indigenous peoples' land rights in Kenya may be vindicated in two main ways. The first is through a progressive interpretation of the existing legal framework by courts. Such interpretation hinges on giving effect to existing provisions in Kenya's Constitution, particularly the right to life, non-discrimination and equality, protection from deprivation of property, and the Trust lands provisions. Progressive interpretation of the existing legal framework could also include recognition and application of the concept of indigenous title.

The second way in which indigenous peoples' land rights may be vindicated is by reforming the law to cater for all previously marginalised groups. Such reforms should include support for land restitution and redistribution, and equal application of African customary law.

The first way in which indigenous peoples' land rights may be vindicated is predicated on judicial activism. Using a court case by the Ogiek indigenous community, this thesis argues that, while the Kenyan legal framework has the potential to protect the land rights of indigenous peoples, its interpretation by the courts has been restrictive. It is therefore imperative that the law should be reformed to accommodate the rights of all marginalised groups. Such reforms need not be specifically designed to protect indigenous peoples, but rather all communities and individuals who are not adequately protected by the existing legal framework.

A case study of the Maasai indigenous community is also undertaken to highlight the limitations of assimilationist legal measures that, far from protecting the groups they are meant to assist,

instead entrench the *status quo*. The Maasai group ranches scheme, while ostensibly anchored in the legal framework, was designed to convert otherwise harmonious community land relations to a statutory regime that ignored community traditions and the Maasai's preferred way of life. The failure of this scheme and the eventual subdivision of Maasai land provide strong evidence of the lack of appreciation and regard for Kenya's indigenous peoples and the fundamental principles of justice, non-discrimination and equality prevailing at that time.

The legal reform option for vindicating indigenous peoples' rights is dependent upon political processes. By recourse to two comparable experiences, South Africa and Namibia, the thesis demonstrates that indigenous peoples' land rights can be vindicated through a legal framework adopted to cater for all previously marginalized groups. Albeit fraught with constraints, South Africa's indigenous peoples have utilised the legal reforms that were enacted to redress the historical injustices of the apartheid regime. Although Namibia has also adopted some legal reforms, especially relating to land redistribution, the apparent lack of political will to address the rights of her most marginalised communities hampers their effectiveness.

The Namibian case shows that political processes can not be relied upon to right the wrongs suffered by marginalised peoples, especially when those groups lack political clout. However, as in South Africa, where the end of apartheid provided an ideal political environment to press for reforms that would cater for marginalised peoples' needs, the political crisis following the December 2007 elections in Kenya provides an important window of opportunity. In the negotiations that followed this crisis, land reform has been identified as one of the key issues that demands comprehensive resolution for peace and prosperity to prevail. It is therefore imperative that genuine reforms that accord all Kenyan people an equitable share of her resources and

address historical land injustices are adopted. Such reforms, it is argued, would enable indigenous peoples to vindicate their land rights, alongside other marginalised peoples.



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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AG	Attorney General
AHG/AU	Assembly of Heads of State and Government of the African Union
AHRLR	African Human Rights Law Reports
AIR	All India Reports
APRM	African Peer Review Mechanism of the New Partnership for Africa's Development
BCLR	Butterworth's Constitutional Law Reports
BWHC	High Court of Botswana
CC	Constitutional Court of South Africa
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEMIRIDE	Centre for Minority Rights Development-A Kenyan NGO
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CHRLD	Commonwealth Human Rights Law Digest
CLR	Commonwealth Law Reports
CPA	South Africa Community Property Associations
DFID	Department of International Development- United Kingdom
DLR	Dominion Law Reports-Canada
EA	East Africa
ECOSOC	United Nations Economic and Social Council
eKLR	electronic Kenya Law Reports
eKLR (E & L)	electronic Kenya Law Reports (Environmental and Land Law Reports)
HRC	United Nations Human Rights Committee
HRW	Human Rights Watch
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IIED	International Institute for Environment and Development
ILO	International Labour Organization
IWGIA	International Work Group for Indigenous Affairs
LCC	Land Claims Court-South Africa
MLJ	Malayan Law Journal-Malaysia
NEPAD	New Partnership for Africa's Development
NGO	Non Governmental Organization

NRI	Natural Resources Institute
OHCHR	Office of the High Commissioner for Human Rights
RDP	Reconstruction and Development Programme of South Africa
RLA	Registered Land Act of 1963 Laws of Kenya Cap 300
SA	South Africa
SAFLII	South African Legal Information Institute
SALR	South Africa Law Reports
SCA	Supreme Court of Appeal of South Africa
SERAC	Social and Economics Rights Action Centre- A Nigerian based NGO
UN	United Nations
UNGA	United Nations General Assembly
USA	United States of America
WIR	West Indian Reports
TSAR	Tydskrif vir Suid-Afrikaanse Reg

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

One of the greatest challenges that post-independent Kenya faces is how to resolve competing claims over land.¹ On the one hand, are the genuine claims of the original inhabitants of particular lands, and, on the other, the claims of legal title holders who occupy the same land.² Today, some of the original inhabitants of those lands demand and claim restitution of their traditional land rights on the basis that they were dispossessed through historical and prevailing discriminatory legal processes.³ Some of those groups do not have legal title to the lands they now claim, basing their demands on their customary laws, traditions and pre-colonial occupation.⁴ However, Kenya's legal framework subjugates African customary law to written laws.⁵ Consequently, legal title holders continue to own disputed lands, a situation that today threatens to erupt into a major ethnic conflict.⁶

¹ See Report of the Office of the High Commission for Human Rights Fact-finding Mission to Kenya, 6-28 February 2008, 6 <<http://www.ohchr.org/Documents/Press/OHCHRKenya-report.pdf>> accessed 22 March 2008(OHCHR Kenya Report); see also the Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, Government Printer, Nairobi, 2004, 1(Ndung'u Report).

² As above; see also Country Review Report of the Republic of Kenya, African Peer Review mechanism, May 2006 (Kenya APRM Report) 47-62.

³ See for example, *Kemai and 9 others v AG and 3 others* Civil case No 238 of 1999 in eKLR (E& I) (*Ogiek* case); see also *Communication 276/2003, Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya* (Endorois case) (As of June 2008, the communication was still under consideration by the African Commission on Human and Peoples' Rights (ACHPR); see also Ndung'u Report (n 1 above) 1-22.

⁴ See OHCHR Kenya Report (n 1 above); see generally on indigenous peoples struggles to reclaim their ancestral lands in a report prepared by EI Daes 'Indigenous peoples and their relationship to land: Final working paper' UN Doc E/CN.4/SUB.2/2001/21(Daes final working paper).

⁵ See sec 115(2) Constitution of Kenya, Laws of Kenya, Revised Edition (1998) 1992; sec 3(2) Kenya Judicature Act, Laws of Kenya Cap 8; see also L Juma 'Reconciling African customary law and human

Indeed, the eruption of violence in Kenya after a disputed presidential election in December 2007 highlighted underlying issues of conflict among the more than 42 ethnic tribes scattered across the country.⁷ Beyond the electoral dispute, historical land injustices in Kenya emerged as one of the root causes of the violence and related conflicts.⁸ These injustices are aptly captured by a recent Kenya Draft National Land Policy:

Historical injustices are land grievances which stretch back to colonial land policies and laws that resulted in mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date. Sources of these grievances include land adjudication and registration laws and processes, treaties and agreements between local communities and the British. The grievances remain unresolved because successive post independence Governments have failed to address them in a holistic manner. In the post-independence period, the problem has been exacerbated by the lack of clear, relevant and comprehensive policies and laws.⁹

rights in Kenya: Making a case for institutional reformation and revitalization of customary adjudication processes' (2002) 14 *Saint Thomas Law Review* 505.

⁶ See HRW 'Ballots to bullets, organised political violence and Kenyan crisis of governance' 2008 (20) 1A *Human Rights Watch* 12-14; see also Ndung'u Report (n 1 above) 140-142.

⁷ See HRW (n 6 as above); see also Kenya General Election 27 December 2007, The Report of the Commonwealth Observer Group, Commonwealth Secretariat (2007) 28; Although there could be more than 42 ethnic communities in Kenya, officially the State claims that there are about 42 ethnic communities see Kenya's initial State Report to the ACHPR pursuant to its obligations under art 62 of the African Charter on Human and Peoples' Rights (African Charter) considered during the 41st Ordinary Session of the ACHPR in Accra, Ghana, in May 2007, para 5; see the Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, R Stavenhagen, Mission to Kenya, A/HRC/4/32/Add3 26 February 2007 (Stavenhagen Kenya Mission Report) para 21 citing the 1989 national census which omits the Ogiek, El Molo, Watta, Munyayaya, Yakuu and other smaller ethnic groups from the list of 42 tribes of Kenya.

⁸ Other causes of the conflict include the inequitable distribution of state resources such as jobs, infrastructure, skewed economic policies that fail to address the needs and demands of the poor and clamour for political power; see P Kagwanja 'Breaking Kenya's impasse, chaos or courts' 2008 (1) *Africa Policy Institute*, 1.

⁹ See Draft National Land Policy, Government of Kenya, Nairobi, 2006, para 190.

Commentators across the political divide acknowledge that these are the deep-seated causes of the crisis in Kenya, and that allegations of a stolen election merely served to ignite the flames.¹⁰ In fact, it was not the first time that such violence had been sparked by elections. The run-up to the 1992 and post-1997 general elections sparked similar violence that claimed hundreds of lives and displaced thousands of ‘non-indigenous’ residents in parts of the Rift Valley and Coast Provinces.¹¹

According to surveys conducted, ‘increased population in the affected regions had put pressure on available land, forcing some of the indigenous people to seek ways of recovering land that was “irregularly” allocated to non-indigenous communities’.¹² The term ‘indigenous’ in this context is employed to denote the original inhabitants of particular lands in the various regions of the country. The Rift Valley Province, which has over the years been most affected by the ethnic land-related conflicts is one of the cosmopolitan regions in the country. Almost all the diverse tribes in Kenya inhabit lands in that region. Historically, however, its original inhabitants were the Ogiek and the Maasai.¹³

¹⁰ Kagwanja (n 8 above); see also ‘How state land policy shaped conflict’ *Daily Nation* 9 February 2008 <www.nationaudio.com> accessed 15 February 2008; see also ‘Answers to land problems depend on political will’ *East African Standard* 10 February 2008 <www.eastandard.net> accessed 15 February 2008; International Crisis Group ‘Kenya in crisis’ 2008 (137) *Africa Report* 1.

¹¹ n 10 above; see also ‘By-elections campaigns stir up ethnic distrust’ *Daily Nation* 24 June 2008 <http://www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=1&newsid=125971> accessed 24 June 2008.

¹² As above; see also OHCHR Kenya Report (n 1 above) 6; HRW (n 6 above) 14; Kenya APRM Report (n 2 above) 62.

¹³ See J Lonsdale ‘The conquest state, 1895-1904’ in WR Ochieng (ed) *A modern history of Kenya 1895-1980* (1989)12; JEG Sutton ‘The Kalenjin’ in BA Ogot (ed) *Kenya before 1900 eight regional studies* (1976) 21-52; RH Blackburn ‘Okiek history’ in BA Ogot (ed) *Kenya before 1900 eight regional studies* (1976) 53-83; T Spear *Kenya’s past: An introduction to historical method in Africa* (1981).

The original inhabitants of the Rift Valley region felt aggrieved by what they term historical land injustices that were perpetrated against them by the colonial regime and successive independent governments.¹⁴ It is therefore not surprising that the region has witnessed some of the worst forms of conflict and attendant violence over the years. This violence has targeted ‘non-indigenous communities’.¹⁵ One of the recent gruesome attacks in the region included the burning to death of about 50 women and children who had sought refuge in a church after the 2007 general elections.¹⁶

The original inhabitants of the Rift Valley trace the ‘theft’ of their ancestral lands back to colonial rule.¹⁷ The British colonial regime altered the dynamics of land control, use and access by indigenous communities through the imposition of English property law.¹⁸ Okoth-Ogendo rightly observes that the implementation of the laws was purely aimed at legitimising the colonialists’ expropriation of Africans land.¹⁹ The impact of the colonial legal framework was outright dispossession of the natives. The best arable pieces of land then known as the ‘white highlands’, the majority of which were in the Rift Valley, were acquired by colonial settlers.²⁰

¹⁴ See HRW (n 6 above) 14; see also Kenya APRM Report (n 2 above) 49.

¹⁵ See HRW (n 6 above) 14; see also Kenya APRM Report (n 2 above) 49.

¹⁶ See Kagwanja (n 8 above) 4.

¹⁷ See HRW (n 6 above) 14.

¹⁸ See HWO Okoth-Ogendo *Tenants of the Crown: Evolution of agrarian law and institutions in Kenya (1991)* 16-17; see also YP Ghai and JPWB McAuslan *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present (1970)* 25-30.

¹⁹ As above.

²⁰ Ghai & McAuslan (n 18 above) 85.

Foreign laws were employed to disinherit the indigenous communities of their lands.²¹ Through the promulgation of Orders in Council, the colonial authorities controlled virtually all the land in Kenya.²² Despite promises and hopes by indigenous peoples that independence in 1963 would facilitate the return of their ancestral lands, these can best be described as ‘dreams shattered’. Indeed, according to the African Peer Review Mechanism’s Country Report of the Republic of Kenya ‘after the departure of the British colonial administration, a few ethnic groups managed to amass significant portions of land in the former ‘white highlands’.²³ That was made possible through the retention and entrenchment of the colonial laws and policies relative to land rights thereby legitimising dispossessions of the original owners of the lands. Inevitably, aggrieved communities have not relented in their agitation for the return of their ancestral lands, often accompanied by violence, mass destruction of property and gross loss of lives.²⁴ However, successive independent governments have continued to gloss over the issue of land disputes.²⁵ Instead, they have elected to ignore a deep-seated historical injustice, arguing that the law should take its course.²⁶ According to Wanjala, ‘the land policies that were relentlessly pursued by the colonial government and later continued or at the very least modified by the “independence” government have generated deep rooted problems which at various times have threatened to

²¹ SC Wanjala ‘Land ownership and use in Kenya: Past present and future’ in SC Wanjala *Essays on land law: The reform debate in Kenya* (2000) 27-29.

²² As above.

²³ See Kenya APRM Report (n 2 above) 47.

²⁴ As above 49; see also HRW (n 6 above).

²⁵ Kenya Draft National Land Policy para 190.

²⁶ SC Wanjala ‘Themes in Kenya land reform’ in Wanjala (n 21 above) 172.

destroy the fabric of Kenyan society'.²⁷ The written laws which are relied upon by the legal title holders and the government subjugate the customary laws of the original occupiers of the same lands.

The independent government justified the retention of colonial land laws on the grounds that 'the independent Constitution had provisions which tied the hands of the government. Land could not just be acquired for redistribution to the landless Africans without full and prompt compensation for the settlers'.²⁸ That argument and its continued implementation to this date are part of the problem. The wholesome acceptance and entrenchment by the independent state of the colonial land laws betrayed the people who fought for independence. Although, apart from the armed struggle, the granting of independence was arrived at through political negotiations, most land laws disinherited the indigenous peoples from their lands. It was therefore imperative that a solution be found that would take into consideration the interests and rights of the original inhabitants of the lands that were appropriated by the settlers through foreign laws.

Instead, the independent Government elected to retain those laws which gave an upper hand to those in power.²⁹ The independent state further exacerbated the situation by adopting the principle of 'willing buyer willing seller' in land transactions, resulting in the original inhabitants of certain lands remaining landless. As a result of this policy, communal and ancestral lands were appropriated by outsiders who had the means to purchase the lands, leading

²⁷ As above.

²⁸ As above.

²⁹ Kenya Draft National Land Policy para 25.

to inequitable distribution of that resource. While this is perfectly legal and protected by the law, in light of diminished arable land resources, this resulted in a strained peaceful co-existence between indigenous peoples and those perceived to be ‘outsiders’. ‘Outsiders’ have been targeted for ejection, as evidenced by the post-2007 violent evictions and deaths, particularly in the Rift Valley Province.

While one may want to wish away the current crisis in Kenya as purely political, it has become increasingly impossible to ignore one of the root causes of the problem. In the circumstances, the need for a comprehensive land reform process can not be overemphasized. Indeed, there is a need to balance the rights of land holders who have legally acquired land in any part of the country with those of the original inhabitants. Most of these inhabitants have genuine claims over their ancestral and traditional lands –claims which pit them against the legal title holders.

The Kenyan legal framework favours and protects legal title holders. Registered land owners acquire an absolute and indefeasible title to land unless such land was obtained by fraud or mistake and subject only to encumbrances.³⁰ A controversial provision is that first registrants are

³⁰ See sec 27 Registered Land Act, Laws of Kenya Cap 300 (1963) (RLA) which provides that: Subject to this Act - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease; see also sec 28 RLA. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register;...; see also sec 143(1) RLA.

not hampered by fraud or mistake from enjoying absolute and indefeasible title.³¹ Indeed, such legal protection of registered title holders has made it difficult for original claimants to their traditional lands to find recourse in Kenya's courts.³² These hurdles of proving title are further compounded by the status of customary law in the hierarchy of Kenya's sources of law. African customary law, which in such circumstances would accord title to the original inhabitants of certain territories, is according to Kenya's Constitution subordinate to all written laws and its application limited by the repugnancy clause.³³

This thesis seeks to identify legal arguments available to the original inhabitants of lands now occupied by non-residents, to protect their land rights. In so doing, it examines Kenya's legal framework, including comparable case law and applicable international standards.

The thesis argues that the international human rights standards and norms, apply to the situation of these groups. Recent developments in international jurisprudence as well as that of comparable domestic jurisdictions point to a growing recognition that certain communities have been marginalized and dispossessed of their land due to historically-discriminatory laws and

³¹ Sec 143(1) RLA Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

³² Wanjala (n 21 above) 27-29.

³³ Sec 115(2) Constitution of Kenya.

practices.³⁴ This thesis argues that some of those norms and comparable jurisprudence can be applied in Kenya to redress past wrongs against indigenous peoples with regard to the protection of their traditional lands.

This is particularly so since some of these communities have self-identified as indigenous peoples and associating themselves with the global indigenous rights movement.³⁵ That is notwithstanding the fact that the question of ‘who is indigenous’ is highly controversial in Kenya, as is the case in most other African countries.³⁶ The reference to indigenous peoples in this thesis is therefore to the original inhabitants of the specific territories they claim to be their ancestral lands, now occupied by ‘outsiders or non-original residents’, as well as groups who self-identify as such. The thesis employs two case studies of such groups- the Maasai and the Ogiek- to illustrate the point.

The indigenous rights regime is an important framework for ventilating land rights for some of these communities. The regime derives international standards and comparable best practices from similarly-situated jurisdictions, which the thesis argues could apply in the Kenyan context, beside, the existing domestic legal framework. To a certain extent, the thesis argues, Kenya’s

³⁴ See J Gilbert ‘Historical indigenous peoples land claims: A comparative and international approach to the common law doctrine on indigenous title’ (2007) 56 *International and Comparative Law Quarterly* 583-612.

³⁵ See *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa* Adopted by the African Commission on Human and Peoples’ Rights (African Commission) at its 28th Ordinary Session, ACHPR & IWGIA (2005) 92; Stavenhagen Kenya Mission Report (n 7 above) para 10; see also International Work Group for Indigenous Affairs (IWGIA) *The Indigenous World* (2007) 468; Report of the Round Table Meeting of Experts on Minorities and Indigenous Peoples in Kenya, Kenya National Commission on Human Rights and Centre for Minority Rights Development, Nairobi, 30-31 October 2006, 4 (Report of the Round Table Meeting Nairobi).

³⁶ As above.

legal framework has some potential to protect the rights of indigenous peoples. In that regard, the thesis presents applicable legal resources that can be invoked to give meaning to original inhabitants' land rights through progressive interpretation. It also makes a case for legal reform, since progressive interpretation by the courts can not be guaranteed. Such reforms would seek to address the loopholes that constrain the legal recognition and the protection of indigenous peoples' rights to their ancestral lands.

While the focus of the thesis is limited to Kenya, that country's experiences are shared by many other African countries, as is illustrated in a number of examples cited in some of the ensuing chapters. The aim of this chapter is to: (1) give an overview of the thesis; (2) briefly discuss the question of 'who are indigenous peoples?'; (3) examine the relevance of the concept 'indigenous peoples' in realising the groups' fundamental human rights in Kenya; (4) outline the focus of the study- 'indigenous peoples land rights'; and (5) identify the research methodology.

1.2 Who are indigenous peoples?

There is no global consensus on the definition of the term 'indigenous peoples'.³⁷ In fact, a debate rages as to whether the concept is applicable in certain regions of the world, particularly

³⁷ See examples of some attempted definitions, related discussions and historical account of the development of the concept in SJ Anaya *Indigenous peoples in international law* (2004) 3-72; see also ACHPR & IWGIA (n 35 above) 87-95; P Thornberry *Indigenous peoples and human rights* (2002) 33-60; see also KN Bojosi & GM Wachira 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights' (2006 (6) (2) *African Human Rights Law Journal* 384-391.

Africa and Asia.³⁸ In some jurisdictions, the term ‘indigenous peoples’, evokes sentiments of the past, pitting European imperialists against colonized peoples.³⁹ In these circumstances, ‘indigenous peoples,’ are seen as communities who were the original inhabitants of territories today under the domination of ‘descendants of European settler populations’.⁴⁰ In countries where such a framework no longer exists, some states have argued that the term is inapplicable.⁴¹ In Africa, the question of the definition of ‘who is indigenous’ on the continent remains contentious.⁴² African states have expressed concern that the lack of a definition would cause conflict and tension among various ethnic groups resident within their territories.⁴³ They argue that the absence of defined parameters of the groups to whom the concept ‘indigenous’ applies is likely to cause problems of implementation, especially in light of the fact that they consider all Africans to be indigenous to the continent.⁴⁴ African states appear wary of the possibility that the recognition of a certain section of their population as indigenous would be tantamount to according those groups preferential treatment. They also fear that it would lead to secession of

³⁸ See for example Thornberry (n 37 above) 2; see also B Kingsbury “indigenous peoples” in international law: A constructivist approach to the Asian controversy’ (1998) 92 *American Journal of International Law* 414.

³⁹ Thornberry (n 37 above) 2.

⁴⁰ As above.

⁴¹ IWGIA (n 35 above) 559-560; see also ACHPR & IWGIA (n 35 above) 12.

⁴² See Africa Group, *Draft Aide Memoire*, UN Declaration on the Rights of Indigenous Peoples, 9 November 2006, para 2.1.

⁴³ As above para. 2.2; see also Advisory Opinion of the African Commission on Human and Peoples’ Rights on the UN Declaration on the Rights of Indigenous Peoples, Adopted by the African Commission on Human and Peoples’ Rights, at its 41st Ordinary Session, Accra, Ghana, May 2007 sourced at <www.iwgia.org> accessed 10 August 2008, para 9.

⁴⁴ Advisory Opinion of the African Commission (n 43 above) paras 9 and 13.

the recognized ‘indigenous peoples’ and destabilize regional peace.⁴⁵ The fear by states of the possibility of secession by indigenous peoples is revisited in more detail later in the thesis.

From the foregoing, it is apparent that the fears of African states seem to have been founded on the misconception that indigenous peoples seek a separate and distinct identity from that of the state.⁴⁶ Far from it, the clamour by indigenous peoples for recognition does not constitute a demand for special treatment or separate legal regime, but rather ‘to guarantee the equal enjoyment of the rights and freedoms of groups, which have been historically marginalised’.⁴⁷ The African Commission’s Working Group of Experts on Indigenous Populations/Communities ‘acknowledges that except for a few exceptions involving communities that migrated from other continents or settlers from Europe, Africans can claim to be aboriginal people of the continent and nowhere else’.⁴⁸ The term ‘indigenous peoples’ in Africa, therefore, is not based on the concept of aboriginality, where particular groups can be said to have been the first peoples of the territories they occupy.⁴⁹

The emphasis on aboriginality is located in one of the most oft-cited definitions of indigenous peoples, by Martinez Cobo, the first UN Special Rapporteur of the UN Sub-Commission on the

⁴⁵ Africa Group, *Draft Aide Memoire* (n 42 above) paras 3.0 and 5.0; see also Advisory Opinion of the African Commission (n 43 above) para 9.

⁴⁶ See Advisory Opinion of the African Commission (n 43 above) para 16-31.

⁴⁷ As above, para 19.

⁴⁸ ACHPR & IWGIA (n 35 above) 12.

⁴⁹ See Advisory Opinion of the African Commission (n 43 above) para 13.

Prevention of Discrimination and Protection of Minorities (later renamed the Sub-Commission on the Promotion and Protection of Human Rights):

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁵⁰

While Cobo's statement is not definitive, in that it is open to various interpretations, and has been criticised for its focus on aboriginality,⁵¹ it captures some of the key elements contemporary indigenous movements have identified as applying to their circumstances. These include the fact that most of these groups are vulnerable due to historical conditions, are in a non-dominant position, have an attachment to their ancestral territories and cultural identity, and are determined to preserve, develop and transmit their territories and identity to future generations.⁵² Cobo's elements could be considered as affirming similar characteristics spelt out by ILO Convention

⁵⁰ See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problems of Discrimination Against Indigenous Population, UN ESCOR, 1986 UN Doc E/CN.4 Sub2 1986/7/Add.1-4, para 379 (Cobo's Report).

⁵¹ See ACHPR & IWGIA (n 35 above) 91-92 -Cobo's definition has been criticized on 'the grounds that aboriginality is not the only determining factor and not enough importance is placed to the principle of self-identification and on contemporary situations'.

⁵² International standards, studies and institutions that have identified similar criteria include the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991 art 1(ILO Convention No 169); World Bank Operational Directive 4.20(1991); ACHPR & IWGIA (n 35 above) 89-90; Working Group on Indigenous Populations, Working Paper by the then Chairperson-Rapporteur, EI Daes on the Concept of "Indigenous People," U.N ESCOR, Commission on Human Rights, Sub Commission on Prevention of Discrimination and Protection of Minorities, 14th Sess, U.N.Doc.E/CN.4/Sub.2/AC.4/1996/2, 1996, 5 (Daes Concept paper).

No169.⁵³ It is instructive to note that the ILO Convention No 169 is one of only two treaties specifically dealing with indigenous peoples' rights- the other being the ILO Convention No 107.⁵⁴ While no African state has ratified this treaty, the standards it enumerates continue to inspire indigenous peoples globally to demand the recognition of their fundamental rights.⁵⁵ Article 1(2) of the ILO Convention No 169 provides for the principle of self-identification, which has become the fundamental criterion for determining which groups are considered indigenous peoples.

Given the divergence of opinion, particularly among states, on the question of indigenous peoples, international standard-setting mechanisms and indigenous peoples themselves have advocated a human-rights-based approach to the concept, rather than a focus on aboriginality.⁵⁶ Spurred by recent advances and awareness of their rights through active participation within the United Nations (UN) framework and regional human rights mechanisms, indigenous peoples have endorsed the self-identification criterion as being instrumental in determining who they are.⁵⁷ They have similarly identified with international and regional standard-setting fora to draw

⁵³ Art 1 ILO Convention No 169 '...peoples....who irrespective of their legal status retain some or all of their own social, economic, cultural and political institutions'.

⁵⁴ Countries that had ratified ILO Convention No 107, which was considered assimilationist are still bound by its provisions. In Africa these countries include: Tunisia, Malawi, Guinea- Bissau, Ghana, Egypt and Angola <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107>>accessed 13 February 2006.

⁵⁵ Some of the standards enumerated by the ILO Convention No 169 are also reflected in the recently adopted UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N.Doc.A/RES/47/1 (2007).

⁵⁶ A Eide & EI Daes, Working Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples,*E/CN.4/Sub.2/2000/10*, para 37.

⁵⁷ See ACHPR & IWGIA (n 35 above) 92-3 endorsing the modern analytical understanding of the concept also advocated by the United Nations Working Group on Indigenous Populations which gives the following criteria as applicable in identifying indigenous peoples: (1) The occupation and use of territory; (2) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social

attention to their predicament and particular circumstances and, where possible, assert their fundamental human rights.⁵⁸

Therefore, the term ‘indigenous’ is today used by ‘particular marginalised groups in a modern analytical form of the concept’.⁵⁹ The modern application of the term does not focus on aboriginality but rather on issues of concern to indigenous peoples ‘in an attempt to draw attention to and alleviate the particular form of discrimination they suffer from’.⁶⁰ ‘These are groups who have, due to past and ongoing processes, become marginalised in their own countries and they need recognition and protection of their basic human rights’.⁶¹ Their ‘culture and way of life has been subject to discrimination and contempt and their very existence are under threat of extinction’.⁶² The groups feel that they ‘have been left on the margins of development and are perceived negatively by dominating mainstream development paradigms’.⁶³ The communities are ‘determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems’.⁶⁴

organisation, religion and spiritual values, modes of production, laws and institutions; (3) self-identification, as well as recognition by other groups, as a distinct collectivity; (4) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, see Daes concept paper (n 52 above).

⁵⁸ See Anaya (n 37 above) 57-58, 72.

⁵⁹ ACHPR & IWGIA (n 35 above) 88.

⁶⁰ ACHPR & IWGIA (n 35 above) 88.

⁶¹ As above 86.

⁶² As above 87.

⁶³ As above.

⁶⁴ Cobo’s Report (n 50 above).

The African Commission's Working Group on Indigenous Populations/Communities in Africa has adopted an approach which focuses on the following criteria:

Self identification as indigenous and distinctly different from other groups within a state; on a special attachment to and use of their traditional land whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; on an experience of subjugation, marginalisation, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.⁶⁵

A possible rationale for the Commission's approach is the fact that in Africa, the decolonisation processes transferred state powers to groups dominant in the territory. Certain groups remained vulnerable primarily due to their close attachment to their traditional cultures and their reluctance to assimilate and embrace western developmental paradigms adopted by the post-colonial state.⁶⁶ It is some of these groups who today self-identify as indigenous peoples and demand recognition and protection of their fundamental rights in accordance with their culture, traditions and way of life.

While the rights claimed by indigenous peoples are not necessarily any different from those sought by other marginalised groups, it is to be borne in mind that those groups self-identifying as indigenous peoples are generally excluded in fact and law from utilising available options due to various circumstances. Some of these factors include the dire poverty levels amongst these

⁶⁵ ACHPR & IWGIA (n 35 above) 93.

⁶⁶ I Brownlie (FM Brookfield ed) *Treaties and indigenous peoples* (1992) 56.

peoples, to the extent they are regarded as being among the ‘poorest of the poor’.⁶⁷ Most indigenous peoples are therefore unable to access the existing legal framework to champion their rights and when they do manage this, they are continuously disadvantaged by either a lack of comprehension (due to illiteracy and misinformation) or the inability of the system to give meaningful expression to their rights.⁶⁸

The majority of those communities fall within two categories identified by the African Commission’s Working Group of Experts on Indigenous Populations in Africa, namely, the pastoralists and hunter-gatherers.⁶⁹ In Kenya, the pastoralists include the Endorois, Borana, Gabra, Maasai, Pokot, Samburu, Turkana and Somali and the hunter-gatherer communities comprise the Awer(Boni), Ogiek, Sengwer or Yaaku.⁷⁰ All of these groups self-identify as indigenous peoples. For purposes of this thesis, the focus falls on two groups, the Maasai and Ogiek. The choice of the two groups as case studies is based on the fact that there is less controversy as to their indigenous status from the perspective of the African Commission on Human and Peoples’ Rights’ approach to the subject. Indeed, the African Commission expressly identifies these two groups as some of the most marginalised communities in Kenya due to their culture and particular way of life. The focus on the two groups is also due to the fact that their predicament exemplifies similar legal issues faced by many other indigenous communities in

⁶⁷ Independent Commission on International Humanitarian Issues *Indigenous Peoples, A Global Quest for Justice* (1987) 16-17.

⁶⁸ Advisory Committee on Human Rights and Foreign Policy ‘Indigenous Peoples’ (1993) 16 *Advisory Report, Netherlands*, 7, 18 (Advisory Committee, Netherlands).

⁶⁹ ACHPR & IWGIA (n 35 above) 92; see also IWGIA (n 35 above) 468.

⁷⁰ See Stavenhagen Kenya Mission Report (n 35 above) para 10; see also IWGIA (n 35 above) 468; Report of the Round Table Meeting Nairobi (n 35 above).

Kenya and Africa generally. They also represent both pastoralist (the Maasai) and hunter-gatherer (Ogiek) communities whose land tenure systems, despite some similarities, are distinct.

1.3 Relevance of the concept ‘indigenous peoples’ in realising the groups’ fundamental human rights

In recent times, international processes,⁷¹ judicial⁷² and quasi-judicial bodies,⁷³ experts,⁷⁴ scholars,⁷⁵ and indigenous peoples themselves⁷⁶ have increasingly drawn attention to the subject

⁷¹ See for example efforts within the International Labour Organisation that resulted in the (ILO Convention No.169 in L Swepston’ The Indigenous and Tribal Peoples Convention (No 169): Eight years after adoption’ in C Cohen Human Rights of indigenous peoples (1998); the United Nations Working Group on Indigenous Populations that resulted in a United Nations Declaration on the Rights of Indigenous Peoples; The United Nations Permanent Forum on Indigenous Issues (ECOSOC Res. E/RES/2000/22 (July 28, 2000); ACHPR & IWGIA (n 35 above HRC General Comment No 23 (n 100 above) e); see Various General Comments and Concluding Observations of the United Nations Human Rights Committee(HRC) and the Committee on the Elimination of Racial Discrimination(some of which are discussed in chapter four) such as the United Nations Committee on the Elimination of Racial Discrimination (CERD)*General Recommendation XXIII: Rights of Indigenous Peoples*, U.N. Doc. A/52/18 Annex V (Aug. 18, 1997).

⁷² See for example *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* 2003 (12) BCLR 1301 (CC) (South Africa); *Sesana & others v Attorney General*, (52/2002) [2006] BWHC 1(Botswana); *Mabo v Queensland (No 2)* (1992) 175 CLR 1(Australia); *Delgamuukw v British Columbia*, [1997] 153 D.L.R. (4th) (Canada).

⁷³ See for example at the UN Human Rights Committee the case of *Lubicon Lake Band v Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990). At the Inter-American Commission and Court see for example the cases of *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, 79 Inter-American Court on Human Rights SER. C, (2001); *Maya Indigenous Community of Toledo District v Belize*, Case 12.053, Report No. 40/04, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.122 Doc. 5 rev., (2004); *Mary & Carrie Dann v United States*, Case 11.140, Report No. 75/02, Inter-American Commission on Human Rights, Doc. 5 rev. 1 (2002); At the African Commission on Human and Peoples’ Rights see the pending case of *Endorois* (n 3 above).

⁷⁴ See Cobo’s Report (n 50 above); Stavenhagen Kenya Mission Report (n 35 above); Report of the UN Special Rapporteur on Indigenous Peoples Mission to South Africa 2005(E/CN.4/2006/78/Add.2) (Stavenhagen South Africa Mission Report); Eide & Daes (n 47 above).

⁷⁵ Anaya (n 37 above); Thornberry (n 37 above); BK Roy & G Alfredsson ‘Indigenous rights: The literature explosion’ (1987) 13 *Transnational Perspectives* 19; P Aiko & M Scheinin (eds) *Operationalizing the right of indigenous peoples to self-determination* (2000); RA Williams ‘Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples’ survival in the world’ (1990) 39

and the issues of concern to these groups. Developments within international law and comparative domestic legal jurisdictions herald an emerging framework on which indigenous peoples may base their demands for rights protection.⁷⁷ This is the indigenous peoples' rights regime anchored by international human rights law standards and processes such as the ILO Convention No 169,⁷⁸ the work of the UN Working Group on Indigenous Peoples, which has resulted in a Declaration on the Rights of Indigenous Peoples⁷⁹ and other standard-setting fora, such as the UN Permanent Forum on Indigenous Issues⁸⁰ and the UN Special Rapporteur on Indigenous Peoples.⁸¹ Regionally, the African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities in Africa⁸² is similarly emerging as an important platform for indigenous peoples to develop region-specific standards.

Duke Law Journal; S Wiessner 'The rights and status of indigenous peoples: A global comparative and international legal analysis' (1999) 12 *Harvard Human Rights Journal* 57.

⁷⁶ See for example the Annual Reports of the International Work Group on Indigenous Affairs (IWGIA), *The Indigenous World* <www.iwgia.org> accessed on 10 August 2007.

⁷⁷ See Anaya (n 37 above) 49-72; see also JS Anaya & RA Williams RA Jr 'The protection of indigenous peoples' rights over lands and natural resources under the Inter-American Human Rights System' (2001) 14 *Harvard Human Rights Journal* 33; Wiessner (n 75 above) 57.

⁷⁸ ILO Convention No 169.

⁷⁹ UN Declaration on the Rights of Indigenous Peoples.

⁸⁰ Establishment of a Permanent Forum on Indigenous Issues, UN ESCOR, 2000, Supp. No. 1, *UN Doc. E/2000/99*, 50.

⁸¹ Commission on Human Rights Resolution E/CN.4/RES/2001/57.

⁸² See ACHPR & IWGIA (n 35 above); see also reports of the African Commission's Working Groups of Experts on Indigenous Populations/Communities various country study missions and activities cited at IWGIA (n 35 above) 586-590.

The fundamental issues of concern to groups self-identifying as indigenous peoples, are generally similar all over the world and are due to historical processes of discrimination and subjugation.⁸³

The indigenous peoples' rights framework is therefore a unique strategic avenue that attracts global attention to indigenous peoples' issues. It is also associated with international standard-setting mechanisms and norms.⁸⁴ Indigenous peoples all over the world have therefore sought to identify with the global indigenous peoples' rights regime, in a bid to utilize its mechanisms and standards to protect their fundamental human rights.⁸⁵ By identifying with that regime, these groups highlight their particular circumstances. This scenario calls for the application of the principles of 'equity, justice and fair dealing' to relations between a dominant group and a marginalised one.⁸⁶

Granted, there is considerable debate as to the 'usefulness of linking specific rights to indigenous groups'.⁸⁷ It has been argued that the rights sought by groups identifying as indigenous peoples are not any different from those by other people who have been denied their fundamental human rights by the state.⁸⁸ In which case then, the rights could be espoused and if found wanting

⁸³ ACHPR & IWGIA (n 35 above) 87; see also J Beauclerk, J Narby & J Townsend *Indigenous peoples a field guide for development, development guidelines* No 2 (1988) 3.

⁸⁴ Anaya (n 37 above) 72.

⁸⁵ As above.

⁸⁶ Brownlie (n 66 above) 1; Gilbert (n 34 above) 610.

⁸⁷ Kingsbury (n 38 above) 3.

⁸⁸ As above.

guaranteed by the existing legal frameworks as with all other human rights violations.⁸⁹ Indeed, existing legal resources encompass rights and mechanisms that have the potential to give effect to indigenous peoples' demands, as held in the Australian High Court Case of *Gerhardy v Brown* in which Mason J stated that the concept of human rights 'though generally associated in Western thought with the rights of individuals, extends also to the rights of peoples and the protection and preservation of their cultures'.⁹⁰

However, while the general corpus of human rights law may potentially be invoked to realise the rights of indigenous peoples, where its application is limited by a restrictive interpretation, it is useful to adopt legal reforms that expressly provide for recognition and protection of certain rights that are exercised by marginalised communities. Indeed, while indigenous peoples' predicament is not always much different from other resource-constrained people living in far-flung and remote corners of different countries, they are particularly affected due to their way of life and cultural set-up. The collective exercise of group rights by indigenous peoples 'involve[s] elements of recognition of the cultural or other identity of the group, which recognition is not ensured by the normal application of the provisions representing individual rights'.⁹¹

Accordingly, legal frameworks that give prominence to individual rights may not adequately address the needs and aspirations of some indigenous groups who elect to exercise certain rights

⁸⁹ As above; see also Brownlie (n 66 above) 2; JJ Corntassel & TH Primeau 'Indigenous 'sovereignty' and international law: Revised strategies for pursuing "self determination" (1995) 17 *Human Rights Quarterly* 42-65.

⁹⁰ Thornberry (n 37 above) 4 citing *Gerhardy v Brown* (1995) 149 CLR 70, 104-05.

⁹¹ Brownlie (n 66 above) 29; see also generally on indigenous peoples' 'strong sense of solidarity that emerges from their inherent need to preserve and retain their culture, way of life and common heritage' in Thornberry (n 37 above) 331; Anaya (n 37 above) 141.

collectively. It has been argued that ‘there will continue to be claims which, while they might warrant recognition in the form of attribution of rights, cannot easily be translated into individual rights’.⁹² Such rights include the right to self-determination, and collective rights to land and natural resources and cultural entitlements. ‘The simple fact that these rights cannot be accommodated in the framework of individual rights does not in itself constitute grounds for ignoring such claims all together.’⁹³ However, the lack of understanding by the state of the specific needs of indigenous peoples continues to hamper the realisation of these rights as does the lack of scope and capacity by indigenous peoples to invoke legal protection mechanisms.

Due to economic and political marginalisation as a result of unfavourable and skewed state policies, existing legal frameworks have failed to adequately address indigenous peoples’ preferred way of life. Indigenous peoples’ subjugation is mainly because of their cultural identity as a group, which leads to discrimination and excision from all spheres of the state.⁹⁴ The fact that indigenous peoples are also in a non-dominant position within the political and state structures exacerbates their situation.⁹⁵ This is evidenced by the enactment and retention of laws and policies that do not take into account their particular needs and demands. A number of indigenous peoples, notably the pastoralists in Kenya, have sought recognition and the protection of their land and resource rights and prefer to own, control and utilise them communally. This has often caused tension and conflict with existing legal instruments and state policies that provide

⁹² Advisory Committee Netherlands (n 68 above) 4.

⁹³ As above 17.

⁹⁴ Anaya (n 37 above) 129-130.

⁹⁵ Advisory Committee Netherlands (n 68 above) 18.

for and encourage individual land tenure. In the absence or due to inadequacy of legal backing and government support, most of these communities have been dispossessed of their traditional lands and resources. Concrete examples and further discussion of these issues are revisited in chapter four of this thesis.

Although the concept ‘indigenous peoples’ is a useful and strategic rallying call to galvanise support and draw attention to the issues faced by groups who self-identify as indigenous in Kenya, the inadequacy of the legal framework to right historical and continued land injustices, similarly affects other marginalised communities. That is particularly the case, where the marginalised communities are dependent on land for economic sustenance and basic survival.

1.4 Indigenous peoples’ land rights

While indigenous peoples globally are faced with numerous human rights violations, the focus of this thesis is on one of the core rights demanded by indigenous peoples - the right to land. Although the focus is on land rights this inevitably overlaps with natural resource rights. Land rights are indisputably core claims by indigenous peoples globally, and particularly in Africa. The centrality of land for indigenous peoples is based on the fact that they rely on traditional lands and natural resources for their livelihood, economic sustenance, as well as religious and cultural life.⁹⁶ ‘Indigenous peoples’ rights over land and natural resources flow not only from

⁹⁶ See Study on Indigenous People and their Relationship to Land, by Daes EI, UN Doc.E/CN.4/Sub.2/1999/18, 3 June 1999, para.18 (Daes study); see also Anaya (n 37 above) 141; J Asiema & FDP Situma ‘Indigenous peoples and the environment: The case of the pastoral Maasai of Kenya’ (1994) 5 *Colorado Journal of International Environmental Law and Policy* 150; R Hitchcock R & D Vinding ‘Indigenous peoples’ rights in Southern Africa: An introduction’ in R Hitchcock R & D Vinding (ed) *Indigenous peoples rights in Southern Africa* (2004) 11.

possession, but also from their articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional nexus with the earth and its fruits'.⁹⁷ The rights to access, control, utilize and own traditional lands and natural resources are therefore critical to the survival of indigenous peoples all over the world.⁹⁸

Some states' laws do not give regard to and often conflict with indigenous peoples' rights over these lands.⁹⁹ In Kenya, for example, while there are relevant provisions within the law that could be invoked to give meaning to indigenous peoples' land and resource rights, the legal framework is generally inadequate with regard to protection of these communities. There is overwhelming evidence of the state's disregard for the particular demands of indigenous peoples, manifested by inadequate or total lack of consultation and participation of these groups in issues that affect them, including the way in which their lands should be utilized. The recognition of indigenous peoples' laws, traditions and customs is therefore crucial to the protection of their rights to land and natural resources.¹⁰⁰

Groups self-identifying as indigenous peoples in Kenya have been and still marginalised by the state. This is primarily through the lack of recognition that their rights deserve protection in accordance with their traditions and culture. Instead, the state has pursued policies of

⁹⁷ Anaya (n 37 above) 141; see also Cobo's Report (n 50 above) 39.

⁹⁸ See Williams (n 66 above) 681.

⁹⁹ Brownlie (n 66 above) 56.

¹⁰⁰ See part II ILO Convention No 169; Art 26 UN Declaration on the Rights of Indigenous Peoples; see also *Länsman v Finland*, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992, para 9.5; see also Human Rights Committee, General Comment 23, Art 27 (55th session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 (1994) 38, para 7.

assimilation. This state of affairs is sanctioned by legal and administrative policies that have little, if any, regard for the needs, demands and aspirations of the indigenous peoples themselves. This includes lack of legal recognition of the collective nature of most of their claims.¹⁰¹ A long history of indifference to indigenous peoples has therefore resulted in extreme levels of poverty and a violation of their fundamental human rights and freedoms. Similarly, like other indigenous peoples globally, ‘these communities have been forced to endure decision making on issues which materially affect them without having been able to have an equal say in this process and thus exert any real influence’.¹⁰²

The economic livelihood of indigenous peoples in Kenya is severely affected by the lack of an adequate legal framework protecting their traditional lands and resources, as well as policies that mainly favour the dominant economic paradigms.¹⁰³ In Kenya, like in most other African countries, settled agriculture, mining, and modern development schemes are seen as the preferred way of development.¹⁰⁴ As a result, certain types of indigenous peoples’ economic means of livelihood, such as nomadic pastoralism, hunting and gathering, are looked down upon, putting their future survival and development in serious jeopardy.¹⁰⁵ The sustainability and development potential of their cultural systems are also ignored and are wrongly perceived as primitive,

¹⁰¹ Advisory Committee Netherlands (n 68 above) 4.

¹⁰² As above 4.

¹⁰³ As above 2; IWGIA (n 35 above) 468–470.

¹⁰⁴ See J Ngugi ‘The decolonization-modernization interface and the plight of indigenous peoples in post-colonial development discourse in Africa’ (2002) 20 *Wisconsin International Law Journal* 300.

¹⁰⁵ ACHPR & IWGIA (n 35 above) 29; Stavenhagen Kenya Mission Report (n 35 above) para 17.

uneconomic, environmentally destructive and incompatible with modernisation.¹⁰⁶ The state continues to systematically marginalize indigenous peoples ‘on the basis of their economic, social and cultural characteristics, which are inextricably connected to the use of land and natural resources’.¹⁰⁷ It also attempts to assimilate these peoples by promoting westernised ideals of development, calling upon these communities to discard their rich cultures and ways of life and instead adopt modernity.¹⁰⁸ This is usually done in total disregard of the communities’ strengths, needs and preferences and is often without adequate consultation and participation of the community.¹⁰⁹

The scope of this study is limited to an examination of the current legal framework in Kenya and the extent it protects indigenous peoples’ rights to land. On the basis of international standards and comparable jurisprudence from other jurisdictions, the study makes a case for comprehensive reform. The study discusses the available arguments within the existing legal framework and applicable human rights standards that would give effect to indigenous peoples’ land and resources rights in Kenya. It also examines the applicability of developing international standards and comparable regional and domestic norms within the indigenous rights regime that give meaning to indigenous peoples’ land and resource rights. Towards this end, relevant jurisprudence from comparable domestic, regional and international human rights fora is examined. The analysis identifies best practices and deficiencies and postulates possible options

¹⁰⁶ Stavenhagen Kenya Mission Report (n 35 above) para 17.

¹⁰⁷ As above para 11.

¹⁰⁸ As above; Report of the Round Table Meeting Nairobi (n 35 above).

¹⁰⁹ The Maasai group ranches discussed in chapter three of this thesis is a case in point.

in the protection of indigenous peoples' rights to land and resources in Kenya that could also be applicable in most other African countries.

1.5 Research methodology

The argument of this thesis is primarily based on a review of literature on indigenous peoples' rights in general. Particular focus is given to indigenous peoples' land rights. The thesis surveys the relevant legal framework in Kenya, notably the Constitution, statutes, case law and applicable international and regional norms, particularly with regard to land and resource rights. The thesis also examines international, regional and comparable domestic human rights standards and jurisprudence, especially emerging standards that protect indigenous peoples' rights.

The thesis also benefits from shared practical experiences whilst conducting desk and in-depth studies in Kenya and South Africa on a joint research project of the International Labour Organisation and the African Commission on Human and Peoples' Rights that examines constitutional, legislative and administrative provisions concerning indigenous and tribal peoples in Africa. The research entailed engagement, discussion and dialogue with indigenous peoples, indigenous peoples' experts, government representatives, civil society and other relevant actors such as international institutions. Through these interactions this thesis has gained considerable insights on indigenous peoples' concerns, deficiencies in the law and suggestions of a suitable legal framework that vindicates their fundamental human rights.

The research has also benefited from participation in certain sessions of the African Commission on Human and Peoples' Rights (African Commission) and particularly meetings of the African

Commission's Working Group of Experts on Indigenous Populations/Communities in Africa. Some of the information in this research has also been gathered through participation and engagement with experts and indigenous peoples' representatives in a number of international and local conferences, workshops and training sessions.

1.6 Chapter overview

The thesis is divided into six chapters. Chapter one is an introduction and sets out the content and structure of the research. The Chapter commences with a discussion of the concept 'indigenous peoples' and examines its relevance in the realization of the groups fundamental human rights. The Chapter sets out the focus of the thesis and methodology adopted in the research.

Chapter two is a survey of the land and resource rights of indigenous peoples. It puts into context one of the core claims by indigenous peoples, namely land. It is an examination of the relation between indigenous peoples and their land. The chapter proceeds to discuss the main problems that hamper the realization of land rights by indigenous peoples.

Chapter three examines Kenya's legal framework as it relates to land. Using two case studies, that of the Maasai and the Ogiek, the chapter illustrates the hurdles faced by indigenous peoples in vindicating their land rights in Kenya.

Chapter four assesses the extent to which the current legal framework can vindicate indigenous peoples' land rights. It reviews the application of various international norms, comparative

common law jurisprudence and makes a case for the progressive interpretation of the legal framework by Kenyan courts of law in order to give meaning to indigenous peoples' land rights.

Chapter five surveys some of the legal resources that have been employed to recognise and protect indigenous peoples land rights in two comparable jurisdictions in Africa: South Africa and Namibia. This is done in a bid to identify best practices that may inform a suitable legal framework to vindicate indigenous peoples' land rights in Kenya.

Chapter six identifies possible legal reforms that would guarantee the protection of indigenous peoples land rights in Kenya. By recourse to identified best practices in South Africa and Namibia as well as international standards and norms, the chapter proffers possible legal reforms that, if adopted, would vindicate indigenous peoples' land rights in Kenya.

CHAPTER TWO

LAND RIGHTS AS CORE CLAIMS OF INDIGENOUS PEOPLES IN KENYA

2.1 Introduction

This chapter discusses land as one of the core claims of indigenous peoples in Kenya. The chapter commences by tracing the relationship of indigenous peoples in Kenya with their lands. The chapter explores the main issues of concern of these groups in Kenya with regard to their lands. These issues are: (1) lack of (or inadequate) legal recognition and protection of their lands; and (2) lack of (or inadequate) consultation and participation on issues affecting their lands.

2.2 Relation between indigenous peoples and their lands

The majority of communities in Sub-Saharan Africa rely on agrarian economies and, as such, view land as an important factor in their existence.¹¹⁰ Indeed, access to land and natural resources was at the core of the anti-colonial wars waged in a number of countries on the continent.¹¹¹ Communities relying on land and natural resources for their subsistence have therefore cultivated special relationships with the lands and territories they occupy.¹¹² These communities exhibit some form of connection with their lands as evidenced through inheritance, burial rites and other

¹¹⁰ J Blocher J 'Building on custom: Land tenure policy and economic development in Ghana' (2006) 9 *Yale Human Rights and Development Law Journal* 169; see also B Maragia 'The indigenous sustainability paradox and the quest for sustainability in post-colonial societies: is indigenous knowledge all that is needed?' (2006) 18 *Georgetown International Environmental Law Review* 205.

¹¹¹ See Ndung'u Report (n 1 above) xvii.

¹¹² See Maragia (n 110 above) 205.

cultural activities. Lands provide a source of livelihood and, over time, a spiritual connection to the ancestors whose remains are buried in those lands. Communities identify with certain landmarks within their territories such as special trees, rivers, dams, lakes, hills, mountains, caves and similar natural features. Various communities associate these landmarks with their sense of being and their spiritual heritage. Cultural and religious activities are often celebrated in the vicinity of these landmarks or invoke their spiritual significance.

That said, the majority of these communities have today adopted modern means of livelihood and while retaining some attachment to their ancestral lands, particularly in the case of rural communities, do not depend solely on particular lands. Indeed, most agrarian communities such as the Kikuyu of Kenya are known to migrate to alternative lands if available, settle there and establish complete allegiance to their new-found territories.¹¹³ To most of these communities, economic gains are the primary animating factor in their relationship to lands rather than community cultural values, beliefs and welfare. Additionally, some of these communities prefer individual ownership to lands and resources in a bid to optimize output for individual gains.¹¹⁴

On the other hand, ‘of the common traits that indigenous peoples share, probably the most notable is the retention of a strong sense of their distinct cultures and traditions’.¹¹⁵ In Kenya, indigenous peoples have a strong attachment to their unique and rich culture and traditions which

¹¹³ See J Glazier *Land and the uses of tradition among the Mbeere of Kenya* (1985) 202.

¹¹⁴ J Kenyatta *Facing Mount Kenya* (1979) 21 (Kenyatta was the first President of Kenya); see also K Kibwana ‘Land tenure in pre-colonial and post-independent Kenya’ in W Ochieng (ed) *Themes in Kenya history* (1990) 232.

¹¹⁵ See Daes study (n 96 above) para 18.

they make every conscious effort to transmit to their future generations.¹¹⁶ However, these cultures and traditions have been misunderstood and subjected to negative stereotyping by dominant groups.¹¹⁷ Given that dominant groups, due to their numerical strength, have occupied the majority of leadership positions in the State, the dominant cultures are promoted and regarded as more ‘civilized’.¹¹⁸

On the whole, indigenous peoples practice traditional economic activities that demand that they inhabit and reside in particular lands and territories that support their way of life.¹¹⁹ The hunter-gatherer communities of Kenya, such as the Ogiek, traditionally inhabit forests and rely on hunting, gathering wild fruits and bee-keeping for their survival.¹²⁰ However, due to severe land alienation and the reduction of their traditional territories, some have resorted to small-scale farming.¹²¹ Consequently, their cultures and traditions are rapidly becoming extinct.¹²²

¹¹⁶ Stavenhagen Kenya Mission Report (n 35 above) para 25.

¹¹⁷ Report of the Round Table Meeting Nairobi (n 35 above) 7, 10.

¹¹⁸ Stavenhagen Kenya Mission Report (n 35 above) para 22-24.

¹¹⁹ As above para 25; ACHPR & IWGIA (n 35 above) 89.

¹²⁰ Stavenhagen Kenya Mission Report (n 35 above) para 36-41; see also JT Kimaiyo, *Ogiek Land Cases and Historical Injustices 1902-2004*, Vol 1, Ogiek Welfare Council, (2004).

¹²¹ Stavenhagen Kenya Mission Report (n 35 above) para 25-35.

¹²² As above, para 36.

The traditional lands of these indigenous peoples provide the means for their livelihood, economic sustenance, as well as their religious and cultural life.¹²³ Indeed, most of these indigenous peoples are almost entirely dependent on the lands they occupy.¹²⁴ Their lifestyles and way of life are best sustained by the particular lands they inhabit, unlike most other communities who would thrive on any productive lands that they elect to occupy.¹²⁵ The pastoralists, such as the Maasai, inhabit savannahs and semi-arid plains, lands whose only viable economic activity requires communal land ownership. Accordingly, ‘each person in those communities’ exercises rights of access to the land dependent upon his/her specific needs at a particular time’.¹²⁶ As such, while each member of the community or particular group resident in a region could access the land, there exist clear guidelines governing such access and control from community leaders. The community determines the best way and means to utilize their land resources dependent on the prevailing climatic and weather conditions.¹²⁷

Kenya’s indigenous peoples have since time immemorial opted to retain and perpetuate their deep-seated cultures and traditions. These indigenous peoples hold onto their distinct economic, social and cultural characteristics, which have also been the basis of their discrimination and subjugation by the state, on the assumption that these cultures hinder modern development.¹²⁸

¹²³ IWGIA (n 35 above) 468; Daes study (n 96 above) para 18; Asiema & Situma (n 96 above); Hitchcock & Vinding (n 96 above) 11; HRC General Comment No. 23 (n 100 above).

¹²⁴ W Kymlicka *The rights of minority cultures* (1995) 43.

¹²⁵ See Glazier (n 113 above) 202.

¹²⁶ Wanjala (n 21 above) 26.

¹²⁷ IWGIA (n 35 above) 468.

¹²⁸ Stavenhagen Kenya Mission Report (n 35 above) para 11.

The Maasai, for example, exhibit deep-rooted ties to their lands and natural resources. According to Tarayia, this reliance on traditional lands is premised on the fact that they depend on livestock (which rely on pasture, water and salts on the lands) for their upkeep and daily sustenance.¹²⁹ This relationship governs the entire lifestyle of the Maasai, ranging from movement dependent on the livestock needs and other cultural activities. Certain lands are set aside for cultural practices and ceremonial occasions such as ‘the *Enkutoto-E-Purko* in the Kinopop area of Kenya, which is used for the *Eunoto* ceremony to terminate warriorhood and free young adults for junior elder status’.¹³⁰ It is upon the observance of these rites ‘that men may settle and marry. They are also absorbed into the decision-making structures of the society, sitting in conflict resolution fora and articulating customary norms in marriage according to traditional legal mechanisms. The *Endoinyo Oolmoruak* in Tanzania and the *Nainmina Enkiyio* area of *Loita* in Kenya are also reserved for religious and cultural rituals’.¹³¹

Fergus Mackay, a member of the Maori indigenous community in New Zealand, suggests that indigenous peoples’ attachment to their territories is not merely to any piece of land but to the specific place where that land is situated.¹³² It is on the level of the specific territories that indigenous peoples’ relationship with the lands they occupy assumes a special connection that is

¹²⁹ GN Tarayia ‘The legal perspectives of the Maasai culture, customs and traditions’ (2004) *21(1) Arizona Journal of International & Comparative Law* 186.

¹³⁰ As above 187.

¹³¹ Tarayia (n 129 above) 187.

¹³² F Mackay Presentation during proceedings of a workshop on ‘Indigenous peoples and minorities in Africa’ organised by the Southern African Institute for Advanced Constitutional Law and the Centre for Human Rights, University of Pretoria, 13-14 April 2006, Pretoria, South Africa.

basic to their existence and is linked to their beliefs, customs, traditions and culture.¹³³ They are therefore attached to specific traditional lands and not just any piece of land.¹³⁴ These are lands where they have lived for generations and the attachment is linked to the fact that the lands have a cultural and spiritual connection.¹³⁵ As such, while most other communities may still view land as being more than a means of production, to those self-identifying as indigenous peoples, their land and natural resources epitomize their unique culture and collective nature, and are usually their only way of survival.¹³⁶

Admittedly, there is a very indistinct difference between most rural communities and groups self-identifying as indigenous peoples in terms of reliance on the lands they inhabit for their economic sustenance. However, the focus of this thesis is limited to those claims by peoples who are affected more than any other group in Kenya due to the historical circumstances and the way they have elected to live.¹³⁷ Those are groups that have self-identified as indigenous peoples, and, as will emerge in subsequent chapters, continue to suffer serious human rights violations related to their land rights. Indeed, the UN Special Rapporteur on Indigenous Peoples in his Mission Report on Kenya observed that:

¹³³ Cobo's Report (n 50 above) paras 196 and 197.

¹³⁴ Daes concept paper (n 52 above) para 64; Brownlie (n 66 above) 39.

¹³⁵ HJ Deacon & J Deacon *Human beginnings in South Africa: Uncovering the secrets of the Stone Age* (1999) 132; Hitchcock & Vinding (n 96 above) 11.

¹³⁶ See Williams (n 75 above) 681.

¹³⁷ Stavenhagen Kenya Mission Report (n 35 above) para 25-41.

Most of the human rights violations experienced by pastoralists and hunter-gatherers in Kenya are related to their access to and control over land and natural resources. The land question is one of the most pressing issues on the public agenda. Historical injustices derived from colonial times, linked to conflicting laws and lack of clear policies, mismanagement and land grabbing, have led to the present crisis of the country's land tenure system.¹³⁸

The International Working Group on Indigenous Affairs (IWGIA), an authoritative international civil society organizations on indigenous peoples rights, has similarly noted that Kenya's legal framework 'works against the human rights of indigenous peoples in a number of ways as, through evictions or restriction of movement, they deny indigenous peoples access to their resources and primary sources of livelihood'.¹³⁹ Indigenous peoples themselves have also decried the fact that the state continues to destroy their culture and dispossess them of their lands and territories through 'so called development projects such as mining, logging, oil exploration, privatization of their territories, and tourism'.¹⁴⁰ The violation of Kenya's indigenous peoples' culture and land dispossession 'led to the displacement of whole communities and the destruction of the environment, their traditional economies and other practices which had sustained them since time immemorial'.¹⁴¹ Other issues related to indigenous peoples' land and resource rights include: resource-related conflicts due to incursions by dominant communities; environmental degradation and desertification; lack of consultation and participation in the management of their

¹³⁸ Stavenhagen Kenya Mission Report (n 35 above) para 25.

¹³⁹ Stavenhagen Kenya Mission Report (n 35 above) para 25-54.

¹⁴⁰ See Statement of the Loodoariak Community Land and Development Programme in Kenya at the nineteenth session of WGIP cited in Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, R Stavenhagen, submitted in accordance with Commission resolution 2001/65, E/CN.4/2003/90, 21 January 2003, para 20(Stavenhagen on the impact of large scale projects).

¹⁴¹ n 140 above para 20.

resources; and continued marginalization and exclusion from infrastructural and development programs.¹⁴² To illustrate the situation of indigenous peoples in Kenya with regard to their land and resource rights the next sections highlight some of these peoples' key concerns.

2.3 Issues of concern by indigenous peoples in their demand for recognition and protection of their land rights

According to Daes, 'the gradual deterioration of indigenous societies can mainly be traced to the lack of recognition of the profound relationship that indigenous peoples have to their lands, territories and resources, as well as the lack of recognition of other basic human rights'.¹⁴³ Pre-colonial and post-colonial regimes continue to impose their cultural biases to dispossess and illegally expropriate indigenous peoples' lands and resources.¹⁴⁴ This situation persists in Kenya and stems from continued discriminatory laws and policies inherited from its colonial past.¹⁴⁵ Upon independence, the country pursued social, political and economic policies that embraced westernized development paradigms which had little regard for the cultural diversity of its peoples.¹⁴⁶ Accordingly, indigenous peoples who elected to retain their cultures and traditions were left at the periphery of the modern state's development agendas and programs.¹⁴⁷ This has

¹⁴² As above.

¹⁴³ Daes final working paper (n 4 above) 78.

¹⁴⁴ Daes final working paper (n 4 above) 78; see also IG Shivji 'State and constitutionalism: A new democratic perspective' in IG Shivji (ed) *Constitutionalism an African debate* (1991) 33.

¹⁴⁵ Stavenhagen Kenya Mission Report (n 35 above) para 14.

¹⁴⁶ As above.

¹⁴⁷ Stavenhagen Kenya Mission Report (n 35 above) para 14.

led to massive expropriation of their lands, exclusion from development and dire poverty levels. Erika Daes is similarly of the view that ‘the attitudes, doctrines and policies developed to justify the taking of lands from indigenous peoples were and continue to be largely driven by the economic agendas of certain states’.¹⁴⁸

The African Commission likewise observes that indigenous peoples in Africa ‘are subject to domination and exploitation within national, political, and economic structures that are commonly designed to reflect the interests and activities of the national majority’.¹⁴⁹ Such attitudes have culminated in two recurrent problems that equally face indigenous peoples of Kenya with regard to their rights to lands and natural resources. These problems are at the core of indigenous peoples’ struggles and include: inadequate and or non-existent legal recognition and protection of their lands and resources; and a lack of consultation and participation on matters involving their lands and resources. The next section examines these two problems.

2.3.1 Inadequate or lack of legal recognition of indigenous peoples’ rights to lands

One of the greatest challenges facing indigenous peoples in Kenya is the inadequacy of the legal framework to redress the historical discrimination and exclusion of marginalised communities.¹⁵⁰ The legal framework limits the application of traditional legal systems thus disregarding the

¹⁴⁸ Daes final working paper (n 4 above) 79; see similar views in Anaya (n 37 above) 142.

¹⁴⁹ ACHPR & IWGIA (n 35 above) 63.

¹⁵⁰ Stavenhagen Kenya Mission Report (n 35 above) para 11; Stavenhagen South Africa Mission Report (n 74 above) paras 20-32.

culture, way of life, and preferred mode of economic sustenance of these communities.¹⁵¹ Indeed, indigenous peoples in Kenya have decried the fact that the state continues to destroy their culture and alienate their lands and territories through ‘the so called development projects such as mining, logging, oil exploration, privatization of their territories, and tourism’.¹⁵² The violation of Kenya’s indigenous peoples’ culture and land dispossessions have ‘led to the displacement of whole communities and the destruction of the environment, their traditional economies and other practices which had sustained them since time immemorial’.¹⁵³

Kenya recently acknowledged that while in the past it did not take any active measures to preserve and protect minorities, ‘there has been a gradual acceptance of their status and efforts are being made to not only recognise these minorities, but also encourage their survival and protection’.¹⁵⁴ Some of these communities have been subsumed with the rest of society through an unofficial policy of assimilation and integration of numerically smaller tribes into some dominant ones.¹⁵⁵ These include smaller pastoralist and hunter gatherer communities such as the Ogiek, El Molo, Watta, Munyayaya, Yakuu and such others who are excluded from official statistics.¹⁵⁶ The UN Special Rapporteur observes that ‘this situation is derived from colonial

¹⁵¹ IWGIA (n 35 above) 468-470; Report of the Round Table Meeting Nairobi (n 35 above) 10.

¹⁵² Stavenhagen on impact of large scale projects (n 140 above) para 20.

¹⁵³ As above.

¹⁵⁴ Second Periodic Report of Kenya to the UN Human Rights Committee, CCPR/C/KEN/2004/2 para 212.

¹⁵⁵ Stavenhagen Kenya Mission Report (n 35 above) para 21.

¹⁵⁶ As above.

policy of promoting assimilation of smaller communities into other dominant groups'.¹⁵⁷ This has had the effect of reducing the visibility or leaving out such assimilated communities from national policy-making and budget allocations.¹⁵⁸ The lack of official recognition has caused indigenous peoples 'exclusion in policy processes, non-effective consultation in development and become victims of assimilation'.¹⁵⁹

The failure to recognize indigenous peoples and their aspirations, which include the ownership, control and management of their lands in accordance with their culture and traditions, continues to entrench the historical discrimination that has pervaded these groups for generations.¹⁶⁰ This exclusion is mainly takes the form of laws and policies that do not reflect indigenous peoples' proprietary rights.¹⁶¹ Discrimination and unequal treatment takes the form of lack of access or insufficient access to basic socio-economic rights, and a poor infrastructure in their places of habitat. This is a direct result of their perceived reluctance to assimilate and adopt modernity.¹⁶² Further, due to their relatively inferior numbers as compared to dominant communities, they are not, to a large extent, in a position to be equitably represented in political structures of the state, such as parliament, the executive and judiciary, save for where affirmative action measures are

¹⁵⁷ Stavenhagen Kenya Mission Report (n 35 above) para 21.

¹⁵⁸ As above.

¹⁵⁹ Stavenhagen Kenya Mission Report (n 35 above) para 11; see also Report of the Round Table Meeting Nairobi (n 35 above) 4.

¹⁶⁰ Daes final working paper (n 4 above) 144 para 40-48.

¹⁶¹ Anaya (n 37 above) 142.

¹⁶² IWGIA (n 35 above) 468-69.

adopted.¹⁶³ In effect, most indigenous peoples in Kenya lack a voice to ensure that resources in the country are equitably distributed as well as to challenge this discrimination.¹⁶⁴

Kenya's domestic legal order has failed to adequately address these groups' problems.¹⁶⁵ Indeed, since the colonial regime, pastoralism has 'been neglected and held in disrepute by economic planners and policy makers', instead promoting sedentary lifestyles based on crop farming and commercial ranching.¹⁶⁶ Hunter-gatherers and forest-dwellers such as the Ogiek have not been spared either; their traditional forests were nationalized, which led to mass evictions and displacement. Some of these communities were settled away from their natural habitats.¹⁶⁷ The Ogiek hunter-gatherers were forcefully removed from the Mau forest, through the gazettelement of the forest, in effect denying them access to their traditional lands which were the sources of their cultural and spiritual nourishment as well as a source of livelihood.¹⁶⁸

These communities' situation is aggravated by the fact that lands traditionally owned by indigenous peoples are viewed and treated as belonging to no one in particular or to the state

¹⁶³ Stavenhagen Kenya Mission Report (n 35 above) paras 22-24.

¹⁶⁴ IWGIA (n 35 above) 468.

¹⁶⁵ See Stavenhagen South Africa Mission Report (n 74 above) paras 26-32; see also ILO/ African Commission on Human and Peoples Rights, Report of the Workshop to determine the scope and methodology of the research, Examining constitutional, legislative and administrative provisions concerning indigenous and tribal peoples in Africa, 18-20 September 2006, Yaoundé (in file with author).

¹⁶⁶ See Stavenhagen Kenya Mission Report (n 35 above) para 17.

¹⁶⁷ ACHPR & IWGIA (n 35 above) 20.

¹⁶⁸ Kimaiyo (n 120 above).

since they are not demarcated or allotted to an individual title-holder.¹⁶⁹ This is a view erroneously adopted by the state from the colonial law doctrine of *terra nullius* and was applied to mean ‘that indigenous lands are legally unoccupied until the arrival of a colonial presence and can therefore become the property of the colonial power through effective occupation’.¹⁷⁰ The consequences of regarding indigenous lands as legally unoccupied have been to effectively disinherit them of their traditional territories as well as subject them to modern development paradigms bent on further alienation and subjugation.¹⁷¹ States have thus either declared some of these lands as government lands and where they have not nationalized these resources, they have encouraged private individuals to put to ‘better’ use the lands. Such ‘better’ use include large scale commercial ranching, private conservancy projects, real estate development, the awarding of resource extraction concessions such as mining, logging, where applicable, and even military training and exercise zones for foreign troops.¹⁷²

In Kenya, settled agriculture, mining, tourism and modern development schemes are seen as the preferred way to development. Certain types of indigenous peoples’ way of livelihood such as nomadic pastoralism, hunting and gathering, are therefore looked upon negatively and their

¹⁶⁹ See Daes final working paper (n 4 above) 81; see also in the Kenyan context I Lenaola, H Hadley H. Jenner & T Wichert ‘Land tenure in pastoral lands’ in C Juma and JB Ojwang (ed) *In land we trust, environment, private property and constitutional change* (1996) 238.

¹⁷⁰ Daes final working paper (n 4 above) 79; see the ICJ ruling on the invalidity and erroneous application of the doctrine in *Western Sahara, Advisory Opinion*, 1975 ICI. 12; see also the *Mabo v Queensland* (n 72 above) where the High Court in Australia declared the doctrine of *terra nullius* unjust and discriminatory and therefore unacceptable.

¹⁷¹ See Wanjala (n 21 above) 25; see also Lenaola *et al* (n 169 above) 238.

¹⁷² Stavenhagen on impact of large scale projects (n 140 above) page 2 & para 23.

future survival and development are put in jeopardy.¹⁷³ The sustainability and development potential of these cultural systems are ignored and are perceived as being primitive, uneconomic and environmentally-destructive and as incompatible with modernisation. The states attempts to assimilate indigenous communities by promoting westernised ideals of development, calling upon these communities to discard their rich cultures and ways of life to adopt modernity. This is usually done in total disregard of the communities' strengths, needs and preferences and is often without any or adequate consultation and participation of the community.

Of key concern to indigenous peoples, especially pastoralists, is the fact that they prefer communal land tenure while the legal framework in Kenya favours individualized land regimes. While some communities in pre-colonial Kenya held land communally, 'tendencies of individual land tenure were discernible in certain ethnic groups of Central Kenya'.¹⁷⁴ Jomo Kenyatta argues that 'according to the Kikuyu customary law of land tenure every family unit had a land right of one form or another. While the whole tribe defended collectively the boundary of their territory, every inch of land within it had its owner'.¹⁷⁵ However, even where certain parcels of land belonged to individuals there were 'what was referred to as 'commons' which was territory which served the interests of the community in its corporate status, such as common pathways, watering points, grazing fields, recreational areas/grounds, meeting venues, ancestral and cultural

¹⁷³ ACHPR & IWGIA (n 35 above) 29 'The need to increase exports has led to intensification of agricultural production and unplanned cultivation of semi arid areas leading to uncontrolled clearing of forests Areas set aside for dry season grazing by pastoralists have been cleared and cultivated. The underlying anti pastoralists bias dominating rural development policies encourages the spread of farming at the expense of pastoralism often leading to conflicts over scarce resources'.

¹⁷⁴ See Kibwana (n 114 above).

¹⁷⁵ Kenyatta (n 114 above) 21.

grounds and such others'.¹⁷⁶ Kenyatta states that land ownership was based on tribal territorial boundaries which he asserts were 'what the Europeans have misinterpreted to mean "tribal ownership or communal land"'.¹⁷⁷ It is not surprising, therefore, that upon independence, with the Kikuyu at the political helm, the country adopted individualized land tenure systems as had been advanced by the colonial regime.¹⁷⁸ Indeed, the Kikuyu have been at the forefront of championing an individualized land tenure system in Kenya.¹⁷⁹

However, amongst indigenous peoples, especially the pastoralists, an individualized land tenure system are neither a viable option nor compatible with their cultural aspirations and way of life.¹⁸⁰ In Kenya, as is the case in a number of other jurisdictions, indigenous peoples have sought communal land ownership as opposed to individual land tenure systems.¹⁸¹ Apart from cultural and traditional reasons for seeking the collective recognition of their rights, these groups inhabit

¹⁷⁶ Ndung'u Report (n 1 above) 2.

¹⁷⁷ As above.

¹⁷⁸ Wanjala (n 21 above) 26.

¹⁷⁹ See Ngugi (n 104 above) 342.

¹⁸⁰ ACHPR & IWGIA (n 35 above) 24. For example in Kenya in the 1970s the World Bank sponsored a land titling project whose intention was to increase agricultural productivity through the introduction of individual titles. However the effect was decreased productivity, serious insecurity of tenure, landlessness and economic vulnerability. These policies continue in Kenya with many disastrous effects for the pastoralists, especially the Maasai, who have ended up losing their land that is crucial to their livelihood and many today find themselves completely impoverished. There are also examples of treaties signed between the British and the Maasai in 1904 and 1911- (See copies of the 1904 and 1911 Maasai agreements in Carter Report (n 252 below) 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 below) 178-182; see also Ghai & McAuslan (n 18 above) 20-25. The validity of the treaties and attempts to seek the return of the lost Maasai lands is still subject to judicial action. Indeed at the Lancaster House Conference in the 1960s, the Maasai refused to sign the constitutional arrangements on account of disagreements over their land question; see also Asiema & Situma (n 96 above) 149; On the San in South Africa see J Suzman *Regional assessment of the status of the San in Southern Africa* (2001)34.

¹⁸¹ Advisory Committee Netherlands (n 68 above) 4.

lands that may only be suitable for communal sharing of resources.¹⁸² Pastoralists such as the Maasai, for example, occupy lands in arid and semi-arid regions including savannahs suitable for livestock keeping.¹⁸³ While these lands are expansive, they are not suitable for sedentary agricultural farming and nature demands that these resources are utilized and managed in sustainable ways, failing which serious adverse repercussions are experienced, including drought and environmental degradation. However, over the years, these resources have systematically been alienated by the state and other private entities leading to shrinkage, in effect reducing the resource-base of these communities with attendant survival and environmental consequences.¹⁸⁴ Indeed, the Maasai have always and still prefer to manage their traditional lands communally for cultural and pragmatic reasons.¹⁸⁵

The dispossession of the Maasai traditional lands has been sanctioned through such processes as the infamous 1904 and 1911 colonial treaties,¹⁸⁶ and lately through the group ranches scheme.¹⁸⁷

¹⁸² Advisory Committee Netherlands (n 68 above) 4.

¹⁸³ ACHPR & IWGIA (n 35 above) 17.

¹⁸⁴ As above 21.

¹⁸⁵ Tarayia (n 129 above) 205-206.

¹⁸⁶ 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 below) 89-104; The Maasai argued that they had not been consulted and therefore did not consent to the treaties. According to the Plaintiffs in the *Ole Njogo* case, the signatories to the treaties on the Maasai side had no mandate to do so and that the community was therefore duped into entering into the agreements; see also AW Kabourou 'The Maasai land case of 1912: A reappraisal' (1988) 17 *Transafrican Journal of History*. See also Mwangi 'The transformation of property rights in Kenya's Maasai land: Triggers and motivations' (2005) 35 *International Food Policy Research Institute*, CAPRI Working Paper 11.

¹⁸⁷ The conversion of communal land holdings to group ranches was facilitated through legislation. This was primarily through the Land Adjudication Act of June 1968 which provided for the recording of rights and interests in customary lands, and their assignment to their customary users and the Land (Group Representatives) Act which provided for the governance and administration of group ranches. In accordance

The group ranches, discussed in detail in chapter four, eventually failed for a number of reasons, one of which was that the state did not take into account the particular needs of the Maasai and failed to consult the community sufficiently to comprehend the group ranches system. Certainly, it is contended that perhaps the only reason the Maasai accepted the idea of group ranches was because ‘it afforded them protection against further land appropriation from government, against the incursion of non-Maasai and from a land grab by the elite Maasai’.¹⁸⁸ The ‘group ranches’ failed in what some commentators have argued was an indirect policy of opening up and individualizing the Maasai lands.¹⁸⁹ The eventual subdivision of group ranches had various repercussions among the Maasai, the most notable being increased levels of poverty since the pieces of land hived off the ranches were often not sufficient to sustain their livestock and because traditional migratory patterns were blocked as well.¹⁹⁰ The divisions also witnessed a large-scale incursion by mainstream communities who purchased land belonging to some of the recipients of the ranch subdivision.¹⁹¹ The consequence of the sub-division of the ranches was increased alienation of the Maasai lands through the ‘instrumentality of the law’.¹⁹²

with the Land (Group Representatives) Act, the group ranch becomes the property of all its members in equal and undivided shares. The group ranches were registered under a group of ten representatives who would be the nominal title holders and held the land in trust of the other unregistered members of the community see Lenaola et al (n 169 above) 248.

¹⁸⁸ See Mwangi (n 186 above) 7; JG Galaty ‘Ha (I) ving land in common: The subdivision of Maasai group ranches in Kenya’ (1994) 34 *Nomadic peoples* 109-121.

¹⁸⁹ As above; see generally Ngugi (n 104 above) 300.

¹⁹⁰ JG Galaty JG ‘The land is yours: Social and economic factors in the privatisation, Sub division and sale of Maasai ranches’ (1992) 30 *Nomadic Peoples* 27.

¹⁹¹ As above.

¹⁹² Ngugi (n 104 above) 300.

Hunter-gatherers have not been spared from the dispossession of their land and resources by legal processes and policies. This has been mainly through the declaration of the forests they inhabit as protected areas for the purposes of conservation of national resources. The Ogiek's culture and way of life are intimately connected to the forest lands they occupied, yet colonial and successive governments evicted them on the pretext of forest conservation and development.¹⁹³ The Ogiek contend that 'the state sanctioned a series of efforts to dispossess them of their land besides seeking to exterminate, assimilate and impoverish them through constant evictions and disruption of their traditional lifestyles'.¹⁹⁴ Their claims are supported by the fact that the same forests were allocated to other individuals and private corporations to harvest timber and farm.¹⁹⁵ The case of the Ogiek's dispossession is discussed in detail as a case study in chapter four.

The Kenyan state has used the powers of eminent domain and police powers to 'regulate the use of indigenous lands without regard for constitutional limits on governmental power that would otherwise be applicable'.¹⁹⁶ This has led to the state gazetting certain lands and territories occupied by indigenous people. While, admittedly, the state should have the powers to utilize resources for the development of the whole state, proper regard to the needs and circumstances of indigenous peoples' resident within those resources should be taken into account. This includes giving the communities rights of access, and the sharing of the proceeds of the resource.

¹⁹³ Kimaiyo (n 120 above) 17. For further background information on the Ogiek see also <www.ogiek.org> accessed on 10 November 2006.

¹⁹⁴ Kimaiyo (n 120 above) 4.

¹⁹⁵ Stavenhagen Kenya Mission Report (n 35 above) para 37.

¹⁹⁶ Daes final working paper on land (n 4 above) 82.

Further, on the basis of repugnancy clauses the legal framework has limited the application of customary law. Such clauses stipulate that rules of customary law are only valid as far as they are not inconsistent with the constitution and written laws.¹⁹⁷ This poses one of the greatest challenges to indigenous peoples whose only proof to their lands, in most cases, is oral tradition and their connection to culturally-significant places such as graveyards.²⁰⁸ The situation is exacerbated by illiteracy and a lack of awareness due to a lack of formal education and financial means to access legal services.¹⁹⁸ Indeed, the fact that, indigenous peoples' cultures and traditions are not formally recognised or are looked down upon, affects indigenous peoples' capacity to engage with the formal legal system.

The majority of indigenous peoples' laws, customs and traditions are unwritten. They have been passed on orally from generations to generation. These peoples may therefore not be able to prove their title to the lands they occupy on paper (title deeds). However, according to William Langeveldt, a member of the UN Permanent Forum on Indigenous Affairs, as far as indigenous communities are concerned, it is indisputable that the land is theirs.¹⁹⁹ He argues that most indigenous peoples' proof of their claims to the lands they occupy are supported by the existence of the graves of their ancestors and oral testimony of the various generations of the lands

¹⁹⁷ See sec 115(2) and 117(5) Constitution of Kenya; See also sec 69 Trust Land Act (Cap 288) See also Stavenhagen Kenya Mission Report (n 35 above) para 64.

¹⁹⁸ Stavenhagen Kenya Mission Report (n 35 above) paras 55-65.

¹⁹⁹ W Langeveldt Contribution during a workshop on 'Indigenous peoples and minorities in Africa' organised by the Southern African Institute for Advanced Constitutional Law and the Centre for Human Rights, University of Pretoria, 13-14 April 2006, Pretoria, South Africa (In file).

inhabitants.²⁰⁰ However, where controversy arises as to the existence of custom, oral evidence may be inadmissible unless it is supported by other forms of proof.²⁰¹ Indigenous peoples in such circumstances are faced with the daunting challenge of ensuring that their lands are recognized, properly demarcated and protected in accordance with their customary laws and traditions.²⁰² Equally difficult are adequate consultation and gaining compensation for forced resettlement/displacement, evictions and seized lands.²⁰³

In order to effectively address indigenous peoples' needs, it is imperative that states acknowledge and give regard to the status and situation of indigenous peoples within their territories. Such due regard need not be special or specific to indigenous peoples, but rather one that is designed to redress the historical and continued discrimination and exclusion of all marginalised communities within a state. That could for instance take the form of protection of their fundamental human rights in accordance with their traditions and customs.²⁰⁴ Through non-discrimination and equality before the law provisions, such a framework should recognize the relation of indigenous peoples to their lands and natural resources.²⁰⁵ In Kenya, as will emerge later in the thesis, that could entail reform of the law to cater for historical injustices and equal recognition and

²⁰⁰ n 199 above; see also C Daniels 'Indigenous rights in Namibia' in Hitchcock & Vinding (n 96 above) 54.

²⁰¹ See sec 13, 33(d) & 33(f) Evidence Act Laws of Kenya cap 80.

²⁰² ACHPR & IWGIA (n 35 above) 21.

²⁰³ J Anaya 'Indigenous peoples' participatory rights in relation to decisions about natural resource extraction: the more fundamental issue of what rights indigenous peoples have in lands and resources' (2005) 22 *Arizona Journal of International & Comparative Law* 17; see Thornberry (n 35 above) 217.

²⁰⁴ Anaya J (n 35 above) 142.

²⁰⁵ Daes final working paper (n 4 above) 78.

application of marginalised communities’ traditional legal system. This is particularly important since the way of life and means of economic sustenance of most indigenous peoples may be different from that of mainstream communities.²⁰⁶

2.3.2 Inadequate consultation and participation of indigenous peoples over matters affecting their lands rights

A long history of indifference to indigenous peoples has resulted in extreme levels of poverty and the violation of their fundamental human rights and freedoms. Some states have attempted to forcibly assimilate indigenous peoples without any due regard to their particular way of life, cultures and traditions.²⁰⁷ These states have adopted policies and development programmes that adversely affect indigenous peoples’ rights to traditional lands and resources without any or adequate consultation with the communities concerned. This state of affairs is often attributed to the fact that ‘these communities have been forced to endure decision making on issues which materially affect them without having been able to have an equal say in this process and thus exert any real influence’.²⁰⁸

In Kenya, a lack of legal recognition of indigenous peoples and exclusion from development processes continues to hamper the realization of these communities’ fundamental human rights and freedoms. Some of these groups, such as the Endorois, have been denied equitable and

²⁰⁶ Daes final working paper (n 4 above) 78; Stavenhagen Kenya Mission Report (n 35 above) para 25.

²⁰⁷ Advisory Committee Netherlands (n 68 above) 4.

²⁰⁸ Advisory Committee Netherlands (n 68 above).

effective consultation and participation on issues that affect them.²⁰⁹ Others such as the Somali and the Oromo are denied the opportunity to obtain or encounter numerous hurdles when accessing identity documents which hamper their capacity to acquire legal title to their lands and resources.²¹⁰ These documents are also required for the enjoyment of citizenship rights such as voting and participation in electoral politics. It also hampers their enjoyment of other fundamental human rights such as freedom of movement within and beyond the country's borders.²¹¹

Indigenous peoples' precarious circumstances are often linked to their historical and continued marginalisation, social exclusion and discrimination, resulting in an unequal distribution of resources. This is further exacerbated by natural calamities such as drought without proper mitigating interventions from the state; and the imposition of development projects that are often unviable due to a lack of proper consultation and participation of indigenous peoples in their conception and implementation.²¹² These factors adversely affect indigenous peoples' rights to development and access to socio-economic rights such as education, health, housing, water and food.

²⁰⁹ See *Endorois* case (n 3 above).

²¹⁰ Stavenhagen Kenya Mission Report (n 35 above) para 21.

²¹¹ As above.

²¹² Stavenhagen Kenya Mission Report (n 35 above) paras 65-7.

As a result, indigenous peoples have as a result lost large tracts of their lands and natural resources to the state ostensibly for public purposes as well as to private investors.²¹³ For instance, conservation efforts and large-scale infrastructure projects in the name of national development without adequate consultation with indigenous peoples continue to affect indigenous peoples' rights and access to land and resources.²¹⁴ Such projects include conservation projects, the creation of national parks, reserves, mining, and construction concessions which are awarded to public and private entities. In Kenya, the establishment of national parks such as the Manyara, Serengeti, Maasai Mara, and Amboseli has caused tremendous land alienation and eviction and restriction of local communities from resources that were critical for their survival without compensation, supposedly in the national interest.²¹⁵ The UN Special Rapporteur on Indigenous Peoples in his report on an official mission to Kenya notes that local indigenous communities do not participate in the management of the parks and reserves and do not benefit from the revenue.'²¹⁶ This has often caused tension and conflicts with investors and government agencies running the reserves.

²¹³ CERD General Recommendation XXXIII (n 71 above) para 3.

²¹⁴ These could be for example conservation projects, establishment of national parks and reserves, mining and construction projects. In Kenya for example the establishment of the National Parks such as the Manyara, Serengeti, Maasai Mara, Amboseli has caused tremendous land alienation and eviction and restriction of local communities from resources that were critical for their survival without compensation supposedly in the national interest; The ancestral land of the Ogiek in Kenya in the Mau forest has also been declared a protected forest area. However the same forest has been encroached by logging companies and outsiders for other purposes to the extent that the Ogiek have lodged High Court applications over the matter, see IWGIA *The Indigenous World 2002/2003* (2003) 364-371.

²¹⁵ See Stavenhagen Kenya Mission Report (n 35 above) para 53 (with the exception of the Maasai Mara where the Maasai are said to enjoy 19% of the revenues collected).

²¹⁶ See Stavenhagen Kenya Mission Report (n 35 above) para 53.

2.4 Chapter conclusion

States have a duty to give adequate legal recognition to indigenous peoples' rights to land and resources, as well as to ensure the appropriate consultation and participation of these people in policies and programs that affect their land and resources. Such recognition should include indigenous peoples-preferred land tenure regimes, the applicability of customary laws, and should reflect international human rights standards. Any limitation, if at all, of these rights should 'only flow from the most urgent and compelling state interest', after adequate consultation, participation and negotiation of fair amount of compensation as well as alternative remedies.²¹⁷ Having established that land rights are core claims by indigenous peoples, the next chapter surveys the existing legal framework in Kenya and the extent to which it accommodates the land rights of marginalised communities.

²¹⁷ Daes final working paper (n 4 above) 89.

CHAPTER THREE

KENYA'S LEGAL FRAMEWORK AND INDIGENOUS PEOPLES' LAND RIGHTS

3.1 Introduction

This chapter discusses Kenya's legal framework and examines the extent to which it protects indigenous peoples' rights to land. It begins with a short overview of the main sources of law that are applicable in Kenya. This overview is useful in order to appreciate the force of the various laws related to the land question and how they impact upon indigenous peoples and their rights.

The chapter traces the historical development of the current legal regime related to the land question in Kenya. That is done in a bid to explore the reasons behind the current status of indigenous peoples' land issues. By recourse to two case studies, that of the Maasai and the Ogiek, the chapter then surveys the extent to which the current legal framework protects or can give meaning to indigenous peoples' land rights when invoked.

3.2 Sources of applicable laws in Kenya

The hierarchy of sources of law in Kenya can be scanned from the provisions of the Judicature Act, which provides as follows:

The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with -
(a) the Constitution;

(b) subject thereto, all other written laws, including the (*relevant and applicable*) Acts of Parliament of the United Kingdom;

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date; but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) 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.²¹⁸

In exercising their jurisdiction, Kenyan courts of law are guided by this hierarchy. The courts have a mandate to interpret laws and applicable provisions to determine their applicability and to protect fundamental human rights and resolve disputes. In terms of the Constitution, the High Court is the superior court of record and has unlimited original jurisdiction in civil and criminal matters.²¹⁹ Importantly, it has original jurisdiction to determine allegations of violation of fundamental human rights.²²⁰ The highest court in Kenya is the Court of Appeal, which is also a

²¹⁸ Sec 3 Judicature Act Laws of Kenya Cap 8.

²¹⁹ Sec 60 Constitution of Kenya.

²²⁰ Sec 84 as above.

superior court of record. It exercises jurisdiction and powers in relation to appeals from the High Court.²²¹ Other subordinate courts include the magistrates' courts.²²²

The hierarchy of sources of law places the Constitution at the pinnacle. Statutes and other written laws, including those borrowed from England, follow. Common law, doctrines of equity and statutes of general application are equally valid in so far as circumstances in Kenya permit. Ghai and McAuslan have rightly suggested that it would have been useful to make specific reference to or enact the referred applicable laws rather than a general reference to statutes of general application.²²³ African customary law is placed at the bottom of the applicable laws. This is unfortunate given the wide cross-section of people who still rely on African customary law as a source of law.²²⁴

Most indigenous communities rely on their traditions and customs to seek recognition and protection of their land rights. The relegation of African customary law to the lowest position in the hierarchy of applicable laws means that most of these communities have to labour for recognition of their lands rights. African customary law should preferably be on a par with common law, with courts required to apply the regime either chosen by or most relevant to the parties.²²⁵ Another challenge emerges from the fact that the country's land laws seem to favour

²²¹ Sec 64 Constitution of Kenya.

²²² Sec 65 as above.

²²³ Ghai & McAuslan (n 18 above) 375.

²²⁴ Wanjala (n 21 above) 26.

²²⁵ Ghai & McAuslan (n 18 above) 375-376.

individual land tenure, which may not always be feasible for indigenous peoples. That situation was not always the case. It only emerged after the imposition of the English colonial laws and policies whose developments are traced in the next section.

3.3 The land law regime in Kenya

Since colonial times, laws have been employed to alienate traditional lands belonging to African peoples. Today that situation is aggravated by the inconsistencies in the laws. Indeed, there is a general consensus that ‘the land law regime in Kenya is inordinately complex and addresses the land issues from different perspectives leading to inconsistencies in law’.²²⁶ It has been suggested that the only possible way to solve the current land regime quagmire is by ‘resolving the problems between statute law and cultural rights to land that are accommodated by law’.²²⁷ It is therefore important to begin by briefly tracing the history of the land tenure regime in Kenya in order to comprehend and appreciate the *status quo*.

3.3.1 Pre-colonial land ownership in Kenya

In the period before Kenya became a British protectorate on 15 June 1895,²²⁸ ‘the country was populated by Africans exercising a customary land tenure system’.²²⁹ Ownership, access, and

²²⁶ Reassessing Kenya’s Land Reform, *The Point, Bulletin of the Institute of Economic Affairs*, Issue No 40, (November, 2000) 3; Ndung’u Report (n 1 above) 190- There are more than 40 different statutes dealing with aspects of land administration ownership and use in Kenya.

²²⁷ The Point Bulletin (n 226 above).

²²⁸ See generally Ghai & McAuslan (n 18 above) 3-25.

control of land were therefore dependent on the traditions, customs and ‘intricate rules of usages and practices’ of a particular community.²³⁰ According to Wanjala, ‘the most common form of tenure during the period in question (pre-colonial times) is what can be termed “communal tenure” whereby land belonged to no one individual in particular but to the community (clan, ethnic group) as a whole’.²³¹ However, as seen earlier in chapter two, while communal land ownership could have been the case for certain communities and areas, some communities did exhibit individual land tenure characteristics.²³² Indeed, Kibutha Kibwana suggests that ‘tendencies of individual land tenure were discernible in certain ethnic groups of Central Kenya’, which are mainly lands inhabited by the Kikuyu.²³³ In such communities, while land was based on tribal territorial boundaries, each individual had specific rights of access and control.²³⁴ It is therefore more accurate to say that different communities, even in pre-colonial times, practised varied forms of land tenure according to their culture, traditions and way of life.

Some communities, particularly the pastoralists, such as the Maasai, certainly did prefer and practise communal land ownership. This meant that ‘each person in the community had rights of access to the land dependent upon his/her specific needs at the time’.²³⁵ While each member of

²²⁹ TOA Mweseli ‘The centrality of land in Kenya: Historical background and legal perspective in Wanjala (n 21 above) 4.

²³⁰ Ndung’u Report (n 1 above) 1; see also Wanjala (n 21 above) 26.

²³¹ Ndung’u Report (n 1 above) 1; see also Wanjala (n 21 above) 26.

²³² Kenyatta (n 114 above) 21.

²³³ See Kibwana (n 114 above) 232-233.

²³⁴ As above.

²³⁵ Wanjala (n 21 above) 26

the community or particular group resident in a region could access the land, there existed clear guidelines governing such access and control from community leaders. The Maasai community determined the best way and means to utilize their land resources dependent on the prevailing climatic and weather conditions.

The pre-colonial land tenure system was therefore as varied as there were different tribes. While some groups practised some form of individual ownership, others held land communally.²³⁶ With the advent of colonialism, the British embarked on a process of streamlining land ownership through ‘land alienation, imposition of English property law and transformation of customary land law and tenure’.²³⁷

3.3.2 The colonial land tenure system in Kenya

‘The declaration of protectorate status over Kenya by the British in 1895 was followed by a systematic and “legal” process of alienating large tracts of land and dispossessing indigenous peoples of their land’.²³⁸ This was made possible by the erroneous reasoning that Africans were not civilized enough to govern themselves, let alone administer their property rights.²³⁹ On that

²³⁶ Kibwana (n 114 above) 232-233.

²³⁷ Wanjala (n 21 above) 27.

²³⁸ As above 27. It must be borne in mind that the use of the term ‘indigenous peoples’ in that regard is in reference to all Africans resident in Kenya and not necessarily the groups identified as such by the African Commission’s Working Group.

²³⁹ As above 27; see also Anaya (n 35 above) 31-34.

basis the British, as did most other colonial occupiers, used foreign laws and western conceptions of civilization to dispossess Africans of their land.²⁴⁰

It is certainly not true that the African did not have structures in place that would qualify as government. The Maasai for example had clans, councils of elders, spiritual leaders and organized structures to determine and decide on the community's needs.²⁴¹ The fact that they moved from place to place in pursuit of pasture dependent on the environmental conditions prevailing at certain seasons did not mean that they lacked a 'settled form of government'.

The colonial authorities promulgated laws that vested virtually the whole Kenyan territory in the Crown.²⁴² The dispossession of indigenous lands was legitimized by the enactment of the Crown Lands Ordinance of 1915, which defined 'Crown land' to mean:

All public lands in the colony which are for the time being subject to the control of His Majesty by virtue of any treaty, convention, or agreement, or by virtue of His Majesty's Protectorate, and all lands which have been acquired by his Majesty for the public service or otherwise howsoever, and shall include all lands occupied by the native tribes of the colony and all lands reserved for the use of the members of any native tribes.²⁴³

²⁴⁰ See Okoth-Ogendo (n 18 above) 11; see also HWO Okoth-Ogendo 'The nature of land rights under indigenous law in Africa' in A Claasens & B Cousins *Land, power & custom controversies generated by South Africa's Communal Land Rights Act* (2008) 96-99.; See also Anaya (n 35 above) 31-34 on how the colonisers consolidated power over the colonies through a trusteeship doctrine and sought to 'civilise' indigenous peoples by imposing their laws and policies.

²⁴¹ Galaty (n 190 above) 27; L Hughes *Moving the Maasai, A colonial misadventure* (2006) 14.

²⁴² Mweseli (n 229 above) 9; see also Okoth-Ogendo (n 18 above) 41.

²⁴³ Sec 5 Crown Lands Ordinance.

According to Ghai and McAuslan, the ‘disinheritance of the Africans from their lands was complete’ by the time of the 1915 Crown Land Ordinance.²⁴⁴ Indeed, the Colonial Court in *Isaka Wainaina wa Gathomo and another v Murito wa Indangara and others* interpreted the Crown Lands Ordinance to the effect that Africans were mere tenants at the will of the Crown with no more than temporary occupancy rights to the land.²⁴⁵ Commonly referred to as the Barth judgment (after the then Chief Justice who decided the case), the colonial authorities, through the instrument of the law and the courts, had effectively rendered Africans landless.²⁴⁶

The Crown subsequently imposed taxes in a bid to secure cheap labour for the settler incursion that was precipitated by colonial property laws and policies.²⁴⁷ Indigenous Africans were also compelled to provide cheap labour to the white settler farms through a range of measures such as the pass (kipande) system, conscription and recruitment.²⁴⁸

With time, however, the colonial plans for effective disinheritance of African indigenous lands fuelled discontent. Due to overpopulation, high poverty levels and increased insecurity in the reserves, the demand for the return of indigenous lands intensified.²⁴⁹ Various efforts and

²⁴⁴ Ghai and McAuslan (n 18 above) 28.

²⁴⁵ See *Isaka Wainaina wa Gathomo and Kamau wa Gathomo v Murito wa Indangara, Nganga wa Murito and Attorney General* (1922-23) 9 (2) KLR 102; see an analysis of the effect of the case in *Okoth-Ogendo* (n 18 above) 53-53.

²⁴⁶ *Okoth-Ogendo* (n 18 above) 54.

²⁴⁷ See for example Hut Tax Regulations Number 18 of 1901; The Native Hut and Poll Tax Ordinance Number 2 of 1910; The Native Registration Ordinance Number 1915 and 1921.

²⁴⁸ Mweseli (n 229 above) 10.

²⁴⁹ Wanjala (n 21 above) 29.

commissions to address the rising tension and agitation were mooted by colonial authorities, which eventually led to the 1930 Native Lands Trust Ordinance.²⁵⁰ The Ordinance was aimed at setting aside native reserves, and where need arose, additional lands for the natives. The law also established a Native Trust Board to manage the reserves. The Ordinance had limitations to the extent that the Crown could still grant leases and licenses to Europeans in the reserves and also for public use.²⁵¹

Agitation for independence did not cease with such token and unilateral measures that still preferred colonial interests to the interests of Africans. The Morris Carter Land Commission²⁵² was accordingly set up and made several recommendations that sought to address some of the natives' grievances; principally the need for more land and rights. The authorities crafted and introduced further laws²⁵³ on the assumption that problems in the reserves were 'due to overpopulation, bad land use and defective tenure arrangements'.²⁵⁴ The authorities also devised plans to co-opt the 'civilised' indigenous Africans in order to deal with the 'dangers posed to the colonial hegemony'.²⁵⁵ According to Okoth-Ogendo, the colonial authorities identified the

²⁵⁰ See for example the Devonshire White Paper of 1923 providing that Kenya was an African country and native rights were paramount; Hilton Young Commission Report of 1929 endorsing the white highlands and native reserves and called for satisfaction of native requirements.

²⁵¹ Mweseli (n 229 above) 11-This is illustrated by 'discovery of Gold in the Kakamega reserve, which prompted the Government's acquisition of the reserve which demonstrated that security was subject to imperial interests'.

²⁵² The Report of the Kenya Land Commission (1933) (Carter Report).

²⁵³ These laws were: Native Lands Trust (Amendment) Ordinance 1934; Crown Lands (Amendment) Ordinance 1938; Native Lands Trust Ordinance 1938; Kenya (Natives Areas) Order in Council 1939 and Kenya (Highlands) Order in Council.

²⁵⁴ Wanjala (n 21 above) 30.

²⁵⁵ Mweseli (n 229 above) 15.

solution to the problem as lying in the individualization of tenure.²⁵⁶ The RJM Swynnerton Plan argued as follows:

Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer a unit of land and system of farming whose production will support his family... He must be provided with such security of tenure through an indefeasible title as this will encourage him to invest his labour and profits into the development of his farm and will enable him to offer it as security against such financial credits as he may wish to secure...²⁵⁷

While the goal behind individualization of land tenure in Kenya was officially economic, it is also reputed to have been motivated by a desire to ‘create a middle class population which was anchored to the land and which had too much to lose by supporting the Mau Mau style revolt’.²⁵⁸ ‘Individualization would confer exclusive rights over parcels of land and thereby remove conflicts.’²⁵⁹ The middle class who had also acquired western education and embraced its form of ‘civilization’ would eventually be groomed to take over the reins of power. Given the trappings

²⁵⁶ Okoth-Ogendo (n 18 above) 70.

²⁵⁷ RJM Swynnerton A plan to intensify the development of African Agriculture in Kenya (1955) cited in Wanjala (n 21 above) 30 note 20; The Swynnerton plan sought to secure land tenure by promoting acquisition of title by individuals. In the Plan’s estimation, the mounting political problems in Kenya over land could be resolved through a restructuring of the property rights regime in the areas that were occupied by Africans. According to the Plan, by according Africans security of tenure over their lands, they would intensify agricultural production and address the thorny issue of landlessness. However, while the plan gave rise to an African middle class, it failed to address landlessness especially for those who did not register their land rights, perhaps out of lack of appreciation and comprehension of the new system or those that were absent from the process. The plan also failed to appreciate that particular communities - such as indigenous peoples- preferred to retain their African customary tenure regimes which accommodated the rights of everyone who resided in those lands, see Okoth-Ogendo (n 18 above) 69-77.

²⁵⁸ Wanjala (n 21 above) 31. The Mau Mau revolt was the Africans armed struggle for liberation; see also MPK Sorrenson *Land reform in the Kikuyu country* (1967) 118; see also Okoth-Ogendo (n 18 above) 71.

²⁵⁹ Mweseli (n 229 above) 15.

individual land tenure promised, and the security of title it offered, the elites who would later accede to power chose to retain the *status quo*.²⁶⁰

The land reform process entailed three stages: adjudication, consolidation and registration. Land adjudication demanded ‘the ascertainment of rights or interests in land amounting to “ownership” in favour of individual claimants’.²⁶¹ Land consolidation involved a process whereby individual holdings were to be aggregated into what were considered ‘economic units’.²⁶² Land registration entailed ‘the entry of rights shown in the adjudication register into a land register and issue of title deeds which conferred upon the individual absolute and indefeasible title to the land’.²⁶³

By the time Kenya gained independence in 1963, individualization of land tenure had taken centre stage and all legal and policy frameworks were geared towards entrenching the *status quo*. Tim Mweseli offers a plausible rationale for the retention of the *status quo* as follows:

Recognition of colonial land titles was the bedrock of transfer of political power. The nationalists accepted not only the sanctity of private property but also the validity of colonial expropriations. The independence constitution immortalized this negotiated position by declaring that there would be no state expropriation without due process...It is clear from the historical processes that by the end of the 1960s a distinct social category with vested interests in the continuity of colonial property and political

²⁶⁰ See generally WO Maloba, *Mau Mau and Kenya, An analysis of a peasant revolt* (1993) 144; Mweseli (n 229 above) 20; see also Lenaola et al (n 169 above) 238.

²⁶¹ Wanjala (n 21 above) 30.

²⁶² As above 30.

²⁶³ As above 30.

processes had emerged. This accounts for the remarkable lack of transformation of the colonial land policies and property law regime after independence.²⁶⁴

The decision by the independence government to respect colonial land titles, in other words, effectively sealed the fate of indigenous peoples who sought restitution of land taken by the British.

3.3.3 Post-independence land tenure in Kenya

On attainment of independence, colonial property laws and policies were confirmed through the Registered Land Act (RLA) of 1963.²⁶⁵ This statute recognized only individual land tenure, to the frustration of groups whose way of life was incompatible with this regime.²⁶⁶ Although the aim of individualization of land tenure was to spur economic growth, the policy ignored indigenous peoples' needs and the contribution they might have made to such growth.²⁶⁷

Certain indigenous communities, particularly the pastoralists, resisted the individualization of their lands. In 1968, in response to internal pressure, and in a bid to address group rights, particularly in the semi-arid areas where pastoral and nomadic lifestyles demanded collective

²⁶⁴ Mweseli (n 229 above) 22.

²⁶⁵ Registered Land Act of 1963 Laws of Kenya Cap 300.

²⁶⁶ Wanjala (n 24 above) 173.

²⁶⁷ See Lenaola et al (n 169 above) 239; see also M Kituyi *Becoming Kenyans: Socio economic transformation of the pastoral Maasai* (1990) 28.

land rights, the Land (Group Representatives Act) was enacted.²⁶⁸ This statute was meant to assist pastoral communities in owning and operating group ranches. However, the scheme, as will emerge later in this thesis, was in fact a roundabout way of entrenching individualized tenure amongst these communities.

The individual land tenure system sanctified by the Registered Land Act was favoured by the state on the basis that Kenya's largely agricultural economy was dependent on it.²⁶⁹ However, the results of imposed individualization, instead of spurring economic growth, 'only led to a destruction of communal tenure, and unmitigated landlessness'.²⁷⁰ Such outcomes are not surprising given that the state elected to 'ignore the centrality of the people in favour of imagined economic development'.²⁷¹ The irony of imported foreign laws that were meant to advance the economy of the country is that they ended up creating greater inequality and poverty in various regions of the country. It is because of these inequalities, which include allocation of land resources that traditionally should have reverted to the inhabitants of customary lands, that land clashes and conflict threaten to deteriorate into civil war in Kenya.

Courts in Kenya have not made the situation any better. They have interpreted the myriad laws regulating land ownership in Kenya differently, resulting in uncertainty and confusion.²⁷² While

²⁶⁸ Land (Group Representatives Act) Laws of Kenya Cap 287.

²⁶⁹ Wanjala (n 21 above) 34; see also SC Wanjala SC 'Problems of land Registration and titling in Kenya' in Wanjala (n 21 above) 97.

²⁷⁰ As above.

²⁷¹ Wanjala (n 26 above) 173.

²⁷² As above 174.

giving primacy to individual land ownership where a dispute arises as to land title on the basis of the Registered Land Act, certain customary laws demand communal land access and control. Courts have on certain occasions ‘ruled that registration extinguishes customary rights to land and vests in the registered proprietor absolute and indefeasible title’.²⁷³ On other occasions, however, courts have held that the ‘registration of title was never meant to disinherit people who would otherwise be entitled to their land’.²⁷⁴ Such conflicting rulings beg the question of the extent to which the individualised tenure regime as a whole affected indigenous peoples’ diverse rights to land.

3.4 The dispossession of indigenous peoples’ lands through the law

Most traditional African societies ‘land belonged to community groups like clans and ethnic groups instead of an individual. The rights of access to community land by the individual member of the group were assured and protected through a respected political authority.’²⁷⁵ However, colonial policies and laws viewed communal land tenure as retrogressive and detrimental to development and efficient utilization of land holdings. A massive process of individualization of land tenure was hence embarked upon. The Registered Land Act enactment in 1968 ‘provided a legal framework for individual land tenure and was the basis for the

²⁷³ Wanjala (n 21 above) 35 citing sec 27 and 28 of the RLA and *Obiero v Opiyo* (1972) EA 227; and *Esiroyo V Esiroyo* (1973) EA 388 (note 29); see also *L Cotula and B Neve* ‘The driver of change’ in L Cotula (ed) *Changes in customary land tenure systems in Africa* (2007) 33.

²⁷⁴ Wanjala (n 21 above) note 30 citing *Muguthu v Muguthu* HC Civil case No 377 of 1968 in (1971) Kenya High Court Digest No 16.

²⁷⁵ See Kenya Land Alliance ‘The National Land Policy in Kenya: Addressing customary/communal land issue’ (2005) 4 *Issue Paper* 3.

extinction of claims based on African customary land law'.²⁷⁶ However, as we have seen, communities whose way of life could not be pursued under individualized tenure remained disgruntled and, in an effort to appease them, the Land (Group Representatives) Act was enacted. This paved way for the group ranches scheme, which is discussed in detail in section 3.5 below.

Despite concerted efforts by successive government regimes to individualize land tenure in Kenya, customary and communal concepts of land ownership are still alive in a number of communities.²⁷⁷ Indeed, in terms of the Constitution and the Trust Land Act, land is vested in the community but is held in trust by local authorities and is governed by the customary law of the particular community.²⁷⁸ The Trust Land Act was enacted 'because the land adjudication and registration process to transform African land relations from communal to individual tenure was not completed by independence'.²⁷⁹ Under the Constitution, and the Trust Land Act, county councils hold land in trust for local residents according to the customary law applicable in that area.²⁸⁰ Most trust lands are still considered 'communal' or 'traditional' and land use practices in these areas are still based on customary law. However, entrusting the management and control of such lands to local authorities has in many instances been a recipe for appropriation by individuals and corporations in total disregard of the rights of local residents.²⁸¹

²⁷⁶ Kenya Land Alliance (n 275 above) 3.

²⁷⁷ Hughes (n 241 above).

²⁷⁸ See sec 115 Constitution of Kenya and sec 69, Trust Land Act (Cap 288).

²⁷⁹ Kenya Land Alliance (n 275 above) 6.

²⁸⁰ Sec 115 Constitution of Kenya; sec 69 Trust Land Act; Lenaola et al (n 169 above) 242.

²⁸¹ Ndung'u Report (n 1 above) 16.

The authority of customary law and the viability of customary tenure are, however, limited by the Constitution through the repugnancy clause.²⁸² The clause provides that ‘no right, interest, or other benefit under customary law shall have effect ...so far as it is repugnant to any written law’.²⁸³ This limitation restricts the applicability of communal land tenure under customary law where such tenure conflicts with individualised tenure.²⁸⁴

The dispossession of communal lands during the colonial and post-colonial period is evidenced by continued agitation for the return of these lands by certain groups and communities. The setting aside of what was known during colonial times as the white settlers’ land in the Western Rift Valley, for example, displaced the Pokot in what is today the Trans-Nzoia district. Portions of this land are still owned by some members of the settler community who opted to remain, whilst other portions have been purchased by individuals and corporations. The Pokot have continued to agitate for compensation or return of their lands, and these struggles have at times become violent.²⁸⁵

The next section consists of a case study of the dispossession of land belonging to one of the groups self-identifying as indigenous in Kenya, the Maasai. The section briefly traces the colonial processes that resulted in the loss of Maasai communal land through treaties and, in post-colonial

²⁸² Sec 115 (2) Constitution of Kenya.

²⁸³ As above.

²⁸⁴ The only law purporting to legitimize communal land tenure is the Land (Group) Representatives Act which as will be illustrated in the next section is in real terms a formal extension of individualization of land tenure in the name of group ranches; see generally Ngugi (n 104 above).

²⁸⁵ Kenya Land Alliance ‘The National Land Policy in Kenya Addressing Historical Injustices’ (2004) 2 *Issue Paper* 10.

times, the introduction of the group ranches. The Maasai claim that they were unfairly deprived of their lands by the British in what is referred to as the Anglo-Maasai treaties of 1904 and 1911.²⁸⁶ They subsequently filed suits, still ongoing at the time of writing, seeking compensation or return of their lands, particularly in Laikipia district. Grievances by the Maasai also emanate from the group ranches scheme, which has had a very far-reaching effect on this particular community.

3.5 A case study of the Maasai land dispossessions

Maasai land relations are governed by their customs, traditions and culture. According to John Galaty, ‘apart from the area adjacent to the Maasai homestead (olokeri) which was often reserved for the exclusive use of the calves, sick animals and small stock of a given family, the rest of the pasture was open to free grazing by the community’.²⁸⁷ Galaty adds that the fact that the lands and resources were ‘common’ does not imply that they were unmanaged but rather were managed by community (communal) sanctions.²⁸⁸

The Maasai’s attachment to and conceptualization of their land resources may be understood through the proverb ‘*ilmeishooroyu Emurua oolayioni*’, which means ‘*sons and land cannot be*

²⁸⁶ Mwangi (n 186 above) 11.

²⁸⁷ Galaty (n 190 above) 27.

²⁸⁸ As above

given out'. This proverb aptly captures the rationale behind the Maasai idea of communal land tenure,²⁸⁹ which Galaty describes as follows:

Within a constituted territorial group (*Olosho*), certain areas were seasonally closed, to allow grass to rejuvenate. And in given neighbourhoods, specific locals were designated for building homesteads, so that structures would not be randomly scattered across the country side, and individual families would not appropriate the best areas for the settlements, the daily movement of their livestock thus spoiling the grazing for others. Through routine and negotiation, certain families gained acquired right of return to reside in certain wet- season areas of good grass. But these rights were never exclusive ones, for in time of environmental pressure, herds were moved freely to any region within *Olosho* with accessible pasture, if not across *Olosho* boundaries, to exploit available grazing elsewhere. The obverse is true to use but not to dispose of the resources of a given area, or the land itself. One would therefore as the proverb suggests rather give away land than give away sons, one's descendants, ones 'own blood'.²⁹⁰

The Maasai were therefore able to live in harmony and manage their resources equitably in an environmentally friendly manner.²⁹¹ However, like the rest of Kenya's territory, colonialism resulted in dispossession of the Maasai lands. The most notorious steps in this process were the 1904 and 1911 Anglo-Maasai treaties which provided for the eviction of the Maasai 'to create space for the settlement of European immigrants whose agricultural and other commercial activities were anticipated to power economic development in the new Kenya Colony'.²⁹² The

²⁸⁹ Galaty (n 190 above) 26.

²⁹⁰ As above.

²⁹¹ Lenaola *et al* (n 169 above) 236-237.

²⁹² Mwangi (n 186 above) 11. 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*

appropriated lands were converted into individual farms and ranches – a process that continues to spark violent clashes whenever the Maasai return to their ancestral lands for grazing purposes, especially during periods of drought.²⁹³ Despite repeated efforts, the Maasai have been unable to reclaim their lands with success.²⁹⁴

The appropriation and further dispossession of the Maasai's land were sanctioned through the recommendations of 'the Kenya Land Commission of 1932 which was mandated with evaluating current and future land needs of the African population, to determine whether it was feasible to set aside more land for African communities and to evaluate African land claims over land alienated to non-natives'.²⁹⁵ The recommendations included *inter alia* that the Maasai should be 'forced to lease out their land to other communities, particularly the cultivators' in order to 'bring tsetse-infested areas into cultivation' and 'help relieve overcrowding in other African areas, particularly in the Kikuyu reserve'.²⁹⁶ To this day, as the Kenyan population grows, especially in urban areas such as Nairobi, the infiltration by other mainstream communities of Maasai land continues.²⁹⁷

The creation of national parks and reserves has also dispossessed the Maasai off their land. Most of the current national reserves and national parks are situated on Maasai land, which mainly

European Settlement in Kenya (1968) 190-209; see also Hughes (n 241 above) 178-182; see also Ghai & McAuslan (n 18 above) 20-25.

²⁹³ Hughes (n 241 above) xiv.

²⁹⁴ As above.

²⁹⁵ Mwangi (n 186 above) 11.

²⁹⁶ As above.

²⁹⁷ As above.

consists of plains and semi-arid areas. This has occurred, for example, through the enactment of ‘the National Parks Ordinance in 1945 which was aimed at promoting wildlife conservation and tourism through national parks, game reserves and game conservation areas’.²⁹⁸ After colonialism, these laws and policies and their effects continued. Over time it was realised that there was a need to regulate incursions by other communities onto Maasai land, and to encourage ‘development’ by creating some sense of ownership on the part of the Maasai in their communal lands. This led to what has been referred to as the group ranches scheme.

3.5.1 The introduction of group ranches on Maasai land

The conversion of communal land holdings to group ranches was facilitated through legislation. This was primarily through the Land Adjudication Act of 1968, which provided for the recording of rights and interests in customary lands, and their assignment to their customary users, and the Land (Group Representatives) Act, which provided for the governance and administration of group ranches.²⁹⁹ In accordance with the latter Act, a group ranch becomes the property of all its members in equal and undivided shares. A group ranch may be registered in the name of ten representatives as nominal title holders who hold the land in trust for the other unregistered members of the community.³⁰⁰ The Act requires the representatives to enact rules to govern the administration and execution of the group’s projects and activities in a democratic manner through involvement of all the members in decision making

²⁹⁸ Mwangi (n 186 above) 11.

²⁹⁹ Ngugi (n 104 above) 345; see also Lenaola *et al* (n 169 above) 245.

³⁰⁰ Lenaola *et al* (n 169 above) 248.

The ranch should be managed and operated in accordance with sound principles of land use, range management, animal husbandry and commercial practice. The Act also provides for dissolution of the ranch upon written application signed by a majority of the group's representatives. As Mwangi explains:

[The] group ranches were primarily intended to foster the commercialization of Maasai livestock management systems and to transform land into an economic good subject to free buying and selling. The program entailed a shift in land tenure and organization from one under which the range was under common ownership, to an abridged version of the original commons, variable in size and membership, but held under corporate title. Group ranching was also envisaged to facilitate the commoditization of Maasai herds and lands without creating a large pool of landless individuals. Paradoxically, it was also envisioned to provide an evolutionary mode of transformation that would be based on the traditional ways of the Maasai.³⁰¹

In retrospect, the concept of group ranches was either a miscalculation or a subtle attempt convert communal land to private ownership. While there is certainly nothing wrong in privatizing property, the fact that the Maasai community was ill prepared or at least not properly consulted doomed the group ranch system to failure from the onset. Indeed, it has been contended that, 'although the Maasai did not accept or even understand some features of the group ranch such as grazing quotas, boundary maintenance and the management committee they accepted the idea of group ranches primarily because it afforded them protection against further land appropriation

³⁰¹ Mwangi (n 186 above) 7.

from government, against the incursion of non-Maasai and from a land grab by the elite Maasai'.³⁰²

Some of the reasons cited by the State for the transformation of communal land to group ranches were that it would improve efficiency in the utilization of the lands, the groups would enjoy improved infrastructure and financing, and that this would in turn make the ranches commercially viable. Such reasons were premised on the notion that controlled land ownership would automatically infuse a sense of ownership in the lands among the Maasai, as if none existed, and that it would catalyze development. It is now commonly accepted that development does not solely depend on the transformation of a land tenure system from one form to another, and therefore that the independent government was wrong to persuade communities to accept the group ranches scheme by dangling the development carrot.

In particular, group ranches were said to promise development through the provision of dams and boreholes, as well as improved livestock husbandry through the introduction of dipping facilities and animal disease prevention and control.³⁰³ The imposition of group ranches was patronizing to the communities who had long practised reasonably efficient traditional methods of communal land ownership.³⁰⁴ The group ranches policy also disregarded the Maasai's customary-law rules

³⁰² Mwangi (n 186 above) 7.

³⁰³ Mwangi (n 186 above) 7.

³⁰⁴ Lenaola et al (n 169 above) 247-253.

and traditions relating to the management and establishment of boundaries.³⁰⁵ Instead, the State imposed statutory governance structures that were often in conflict with the traditional system. It was therefore not surprising that ‘the group ranches failed to meet their intended objectives and indeed a decade after their creation there were demands for their dissolution and subsequent division into individual, titled units for distribution among registered members’.³⁰⁶

The Land (Group Representatives) Act, while seeking to protect and recognize group ownership, still reflected the administration’s preference for individualized tenure in attempting to demarcate communal land holdings into separate units or group ranches.³⁰⁷ The intention of the drafters was that the land should be held communally in accordance with applicable customary law and practices. However, the group ranches scheme was abused by elites. Persons registered to hold the ranches in trust for the community invariably resorted to selling off pieces of land to the community’s detriment. The ‘pressure to subdivide group ranches and issue individual title deeds in Maasai land resulted in landlessness, marginalization, and increased poverty levels’.³⁰⁸ It is difficult to maintain that this turn of events was not foreseen by the authorities. Indeed ‘while land registration was supposed to obliterate the traditional concepts of land ownership, neither

³⁰⁵ See J Kieyah ‘Indigenous peoples’ land rights in Kenya: A case study of the Maasai and Ogiek people (2007) 15 *Penn State Environmental Law Review*, 2007 406; see also S Coldham ‘Land- tenure reform in Kenya: The limits of law’ (1979) 17 *Journal of African Modern Studies* 620.

³⁰⁶ Mwangi (n 186 above) 12.

³⁰⁷ Lenaola et al (n 169 above) 247.

³⁰⁸ MO Odhiambo and E Karono, Privatisation and pastoral livelihoods in Eastern Africa: Challenges and opportunities, An issue paper, November 2005, 4.

colonialism nor the independent state decimated the traditional land holding system as it did not suit their political interests to do so'.³⁰⁹

3.5.2 The individualization of the group ranches

Various factors are advanced as having contributed to the subdivision of the group ranches. Population increase among the members, which resulted in more children attaining the requisite age for inclusion, put strains on shareholding. According to Mwangi:

As young men matured, they were recruited into group membership. This recruitment commonly involved the collective registration of an entire age set. Members' shares to group ranch land were gradually diminishing with the expansion of membership. The anticipated outcome was that land parcels would become smaller by the day and unviable upon the eventual subdivision of the group ranch. This concern also reflects a general sense that land subdivision was unavoidable.³¹⁰

The subdivisions were also fuelled by political statements calling for individualization of the ranches. The most notable statements were issued by the former President Daniel Moi in the 1980s.³¹¹ The former President 'stressed the need for individuals to develop their own pieces of land. Noting the unviability of group ranch operations, he expressed the fear that group ranches may in future spark trouble because registered members were inviting their friends to reside in the group ranches. He advised Maasai leaders to begin land adjudication to enable each family to

³⁰⁹ Odhiambo & Karono (n 308 above).

³¹⁰ Mwangi (n 186 above) 17; Ngugi (n 104) 348.

³¹¹ See Lenaola *et al* (n 169 above) 247-248.

develop its own farm.’³¹² This could be the reason behind the long-held belief that the state had all along meant to introduce the group ranches with the eventual goal of encouraging individualization of tenure, thereby opening up communal land to acquisition by all. Indeed, to encourage speedy subdivision of the ranches, the then President also directed the ‘rescheduling and eventual writing off of loans borrowed from the Agricultural Finance Corporation’.³¹³ This is consistent with the then regime’s *modus operandi*, where roadside directives and statements carried the weight of legal directives.

The subdivisions proceeded despite the fact that that technocrats and ‘government officials from the Departments of Lands Adjudication and range planners from the Ministry of Livestock Development had cautioned and indeed stopped short of openly discouraging group ranches against subdivision’.³¹⁴ The technocrats’ fears and concerns are captured in Esther Mwangi’s study citing the example of one group ranch in Kajiado district:

According to the minutes of the annual general meeting at Enkaroni group ranch of 26th February 1985, for example, the registrar of group ranches emphasized the grave consequences of ranch subdivision without basic infrastructure. At the same meeting, the Range Officer noted that it was unfortunate that members wish to subdivide the group ranch would result in unviable units which would be expensive to develop because of their small sizes. He further pointed out that if the land were partitioned equally, each member would be entitled to 79 acres (34 hectares) in which one would be able to keep no more than 7 head of cattle. Present also was the District Land Adjudication Officer

³¹² Mwangi (n 186 above) 17 citing *Kenya Times* of 3/9/1985.

³¹³ Mwangi (n 186 above) 17.

³¹⁴ As above 15.

who strongly reiterated the inordinate expenses of individual parcel management and requested members to reconsider their decision.³¹⁵

From the foregoing, it is evident that the decision to individualize land tenure was not based on technical and objective considerations but rather on politics and pressure from within the Maasai. This phenomenon can in turn be traced back to the initial decision to regulate Maasai land relations in terms of group ranches with little if any due regard to their way of life and needs.³¹⁶ The group ranches scheme can further be faulted for discriminating against women, who were neither registered as nominees nor allotted land parcels during the process of subdivision.

The subdivisions are also said to have been catalyzed and influenced by the already existing individual ranches.³¹⁷ The individual ranches owned by colonial settlers and powerful and wealthy individuals were said to be role models for the eventual commercialization of the Maasai and other pastoralists' land. Mwangi avers that:

Because the individual ranchers were to be used as a model for the rest of the Maasai to emulate, conditions were created to ensure their success. Low-interest credit for the purchase of superior breeds and the construction of on-farm infrastructure such as boreholes, water pans was availed through the Agricultural Finance Corporation. This was part of World Bank Financing to Kenya's Livestock sector

³¹⁵ Mwangi (n 186 above) 15.

³¹⁶ Lenaola *et al* (n 169 above) 241, 247.

³¹⁷ As above.

under the Kenya Livestock Development Program. The individual ranchers also had support from livestock extension officers from the Ministry of Agriculture and Livestock Development.³¹⁸

Coupled with financial and animal husbandry support from the government, the individual ranches epitomized modern development and success in the pastoralists' areas. This attracted some individuals within the group ranches who were frustrated by the 'increasing challenges related to collective decision-making [and who thus] thus looked to individual ranching as a reasonable and viable alternative'.³¹⁹ Mwangi sums up the motivating factors on the part of some individuals as follows:

The individual title was viewed as the gateway to development. A title to land represented complete and secure ownership, but more. It could be used as collateral to acquire loans for farm and livestock improvement; it could be used as security against which unforeseen circumstances such as illness could be confronted. For the poor in particular, individual ownership represented not only their extrication from a grazing interaction in which they were exploited, but also an opportunity to manage their livestock in harmony with pasture availability; an ability to earn alternative incomes either by leasing out excess pastures, cultivating, selling charcoal, and in extreme cases, selling off part of their land. With individuation, the poor would become property owners and have access to alternative productive resources that would enable them improve their status within the community.³²⁰

Individual ownership of land was therefore portrayed as the solution to the underlying problems bedevilling communal ownership within the group ranches. However, even at the outset, some

³¹⁸ Mwangi (n 186 above) 15.

³¹⁹ As above 24.

³²⁰ Mwangi (n 186 above) 24.

community members saw the individual ranches as a betrayal by government of their trust and as an opportunity for unscrupulous individuals to hive off individual parcels of communal land for personal gain. The individual ranchers were also notorious for utilizing communal land during the rainy seasons and reverting to their fenced off ranches during the dry season. Subdivision was therefore seen as a solution since it would ensure that this sort of exploitation would cease and that all members would be 'equal' within their property and territories.

The group ranches were beset by various problems from their inception, ranging from inequalities in the number of livestock owned by members, to difficulties in collective decision making that ironically fuelled calls for greater subdivision. Members of the group ranches were differently endowed in terms of resource, particularly with regard to livestock holding. With such inequalities individuals with more livestock derived more benefits from the ranches to the detriment of the poor. This became more apparent during the dry season when, after exhaustion of the ranch pasture, all the livestock was compelled to seek pasture in far-flung areas, resulting in livestock deaths, with the poor bearing the brunt of the losses. 'These grazing differentials amongst group ranch members themselves dovetailed with the exploitative tendencies of the individual ranchers and pushed group members into viewing subdivision as a desirable alternative. With subdivision, each individual would acquire his own parcel and be forced to manage his pastures according to the number of cattle that he owned.'³²¹

³²¹ Mwangi (n 186 above) 26.

The management and control of the group ranches was in the hands of the ten nominee persons registered under the Act.³²² However, decision making also involved the individual members in annual general meetings that often did not attain consensus on contentious issues. Some of the main differences that persisted concerned the enforcement of livestock quotas and the infiltration of outsiders into the ranch.³²³ Some members did not follow rules set to ensure proper management and utilization of the ranches, such as preserving areas set aside for dry seasons, as well as non-payment of fees for the development of the common projects. Managing the ranches became a difficult exercise because of such lack of cooperation from certain members in adhering to rules for resource use. The members also feared incursion into the ranches by mainstream communities, notably the Kikuyu, who had begun accessing some of the individual ranches and purchasing pieces from unscrupulous members.

The subdivision of the group ranches had various repercussions among the Maasai, most notably, increased levels of poverty caused by insufficient grazing land. Traditional migratory patterns were also blocked and much land was lost to mainstream communities who purchased land from the recipients of the ranch subdivision process.³²⁴

³²² Ngugi (n 104 above) 345.

³²³ Some members of the ranches invited their relatives and friends with their livestock from other ranches, regions and even as far as Tanzania to live and utilise their common resources.

³²⁴ MK Van Klinken (ed) *The future of the Maasai pastoralists of Kajiado district* Proceedings of a colloquium held in Limuru, Kenya, May 28-31, 1989 (1990) 105.

Some commentators have gone so far as to argue that the group ranches scheme was a deliberate effort by the authorities to open up the Maasai territories to mainstream communities.³²⁵ Joel Ngugi, for example, argues that the underlying assumptions for the establishment of the group ranches were (deliberately) erroneous:

The pejorative objective of ‘settling down’ the Maasai through legislation was not only mischievously assimilationist but was also founded on the absurd view that the Maasai roam aimlessly over their land. It overlooked the fact that they migrate according to the dictates of eco-climatic factors and that legislating that they ‘settle down’ in the face of these factors, which necessitate their migrations, is not only destructive of their culture but is also tantamount to destroying their economic base.³²⁶

In sum, ‘the dispossession of the Maasai lands was not due to structural internal weaknesses in their traditions and their valuation of material resources or even their "stupidity" as is often made out. Rather, the instrumentality of the law as a device aimed at modernist development played a significant role in their disempowerment’.³²⁷ Lenaola, Jenner and Witchart hold a similar view that ‘the group initiative, despite a stated intention to provide for ownership in groups, offers the option of exclusive individual control of rights to occupation’.³²⁸ It is therefore not surprising that through a biased legal framework, which was intent on benefiting the mainstream communities, indigenous peoples in Kenya have continued to lose their ancestral land rights.

³²⁵ See Lenaola *et al* (n 169 above) 247.

³²⁶ Ngugi (n 104 above) 347.

³²⁷ As above 300.

³²⁸ Lenaola *et al* (n 169 above) 247.

The next case study looks at attempts by another indigenous community, the Ogiek, to assert their land rights in the courts. The case illustrates the hurdles indigenous communities face when seeking protection through legal processes deliberately tailored to protect dominant communities.

3.6 A case study of the Ogiek land dispossessions

The ‘Ogiek is a community with a long history of resistance and struggle aimed at sustaining their unity, identity and cultural distinction’.³²⁹ One of the greatest struggles the Ogiek community has had is that of seeking protection and recognition of their traditional lands. The agitation began as early as colonial times when the Ogiek were regarded as primitive and in need of assimilation to become ‘useful citizens’.³³⁰ The post-independent state ‘continued to sanction a series of efforts to dispossess them of their land besides seeking to exterminate, assimilate and impoverish them through constant evictions and disruption of their traditional lifestyles’.³³¹ While the evictions were not illegal *per se*, since they were based on laws that were ostensibly legislated to protect the environment, it is argued that the evictions were discriminatory, and failed to take into account the Ogiek’s customary law land rights.³³² That argument is revisited in further details below in the analysis of the Court’s judgment.

³²⁹ Kimaiyo (n 120 above) 4; see an analytical discussion of this case in GM Wachira ‘The Role of courts in protecting indigenous peoples’ rights to land and resources in Kenya and South Africa’ (2007) 13 (2) *East African Journal of Human Rights and Peace* 240-269.

³³⁰ As above; Carter Report (n 252 above) 259-260 para 973, 974 and 980; see also Background to the Ogiek <www.ogiek.org> accessed 19 November 2005.

³³¹ Kimaiyo (n 120 above) 4.

³³² See generally Wachira (n 329 above).

The Ogiek's culture and way of life is intimately connected to the forest lands they occupied but colonial and successive governments evicted them for purposes of forest conservation and development.³³³ Their representatives (community leaders) contend that these measures were simply a pretext to deprive them of their land since the same forests were allocated to mainstream communities and private corporations to harvest and farm.³³⁴ For years, Ogiek representatives requested the Kenyan Government to take action to protect them.³³⁵ This involved personal and official lobbying by community leaders, as well as other stakeholders such as the church. The requests proved futile.³³⁶ The community leaders were then tasked with the role of seeking justice through the courts. Due to limited resources, they relied on the goodwill of community members to donate the little they could and sought the services of a legal counsel who was willing to take their matter on a *probono* basis.³³⁷

3.6.1 The Ogiek attempts at protecting their lands through litigation

The current Constitution of Kenya provides that the High Court shall have original jurisdiction over allegations of breach of fundamental human rights.³³⁸ It further provides that a person

³³³ Kimaiyo (n 120 above) 17.

³³⁴ As above.

³³⁵ As above 25.

³³⁶ As above, 25-30 on the extensive out of court efforts mounted by the Community that even involved sending delegations to the then Head of State Daniel Arap Moi but still did not bear fruits due to the competing political and economic interests by powerful stakeholders over the Ogiek lands.

³³⁷ The matter was handled on a pro bono basis by the law firm of Mirugi Kariuki and Company advocates based in Nakuru.

³³⁸ Sec 84 Constitution of Kenya.

aggrieved by the determination of the High Court may appeal to the Court of Appeal, which is the highest judicial tribunal.³³⁹ Members of the community launched their case in the High Court in 1997 asserting their fundamental human rights as protected by the Constitution.³⁴⁰ They demanded a ‘declaration that the eviction from Tinet Forest by the Government contravenes their rights to the protection of the law, not to be discriminated against and to reside in any part of Kenya and further that their right to life had been violated by the forceful eviction from Tinet Forest’.³⁴¹ They also sought orders that the Government compensate them and pay their legal costs.³⁴² The community sought the declarations and orders on the basis of ‘having lived in Tinet Forest since time immemorial. They claimed that the forest had been the home of their ancestors before the birth of the Nation Kenya, and still was as the descendants and members of that community’.³⁴³

The community submitted that it depended for its livelihood on the forest, since most of its members were food gatherers, hunters, peasant farmers, bee keepers, and their culture was associated with the forest where they have their residential houses.³⁴⁴ They alleged that their culture was basically one concerned with the preservation of nature so as to sustain their

³³⁹ Sec 84(7) Constitution of Kenya.

³⁴⁰ *Ogiek* case (n 3 above) 1, 3; Chapter V Constitution of Kenya.

³⁴¹ *Ogiek* case (n 3 above) 1, 3.

³⁴² *Ogiek* case (n 3 above) 4.

³⁴³ As above 4.

³⁴⁴ As above 5.

livelihood and that, due to their attachment to the forest, members of the community were a source of the preservation of the natural environment.³⁴⁵

The State disputed the community's claim that they had lived in the forest since time immemorial and submitted that the area was a protected forest area, and as such the community had no right to live there.³⁴⁶ The respondents contended that the Government intended to degazette the forest to resettle landless people among them the Ogiek but the policy was shelved after realizing that it was a water catchment area. They had therefore carried out numerous evictions to protect the forest.³⁴⁷

The Court dismissed the Ogiek case in March 2000 on the basis that 'the evictions were for the purposes of saving the whole of Kenya from a possible, environmental disaster'.³⁴⁸ According to the Court, allowing the Ogiek to continue living in Tinet forest would spell disaster for the water catchment area whose protection was necessary for the common good of the nation.³⁴⁹

³⁴⁵ *Ogiek* case (n 3 above) 5.

³⁴⁶ As above 5.

³⁴⁷ As above.

³⁴⁸ *Ogiek* case (n 3 above) 22.

³⁴⁹ As above, 15, 22.

3.6.2 Analysis of the Court's judgment and factors inhibiting effective protection of the rights of indigenous peoples

In dismissing the plaintiff's case, the High Court made useful observations which have a bearing on the role of courts in protecting the marginalized. It raises issues of the role and responsibilities of lawyers, affected parties (in this particular case the indigenous community) and judges in the adjudication of matters before courts. Justice Samuel Oguk and Richard Kuloba went to great lengths to decry the fact that they were not presented with certain documentary evidence to prove certain key allegations by the applicants.³⁵⁰ The judges lamented the fact that while certain important issues were raised by the applicants, these were not properly substantiated. Thus, the Court was not convinced that the community's rights were violated.³⁵¹

The Ogiek submitted oral evidence as proof that they were among the first dwellers of the forest and engaged in a traditional way of life. However, the Court was of the view that the cultural and economic activities of the Ogiek had substantially changed and did not necessarily depend on their continuous presence in the forests.³⁵² The Court maintained that position and extensively used it to justify the reasoning that the modern Ogiek would not be expected to conserve the forest which they once ably protected and inhabited.³⁵³

³⁵⁰ *Ogiek* case (n 3 above) 17, 18, 22.

³⁵¹ As above.

³⁵² *Ogiek* case (n 3 above) 2, 8, 9; see also the courts reference to A Fedders and C Salvadori, *Peoples and cultures of Kenya* (1979) 14; WR Ochieng *An Outline History of the Rift Valley of Kenya up to AD 1900* (1975) 10.

³⁵³ *Ogiek* case (n 3 above) 9.

The Court's reasoning failed to take account of the fact that, while a community may have adopted a modern way of life, that in itself does not make that community unable to maintain its cultural and traditional practices. The establishment of forest reserves and national parks by the colonial authorities had been done without regard for the concerns and land rights of the communities who occupied and owned them.³⁵⁴ This was not surprising given that the colonial authorities had no regard for African customary law.³⁵⁵ Notwithstanding this disdain for their rights, the communities resisted the dispossessions, but to no avail.³⁵⁶ According to Kameri-Mbote, despite the communities' resistance, 'they were overpowered and subjugated under the new property ownership systems'.³⁵⁷

In the *Ogiek* case, the court, as instrument of the post-colonial state, essentially argued that the community had adopted modern livelihood strategies and could therefore not be said to be governed by its traditional values and practices.³⁵⁸ Such a position is misconceived and fails to take account of international norms and standards. The United Nations Human Rights Committee, for example, has on various occasions held that adoption of modern livelihood strategies and technologies does not exclude communities from relying on their culture and in

³⁵⁴ See P Kameri-Mbote 'Righting wrongs: Confronting dispossession in post-colonial contexts' Key note speech at a conference on land, memory, reconstruction and justice: Perspectives on land restitution in South Africa, 13-15 September 2006, Cape Town, 4 available at <<http://www.plaas.org.za/events/Past-Events/landmemory/papers/Kameri-Mbote.pdf>> accessed 10 August 2008.

³⁵⁵ See Okoth-Ogendo (n 18 above) 32-33.

³⁵⁶ Kameri-Mbote (n 354 above) 4; see also Carter Report (n 252 above) para 983.

³⁵⁷ Kameri-Mbote as above.

³⁵⁸ See *Ogiek* case (n 3 above) 2, 4, 8, 9.

turn utilizing international norms and standards designed to protect their culture.³⁵⁹ Accordingly, the community in question does not lose the capacity to claim its cultural rights. In the case of *Lovelace v Canada*, the HRC held that refusing to reinstate the rights of a native woman, previously married to a non-Native, to live on her Reserve could not be deemed a proportionate measure, as the Reserve was the only place where she could enjoy her culture.³⁶⁰ The Committee also found a violation of article 27 of the International Covenant on Civil and Political Rights (ICCPR)³⁶¹ in the *Lubicon Lake Band case*.³⁶² Although Kenya is a party to the ICCPR, the covenant has not been entirely domesticated and therefore does not constitute binding authority on its courts. Nevertheless, the jurisprudence of the HRC should inspire and positively influence judicial officers where they adjudicate related matters. That this did not happen in the Ogiek case is evidence of Kenyan courts' reluctance to apply provisions of international instruments which Kenya has ratified, as further demonstrated in chapter four.

The High Court accepted that the disputed area was declared a forest area by the colonial authorities in racially discriminatory translocations to designated areas to pave the way for

³⁵⁹ See *Länsman v Finland* (n 100 above) para 9.3; see also *Apirana Mahuika v New Zealand*, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000) para 9.4.

³⁶⁰ *Sandra Lovelace v Canada* Human Rights Committee Communication No. 24/1977 U.N. Doc. CCPR/C/OP/1 at 10, (1985) para. 15.

³⁶¹ International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly in 1966 and entered in force on 23 March 1976, 999 UNTS 171. Art 27 ICCPR states that persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

³⁶² *Lubicon Lake Band v Canada* (n 73 above) para 33.

exclusive use of the ‘white highlands’ by white settlers.³⁶³ The postcolonial authorities inherited legislation³⁶⁴ which required persons to seek licences to gain access or conduct any activities in the forests.³⁶⁵ While this goal – to protect and conserve the environment – may, on the face of it, sound noble, the applicants argued, the real purpose was to grant economically endowed individuals and corporations access to the forests for far more environmentally and socially detrimental purposes, such as harvesting timber.³⁶⁶ The community, being marginalized and poor, had neither the financial resources nor the political power to benefit from such licences.

It was also alleged that the community was evicted from the said forest while some mainstream communities and well connected individuals were left untouched.³⁶⁷ While the Government maintained that the area was a forest zone and environmentally protected under the Forest Act, the Ogiek contended that ‘the Kenyan government [was] allowing logging companies to cut down trees in the Mau Forest’.³⁶⁸ The Government, for example, imposed a partial logging ban but exempted three big logging companies: Pan African Paper Mills, Raiply Timber, and Timsales Ltd.³⁶⁹ The logging activities undertaken by the three companies have had disastrous

³⁶³ Ogiek case (n 3 above) 1; see also Kimaiyo (n 120 above) 20.

³⁶⁴ Forest Act Laws of Kenya Cap 385; Conservation and Management Act, Laws of Kenya Cap 376; Fisheries Act Laws of Kenya Cap 378.

³⁶⁵ Ogiek case (n 3 above) 10, 11, 14, 15.

³⁶⁶ See Kimaiyo (n 120 above) 19-21.

³⁶⁷ See Ogiek case (n 3 above) 18) (The court however claims that evidence to that effect was not adduced and could not rely on newspaper cuttings).

³⁶⁸ News update on the Ogiek sourced from <www.ogiek.org> accessed on 4 November 2005.

³⁶⁹ Background to the Ogiek (n 330 above).

environmental consequences.³⁷⁰ In court, the state defended the private companies on the grounds that they made an important contribution to the economy.³⁷¹ To which the community responded that, ‘while the government allows powerful logging companies to cut down trees in the forest, it is persecuting an indigenous people who pose no environmental threat and lack political power’.³⁷²

The High Court, however, ruled that the community’s submissions to substantiate such claims were not effectively made. The Court was therefore not convinced that the evictions were discriminatory or that they took place.³⁷³ While one cannot blame the judges for such a finding, it is interesting to note that the same judges were quick to dismiss the applicants’ submission on the similarity of the *Ogiek* case with the landmark *Mabo case* in Australia³⁷⁴ on the grounds that sufficient reasoning was not put to them to make a careful consideration.³⁷⁵

Although Kenya adopted an adversarial legal system, it is submitted that in public interest cases, especially involving marginalized communities, courts have a duty to aid litigants by conducting further research where they can, other than just asserting that they were denied an opportunity to consider in detail the issues for lack of the applicants’ furnishing sufficient facts and evidence.

Lawyers and bar associations should also take a more proactive stance by, for example, appearing

³⁷⁰ Background to the *Ogiek* (n 330 above).

³⁷¹ As above.

³⁷² Background to the *Ogiek* (n 330 above).

³⁷³ *Ogiek* case (n 3 above) 18.

³⁷⁴ *Mabo v Queensland* (n 72 above).

³⁷⁵ *Ogiek* case (n 3 above) 16.

as *amicus curiae* (friends of the court), as is often done in South Africa. The *amicus curiae* would assist the court to ensure justice is done by making available proper facts and evidence.³⁷⁶ This would avert a situation where a court fails to accept critical submissions because of inadequate information.

For example, one of the points the court notes but does not seek clarification on from the state's records or independent experts concerned the history of the Ogiek's occupation of the disputed land. The relevant passage from the court's judgment is worth quoting in full:

The pre-European history of the Ogiek and the plaintiffs was not presented to us in court, to enable us determine whether their claim that they were in Tinet Forest from time immemorial is well-founded. We only meet them in the said forest in the 1930's. Such recent history does not make the stay of the Ogiek in the Tinet Forest dateless and inveterate (as we understand the meaning of the expression 'immemorial' in this context); and nothing was placed before us by way of early history to give them an ancestry in this particular place, to confer them with any land rights. Remember, they are a migratory people, depending on the climate.³⁷⁷

This means that the Court chose the easier route and, without evidence to the contrary, decided to rely only on evidence adduced in the ordinary way. Indeed, the Court acknowledges this and notes that it 'missed an opportunity to closely analyze the whole of the Kenyan land law, because the various land statutes and customary law were not argued, and the case was presented within

³⁷⁶ *Ogiek* case (n 3 above) 15, 16, 21.

³⁷⁷ As above, 21.

the narrow limits of the forests legislation and the extra-curial struggles and resistance of the people who had been removed from the place and relocated elsewhere'.³⁷⁸

Apart from restrictive interpretation of laws by the court, protection of indigenous peoples' land rights is inhibited by the lack of provisions that cater for the particular circumstances of marginalised communities. The Ogiek are currently seeking a review of Kenya's Forest Act and other colonial era legislation to enjoy the right to inhabit their traditional land and traditionally conserve the forest on behalf of the community's future generations. The community presented petitions before the Commission of Inquiry into Illegal/Irregular Allocation of Public Land, established to address contentious land issues throughout Kenya.³⁷⁹ The Commission *inter alia* recommended that the Government should resettle marginalized communities who have been evicted from their traditional lands. It still remains to be seen whether the Government will implement the said recommendations.³⁸⁰

Protection of indigenous peoples' rights in Kenya through courts is also adversely affected by instances of judicial interference and perceived lack of independence from the executive. According to Kenya's Constitution, judges are appointed by the President on the advice of the Judicial Service Commission.³⁸¹ However, members of the Judicial Service Commission are also all appointees of the President, and, although they are required by the Constitution not to be

³⁷⁸ Ogiek case (n 3 above) 15.

³⁷⁹ See Ndung'u Report (n 1 above).

³⁸⁰ As above.

³⁸¹ Sec 61(2) Constitution of Kenya.

subject to the direction or control of any other person or authority, the reality is different.³⁸² Parliament, for example, does not scrutinise or endorse these appointments. Instances where the President has appointed persons whose professional qualifications and character were questionable abound.³⁸³ Notably, ‘the two judges (Kuloba and Oguk) who adjudicated on the Ogiek case were [subsequently] indicted but elected to retire based on allegations of corruption and professional misconduct’.³⁸⁴ In the recent past concern has also been raised over the single-handed appointment of almost half of the 60 judges by President Mwai Kibaki during his first five-year term.³⁸⁵ These developments cast aspersions on the independence of the judiciary, and especially on its ability to right the wrongs suffered by the marginalised.

The executive in Kenya is also known for disregarding decisions of the courts when it suits it. For example, President Mwai Kibaki and members of his Cabinet have, since assuming power, blatantly disregarded the rule of law by ignoring court orders.³⁸⁶ President Kibaki ignored an order of the High Court prohibiting issuance of land titles in favour of certain Ogiek community

³⁸² Sec 68 Constitution of Kenya; see International Commission of Justice (Kenya Chapter) *Kenya judicial independence: Corruption and reform* 2005.

³⁸³ There has been cases where a former Chief Justice had been prior to his appointment been declared bankrupt and pardoned by the President and later appointed to held the electoral commission and finally the judiciary. Others have been persons whose legal qualifications in terms of the Constitution requirements are wanting.

³⁸⁴ B Ongaro & O Ambani, Constitutionalism as a panacea to ethnic divisions in Kenya: A post 2007 elections crisis perspective in GM Wachira (ed) *Ethnicity, human rights and constitutionalism in Africa*, International Commission of Jurists (Kenya) (forthcoming 2008).

³⁸⁵ Ongaro & Ambani (n 384 above); see Gazette Notices No 3620 and 3631 of 22 May 2003; No 9935 of 10 December 2004; No 9933 and 9934 of 2004.

³⁸⁶ See ‘Titles: Did Kibaki bend the law’ <<http://www.ogiek.org/news/news-post-05-10-31.htm>> accessed 10 June 2008; see also ‘Why Kibaki must respect courts’ <<http://www.ogiek.org/news/news-post-05-10-40.htm>> accessed 10 June 2008; see alternative views in ‘Did Kibaki really break the law on Ogiek titles’ <<http://www.ogiek.org/news/news-post-05-10-39.htm>> accessed 10 June 2008; see also ‘Stop ignoring court orders’ <<http://www.ogiek.org/news/news-post-05-10-38.htm>> accessed 10 June 2008.

members, claiming to have been left out of the exercise.³⁸⁷ The President went ahead to issue 12 000 title deeds despite an injunction by the High Court ordering that the process of issuing the title deeds be halted. This was widely seen as an attempt by the Government to ‘bribe’ the Ogiek Community to vote for the Government during the referendum on the Constitution held on 21 November 2005.³⁸⁸ In response, the Ogiek community leaders in a press statement refused to accept the political gesture and outlined the following conditions:

- Publish the list of the 12000 Ogiek and their clans;
- Indicate clearly which land they are giving out stating the geographical locations;
- Inform the world the criteria used to identify the Ogiek and the land in question;
- To understand that there are pending court cases over land between the Ogiek and the Government.³⁸⁹

This reaction seems to have been prompted by earlier empty promises by the Government to issue them with title deeds. This did not take place and instead land was allocated to members of mainstream communities to the detriment of the indigenous community.³⁹⁰ The President’s directive, they indicated, was ill timed and a conspiracy to transfer the Ogiek’s ancestral land in the Nakuru and Narok districts to other mainstream communities for reasons of political

³⁸⁷ See ‘Court stops President from issuing titles’ <<http://www.ogiek.org/news/news-post-05-10-15.htm>> accessed 15 June 2008.

³⁸⁸ The Constitutional Referendum which was held on 21 November 2005 on whether to adopt a Draft Bill to the Constitution widely seen as concentrating too much to the Presidency and the Executive and was voted against by Kenyans. The 1996 Constitution which unfortunately makes no provisions for indigenous peoples’ rights protection will therefore continue to govern the country sourced from <http://www.eastandard.net/hm_news/news.php?articleid=32558> accessed on 22 November 2005.

³⁸⁹ Press Statement to the media by the Ogiek <www.ogiek.org> accessed 4 November 2005.

³⁹⁰ As above.

expediency.³⁹¹ In March, 2004, the President had apparently directed that the Ogiek be issued with title deeds and in fact went further to form a task force to implement the directive. The said task force did not, however, make public its report and neither were the Ogiek allocated any land. The community members thus wondered why the Government had slated the issuance of the title deeds at the same time as the referendum without making public the beneficiaries of the titles, their locations and mention of the pending Court cases.³⁹²

3.6.3 Alternatives for the Ogiek

One of the legal options left for the Ogiek was to appeal their case to the Court of Appeal as provided for by the Constitution.³⁹³ However, the appeal has not been heard five years after the High Court suit was dismissed. Kenyan courts are known to delay such cases, sometimes for years.³⁹⁴ The community ‘still seeks that the government stops the continued allocation of Mau Forest. The Ogiek believe that they have a right to live in what they consider to be their ancestral lands and that the Government is trying to force them out of the forest to give the land to private individuals’.³⁹⁵ The community argues that by evicting them from their traditional lands, the government is violating not only their property rights, but spiritual, cultural and economic ties to

³⁹¹ Press Statement to the media by the Ogiek <www.ogiek.org> accessed 4 November 2005.

³⁹² As above.

³⁹³ Sec 84 (7) Constitution of Kenya; According to Towett Arap Kimaiyo, some members of the Ogiek have since given up on the appeal process which could explain why the appeal process may not have materialised to date (Interview with Towett by the author in Nakuru in October 2006).

³⁹⁴ News update on the Ogiek sourced from <www.ogiek.org> accessed on 4 November 2005.

³⁹⁵ Kimaiyo (n 120 above) 1.

the land. The community also wants the Government to protect their rights to their traditional lands and enact legislation protecting indigenous peoples' land rights.

Another alternative for the Ogiek would be to lodge a communication before the African Commission on Human and Peoples' Rights for violation of the African Charter provisions.³⁹⁶

Again, the Kenya State is known to disregard decisions of the African Commission as evidenced by a similar case involving the Endorois community³⁹⁷ who, after exhausting all domestic remedies, filed a communication before the African Commission for Human and Peoples' Rights in August 2003. The communication sought restitution of land, including giving effect to their

³⁹⁶ Art 34 African Charter. The mandate of the African Commission is to protect and promote human and peoples' rights on the continent. Art 55 provides for individual complaints system otherwise referred to as communications and art 56 makes provisions for conditions to be fulfilled for consideration one of which art 56(5) stipulates that the communications should be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. The Ogiek's appeal has taken five years to be heard and as such could qualify. The specific rights that could be sought include but not limited to art 19, 20, 21 and 22 of the Charter.; see F Viljoen 'Admissibility under the African Charter in M Evans and R Murray (ed) *The African Charter on Human and Peoples' Rights, The System in Practice, 1986-2000 (2002)* 61-99 for a detailed discussion on admissibility under the African Charter on Human and Peoples' Rights.

³⁹⁷ See Endorois case (n 3 above); see also <http://www.minorityrights.org/news_detail.asp?ID=342> accessed 22 May 2006, The Endorois Community lived for centuries around the Lake Bogoria region in South Baringo and Koibatek Districts of Kenya. In the 1970s, the Government of Kenya, without effectively consulting the Community, gazetted the Community's traditional lands for the purposes of creating a game reserve. The Endorois peoples' health, livelihood, religion and culture are all intimately connected with their traditional land, as hunting and gathering lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria. Under Kenyan Law, the region was designated Trust Land; land to be held for the benefit of the Community by local authorities. In the creation of the game reserve, the Government of Kenya disregarded national law, Constitutional provisions and, most importantly, numerous African Charter articles, including the right to property, free disposition of natural resources, the right to religion, the right to cultural life and the right to development. At the present time the Community lives in a number of locations on the periphery of the reserve, being forced from fertile lands to semi-arid areas, divided and displaced from their traditional lands. Access to the Lake Bogoria region is not of right for the Community and the Government continues to deny the Community effective participation in decisions affecting their land, in violation of their right to development. The Community has petitioned the Government on numerous occasions, most importantly in a High Court Constitutional Case in the year 2000. In the case the Community argued that, by creating the game reserve, the County Council breached Trust Land provisions of the National Constitution. The High Court of Kenya in Nakuru ruled against the Community. Despite these efforts at domestic recourse, the Community is still unable to access the land as of right and is denied effective participation in decisions affecting it. The Community has not even received adequate compensation, as required by both national and international law, from the Government for the loss of land.

traditional rights to dwell on, access and benefit from the land. The communication was seized during the Commission's 34th Ordinary Session in November 2003, and was declared admissible during the 37th Ordinary Session of the Commission in Banjul, the Gambia, in 2005. Under the Commission's Rules of Procedure, it is empowered to take action in the form of provisional measures to avoid irreparable damage being caused to the victim of an alleged violation.³⁹⁸ In view of imminent mining activities that would cause irreversible damage to the Endorois' rights and access to lands and resources, the community requested the Commission during its 35th Ordinary Session to adopt provisional measures. This request was duly granted.

However, the 'Government of Kenya went ahead to award mining licenses to private companies in total disregard of the Commission's request for provisional measures'.³⁹⁹ This is despite the fact that Kenya is a party to the African Charter on Human and Peoples' Rights and has undertaken to uphold its provisions which by extension would include abiding by the recommendations of the African Commission. The African Commission has delayed releasing the final decision on the merits of the case to this day.⁴⁰⁰

While the Courts in Kenya seem to echo the position of the State with regard to the land rights of the indigenous communities, the lack of concrete provisions in the Constitution and legislation does not help matters. There is a need to legislate, and sensitize the Government to the need to

³⁹⁸ Rule 111, African Commission on Human and Peoples' Rights, Rules of Procedure http://www.achpr.org/english/_info/rules_en.html> accessed 15 June 2006.

³⁹⁹ *Endorois* case (n 3 above) 9.

⁴⁰⁰ As of the end of May 2008 after the 43rd Ordinary Session of the African Commission on Human and Peoples' Rights at Ezulwini, Kingdom of Swaziland in May 2008, a decision on the merits of the case was still pending- six years since the case was first filed.

protect and promote indigenous peoples' rights, in particular land and resources rights, which are key to their way of life and sustenance. However, lack of specific legislation or provisions protecting indigenous peoples' right to land is not a bar to courts' innovation and progressive utilisation of laws and instruments relating to indigenous peoples to protect these communities.

3.7 Chapter conclusion

This chapter has revealed that colonial and post-colonial governments in Kenya have employed the law to dispossess indigenous peoples of their ancestral lands. Kenya's legal framework has entrenched the individualized land tenure systems that may be unsuitable for certain indigenous communities. It has been established that some indigenous communities, such as the pastoralist Maasai and the Ogiek, rely on traditional lands for their livelihood, economic sustenance, as well as religious and cultural life.⁴⁰¹ Indeed, indigenous peoples' land and other resources are 'the foundation of their economic, social, and cultural development'.⁴⁰² The recognition of indigenous peoples' laws, traditions and customs is crucial to the protection of their land and resource rights.⁴⁰³ This is particularly so because indigenous peoples' rights over land 'flow not only from possession, but also from indigenous peoples' articulated ideas of communal stewardship over

⁴⁰¹ Daes study (n 96 above) para.18; see also Asiema & Situma (n 96 above); Hitchcock & Vinding (n 96 above) 11.

⁴⁰² Art 26 UN Declaration on the Rights of Indigenous Peoples: Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they traditionally owned or otherwise occupied or used. This includes the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights; see also arts 13-19 ILO Convention No 169.

⁴⁰³ n 400 above; see also Ngugi (n 104 above) 297.

land and a deeply felt spiritual and emotional nexus with the earth and its fruits'.⁴⁰⁴ It is therefore imperative to reform the land tenure regime to redress these constraints.

The next chapter examines the extent to which the current legal framework can vindicate indigenous peoples' land rights. It reviews the application of various international norms, comparative common law jurisprudence and makes a case for progressive interpretation of the legal framework by Kenyan courts of law in order to give meaning to indigenous peoples' land rights.

⁴⁰⁴ Anaya (n 203 above) 8; see also J Burger, *Report from the frontier: The state of the World's Indigenous Peoples* (1987)13-16.

CHAPTER FOUR

THE POTENTIAL OF KENYA'S CURRENT LEGAL FRAMEWORK TO VINDICATE INDIGENOUS PEOPLES' LAND RIGHTS

4.1 Introduction

The focus of this chapter is on the possible legal resources that can be employed to address the legitimate legal claims by indigenous peoples to their traditional lands in Kenya. The chapter reviews constitutional and legislative provisions that recognize and protect indigenous peoples' land rights. As noted already, due to restrictive interpretation of these provisions by Kenyan courts, indigenous peoples' land claims have not always been successful.⁴⁰⁵ The chapter argues that the current legal framework nevertheless has the potential to protect indigenous peoples' land rights if progressively interpreted in keeping with international standards.

The development of Kenya's common law has long been influenced by case law from other common-law jurisdictions.⁴⁰⁶ Although such foreign case law is not binding, it is of persuasive value.⁴⁰⁷ Of particular significance is the rule laid down in *Kiplagat* that, where the facts and the legal question addressed in a foreign decision are similar to the case being decided, Kenyan courts should take judicial notice of the foreign decision, notwithstanding differences between the

⁴⁰⁵ See for example the Maasai and the Ogiek case studies as discussed in chapter three.

⁴⁰⁶ See some of the references by the Kenyan courts to decisions of other common law courts for example *RM and another v AG*, High Court of Kenya Nairobi Civil case no 1351 of 2002, sourced at <www.kenyalaw.org> (2006eKLR.) 9 accessed 10 February 2008.

⁴⁰⁷ As above.

two legal systems.⁴⁰⁸ According to the Court, while ‘the Constitution of the United States of America was absolutely unlike in Kenya ... in our view if the facts are sufficiently analogous and if the provisions of the law are similar then this court would be entitled to adopt some or part of the reasoning which is relevant to the situation in Kenya’.⁴⁰⁹ On that basis, this chapter seeks to rely on case law from jurisdictions whose constitutions and legal framework, although not the same as Kenya’s, are sufficiently similar as to admit of meaningful comparison. For example, unlike Kenya, some foreign jurisdictions, such as India, have adopted directive principles of state policy, which have guided their courts in interpreting these jurisdictions’ domestic legal framework.⁴¹⁰ While Kenya has not adopted directive principles of state policy and its Bill of Rights is mainly limited to civil and political rights, it is argued that a progressive interpretation of some of its constitutional provisions could result in recognition and protection of socio-economic rights.⁴¹¹

Kenyan Courts are also slowly beginning to take account of international instruments that have been ratified but not domesticated. For instance, in *RM and another v AG*, the Kenya High Court adopted the reasoning of Justice Musumali of the Zambian High Court in holding that:

⁴⁰⁸ See *Kenneth S Kiplagat v Law Society of Kenya* civil case No 542 of 1996. The Court took notice of *Kneller v State Bar of California* 496 US 1 that was decided in the Supreme Court of the United States.

⁴⁰⁹ *Kenneth S Kiplagat v Law Society of Kenya* (n 408 above).

⁴¹⁰ See the Constitution of the Republic of India promulgated in 1949. Kenya’s courts of law and legal practitioners in Kenya to rely heavily on English (Privy Council) and Indian (Supreme Court) jurisprudence; see *Paschim Banga Khet Mazdoor Samitty v State of West Bengal* AIR 1996) SC 2426 where the court positively interpreted the right to life to include provision of emergency medical treatment which is argued to have been an extension of the interpretation of the directive principles of state policy in conjunction with the right to life enshrined in its constitution. Case cited in K Kibwana & O Ambani ‘The case for constitutional articulation of directive principles of State policy in Kenya’ in M Odhiambo, O Ambani & W Mitullah(ed) *Informing a constitutional moment: Essays on Constitution reform in Kenya* (2005) 54.

⁴¹¹ See Kibwana & Ambani as above 49-59.

Ratification of such instruments by a nation state without reservation is a clear testimony of the willingness by the state to be bound by the provision of such (a Treaty). Since there is that willingness if an issue comes before this court which would not be covered by local legislation but would be covered by international instruments, I would take judicial notice of that Treaty or Convention in my resolution of the dispute.⁴¹²

Such a finding is important for indigenous peoples in Kenya who may invoke international standards and comparative jurisprudence to seek protection of their rights, especially where the existing legal framework fails to do so. However, it is important to note that the general principle on the application of international standards and norms in Kenya, as with most other common-law jurisdictions, is that unless international instruments are domesticated they do not have the force of law.⁴¹³ In the case of *Okunda v Republic*, the East African Court of Appeal held that ‘the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict.’⁴¹⁴ Subsequent court rulings have reaffirmed the *Okunda decision* that ‘where there is no ambiguity, the clear provisions of the Constitutions prevail over International Conventions.’⁴¹⁵ In *Pattni & another v Republic*,⁴¹⁶ the High Court held that

⁴¹² See *Sara Longwe v Intercontinental Hotels Ltd* (1993) 4 LRC 221 cited in *RM and another v AG* (n 404 above) 9) (It is worthy to note that despite Kenya adopting the position of the Sara Longwe case, subsequent jurisprudence in Zambia have departed from that position as emerged from discussions with Professor Michelo Hansungule, Centre for Human Rights, University of Pretoria).

⁴¹³ See *RM and another v AG* (n 406 above) 9; see also *Okunda v Republic* (1970) EA, 453; *Pattni v Republic*, Miscellaneous Civil Application Nos 322 & 810 of 1999(consolidated) Kenya Law Reports (2001) KLR, 264.

⁴¹⁴ *Okunda v Republic* (n 413 above).

⁴¹⁵ *RM and another v AG* (n 406 above) 20.

⁴¹⁶ See *Pattni v Republic* (n 413 above) 264.

‘although international instruments testify to the globalization of fundamental rights and freedoms of an individual, it is the Constitution as a law which is paramount. However, the court can in appropriate cases take account of the emerging international consensus of values in the area of human rights.

Accordingly, unless international standards are domesticated, the provisions of the current legal framework continue to be the main basis for settling disputes.⁴¹⁷ Even where international standards are domesticated, the Constitution takes precedence. Where there is no constitutional conflict, the courts must determine whether the domestic law being applied is consistent with the State’s international obligations.⁴¹⁸ Where the domestic law is inconsistent with international norms and standards, Kenyan courts follow the Bangalore Principles, i.e. they give effect to the domestic law and ‘draw the inconsistency to the attention of the appropriate authorities’.⁴¹⁹ Such inconsistencies may provide a ground for law reform, as discussed in chapter six.

This chapter makes references to norms and standards and their interpretation by international and regional monitoring mechanisms as evidence of ‘emerging consensus of values in the area of human rights’ which courts of law in Kenya should take into account when adjudicating claims

⁴¹⁷ See *Pattni v Republic* (n 413 above) 264; The High Court reaffirmed that international norms, much as they could be of persuasive value, are not binding in Kenya save for where they are incorporated into the Constitution or other written laws. However, the judiciary has acknowledged and reaffirmed the application of Convention on the Elimination of Discrimination against Women (CEDAW) in Kenya, even in the absence of domestication. In the case of *Mary Rono v Jane Rono and William Rono*, (Unreported Civil Appeal No 66 of 2002, Court of Appeal sitting in Eldoret) the court in awarding daughters of a polygamous man (married under customary law) who had died intestate equal shares in the property, the court cited Article 1 of CEDAW as being applicable in Kenya.

⁴¹⁸ See *RM and another v AG* (n 406 above) 21-23.

⁴¹⁹ As above 21; see Bangalore Principles of 1989 reprinted in *Commonwealth Secretariat, Developing Human Rights Jurisprudence* vol 3, 151 Principle 8.

made by indigenous peoples.⁴²⁰ Indeed, some of the international norms and standards surveyed in support of indigenous peoples' land rights are found in Kenya's Constitution. However, the chapter argues that the interpretation of the constitutional provisions that seems to entrench those international standards has been restrictive and has often failed to give regard to indigenous peoples' land rights. A progressive interpretation of those standards by courts of law in Kenya, as has been done by other courts across the globe, would accord indigenous peoples due recognition and protection for their ancestral land rights.

As Williams has noted, the rationale for analyzing international standards that may be considered by courts of law in Kenya while adjudicating indigenous peoples land claims is that, 'like many other oppressed peoples who have appealed to the emerging discourse of international human rights in recent years, indigenous peoples recognize that international human rights law and norms have come to assume a more authoritative and even constraining role on state actors in the world'.⁴²¹ He continues:

Government assertions in the international community that abuses of its citizens' human rights are matters of exclusive domestic concern have become more difficult to sustain. Various formal and informal mechanisms have proven capable of ameliorating abusive state practices violative of international human rights instruments and standards. Blatant state violators of international legal norms often pay the price of increasing isolation. Vitaly important economic and cultural exchange opportunities often are constricted by the international community in reaction to a sovereign state's human rights abuses of its citizens. Although state responses to pressure from the international human

⁴²⁰ See *Pattni v Republic* (n 413 above) 264; see Wiessner (n 75 above) 57.

⁴²¹ Williams (n 75 above) 669; Wiessner (n 75 above) 57.

rights process may not always be sincere or even sustained over time, experience indicates that few governments actively desire pariah status in the international community.⁴²²

Indeed, today, international standards and norms play a significant role in regulating states' conduct and attitude towards their citizens.⁴²³ States are increasingly conforming to international law notwithstanding variances in the level and manner of such compliance. Some states have domesticated such standards in their national legal frameworks while in others courts have invoked and applied them whilst adjudicating disputes.⁴²⁴ Undoubtedly, the domestic legal framework is the most suitable and primary means of legal protection. International legal norms and standards are of little value unless they find application and implementation in national legal frameworks. Reference to international standards, norms and mechanisms in this chapter is intended simply to illustrate the potential these legal materials have if applied by Kenyan courts to protect indigenous peoples' land rights. The ultimate goal should be for these standards to become part of the domestic legal order.

While most of the standards discussed are of a general character and not specifically tailored to indigenous peoples' claims, some have emerged from indigenous peoples' participation in

⁴²² Williams (n 75 above) 669.

⁴²³ RF Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2007) 30 *Fordham International Law Journal* 296-345.

⁴²⁴ See some select examples of states that have domesticated international standards with regard to indigenous peoples' rights to land and resources in Anaya & Williams (n 77 above) 33,58-74. In Africa courts of law have begun recognizing indigenous peoples rights to land and resources by invoking their own domestic standards and international norms; see for example the Botswana case of *Sesana and Others v Attorney General* (n 72 above); South African case of *Alexkor Ltd v Richtersveld Community* (n 72 above).

international standard-setting mechanisms.⁴²⁵ While international law standards can be classified as either binding or non-binding, this chapter surveys them thematically and does not always differentiate between them. However, an attempt is made wherever possible to indicate which standards would be binding on Kenya and which are surveyed for the progressive interpretations they have made relevant to indigenous peoples.

It is important to point out from the onset that the main standards surveyed here are those from international standard-setting mechanisms, most notably the United Nations and its specialized agencies, such as the International Labour Organisation, as well as those from the African human rights system. In a few instances, some comparable norms from the Inter-American human rights system have been cited with the aim of demonstrating possible progressive interpretations of some of the standards that would likewise apply in determining indigenous peoples' cases. An analysis of certain international instruments, norms developed by international standard-setting mechanisms and regionally specific frameworks is made in a bid to tease out some of the applicable norms and standards that give meaning to indigenous peoples' land and resource rights. It is expected that the emergence of favourable international standards in the protection of indigenous peoples' rights will trickle down to the domestic level, even in Kenya.

It is submitted that in a bid to redress the dispossession of indigenous peoples' land in Kenya, courts have a duty to give regard to developing common-law jurisprudence and international norms. This entails a progressive interpretation of the provisions of the Constitution that are consistent with Kenya's international obligations. Such duty emerges from the role of courts as

⁴²⁵ Williams (n 75 above) 664-9; see for example the UN Declaration on the Rights of Indigenous Peoples.

impartial arbiters of disputes.⁴²⁶ Indeed, recourse to international standards and comparative jurisprudence while interpreting the Bill of Rights, as is the case in South Africa, may be necessary.⁴²⁷ While there is no such requirement under Kenya's Constitution, courts have, in certain instances, of their own accord resorted to comparative jurisprudence and recently international law norms to interpret the Bill of Rights.⁴²⁸

A progressive interpretation of the law that is consistent with international standards and comparative jurisprudence is particularly crucial in the case of the rights of minorities and the marginalized, who often do not have the capacity to mobilize the democratic processes in resolving disputes.⁴²⁹ That approach to interpretation was reiterated by the Constitutional Court of South Africa in its judgment on the constitutionality of the death penalty under the transitional 1993 Constitution, stating that:

The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to

⁴²⁶ M Darrow & P Alston 'Bills of Rights in comparative perspectives in P Alston (ed) *Promoting human rights through Bills of Rights: Comparative perspectives* (1999) 493.

⁴²⁷ See sec 39(1)(b) and (c) Constitution of the Republic of South Africa Act 108 1996: When interpreting the Bill of Rights, a court, tribunal or forum- must (b) consider international law (c) may consider foreign law; see also *S v Makwanyane* 1995 (3) SA 391 (CC) para 36-7 where the Court held that the Court may resort to both binding and no binding international law to provide guidance as to the correct interpretation of particular provisions.

⁴²⁸ See for example *RM and another v AG* (n 406 above) 9.

⁴²⁹ *S v Makwanyane* (n 427 above) para 88.

protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.⁴³⁰

The Constitutional Court of South Africa has been particularly vigilant and afforded indigenous peoples protection of their land rights. One example is the case of *Alexkor Ltd & Another v Richtersveld Community and others*,⁴³¹ which will be analyzed in greater detail in chapter five. Although the Constitutional Court relied upon South Africa's domestic land restitution laws⁴³² to find violation of the community's land rights, it also and importantly held that the community possessed rights in the disputed lands before colonialism based on their indigenous laws.⁴³³ The Constitutional Court's willingness to right the wrongs of apartheid and discriminatory laws can be emulated by other courts on the continent in protecting marginalized communities who suffer under laws that subordinate African customary laws and traditions.

In jurisdictions that follow the common-law system, such as Kenya, courts take an adversarial approach to litigation. The legal expertise and evidence adduced is therefore an important component of the litigation process, and largely determines the outcomes of suits. However, most indigenous communities are indigent and generally do not have the resources to engage or retain counsel who are willing to prepare and research extensively. This may prejudice the outcome of cases, especially in litigation that calls not only for written sources of laws but also arguments

⁴³⁰ As above; see also para 37 on the relevance of comparative human rights jurisprudence in the determination of cases.

⁴³¹ *Alexkor Ltd v Richtersveld Community* (n 72 above).

⁴³² Sec 25(7) Constitution of the Republic of South Africa; Restitution of Land Rights Act 22 of 1994 (SA).

⁴³³ *Alexkor Ltd v Richtersveld Community* (n 72 above) para 62; 64.

based on custom, tradition, indigenous law as well as international law and jurisprudence. Therefore, apart from courts being progressive in the interpretation and use of available legal resources, there is a need to sensitize legal professionals representing indigenous peoples to the available jurisprudence and options for the protection of indigenous peoples' claims. The Ogiek case study discussed in chapter three highlighted the critical role of lawyers in adducing relevant arguments in support of indigenous peoples. In that particular case, the High Court indicated that arguments were not made to prove that the Ogiek were the traditional inhabitants of the lands they claimed and as such had a customary interest in these lands.⁴³⁴ Had such arguments been made, the Court might have arrived at a different verdict. Accordingly, lawyers representing indigenous communities need to understand and appreciate available legal resources protecting indigenous peoples' rights, including comparative jurisprudence and international standards.

It is for some of these reasons that this chapter argues that the judiciary has the potential to rectify societal ills by constructively engaging and interpreting the legal framework so as to benefit the poor and the marginalized. Courts have an obligation to ensure that justice is achieved for all people equitably within a country.⁴³⁵ It is therefore imperative that courts, being forums of last resort for the marginalized, should take into consideration the special circumstances of indigenous peoples during determination of their claims. This requires constructive engagement with litigants, meticulous research, and progressive interpretation of the applicable law.

⁴³⁴ See Kimaiyo (n 120 above) 17, tracing the history of the Ogiek that would point to the Ogiek being the original inhabitants of the lands and their claims to the lands in dispute.

⁴³⁵ Gilbert (n 34 above) 610.

The Constitution of Kenya enshrines key clauses that protect the rights of individuals and marginalized groups.⁴³⁶ Although the language of the Kenyan Bill of Rights seems only to envisage individual rights,⁴³⁷ the Constitution makes provision for rights whose enjoyment demands recognition and protection of group rights.⁴³⁸ Relevant to the question of land rights of indigenous peoples are provisions related to the right to life,⁴³⁹ protection from deprivation of property,⁴⁴⁰ and protection from discrimination.⁴⁴¹ Another relevant constitutional enactment is the chapter on trust lands, which, although fraught with limitations, protects group rights, and provides the framework for the application of indigenous peoples' customary laws.⁴⁴²

4.2 The right to life

The Constitution of Kenya, section 71(1), affirms that 'no person shall be deprived of his life intentionally.' While the wording of this provision is in the form of a negative obligation not to take someone's life, it has been argued in other jurisdictions, such as South Africa, that similarly worded provisions could 'also be interpreted positively as placing a duty on the state to protect

⁴³⁶ Secs 70-83 Constitution of Kenya.

⁴³⁷ Sec 70 as above whose relevant part reads 'every person in Kenya is entitled to the fundamental rights and freedoms of the individual'. Most of the rights in Chapter V also provide for the rights of a person.

⁴³⁸ Sec 82 on non discrimination and Chapter ix on Trust Lands as above.

⁴³⁹ Sec 71 as above.

⁴⁴⁰ Sec 75 as above .

⁴⁴¹ Sec 82 as above.

⁴⁴² Sec 114-120 as above.

the lives of its citizens’.⁴⁴³ While in Kenya the right to life is yet to find a positive interpretation, it has not precluded some members of indigenous communities from invoking the right to life in its positive dimension to demand protection of their right to a livelihood. In *Kemai and others v Attorney General and others*, discussed in chapter three, the applicants, members of the Ogiek ethnic community, sought ‘a declaration that their right to life had been contravened by the forcible eviction from the Tinnet Forest’.⁴⁴⁴

The community argued that they had been ‘living in Tinnet Forest since time immemorial, where they derived their livelihood by gathering food, hunting and farming.’⁴⁴⁵ In dismissing the case, the Court held *inter alia* that ‘the applicants were not being deprived of a means of livelihood and right to life. They were merely being stopped from dwelling on a means of livelihood preserved and protected for all Kenyans’.⁴⁴⁶ In so finding, it is arguable that while the Court did not find a violation of the right to life, it tacitly acknowledged that deprivation of means of livelihood could amount to violation of the right to life. In the Court’s reasoning, the community was ‘merely’ being prevented from encroaching on a protected area and emphasized that the ‘eviction from the forest did not bar the applicants from exploiting the natural resources of Tinnet forest, upon obtaining licences prescribed under the Forest Act’.⁴⁴⁷

⁴⁴³ See I Currie & J de Waal *The Bill of Rights Handbook* (2005) 285.

⁴⁴⁴ *Ogiek case* (n 3 above) 1.

⁴⁴⁵ As above.

⁴⁴⁶ *Ogiek case* (n 3 above) 1.

⁴⁴⁷ *Ogiek case* (n 3 above) 2.

In rejecting the community's claim that their right to life was violated by deprivation of their means to livelihood, the Court reasoned that the community did not prove that the 'alternative land given to them is a dead moon incapable of sustaining human life'.⁴⁴⁸ The main thrust of the Court's arguments against recognizing the violation of the right to life of the Ogiek community in the case was based on its finding that the Tinet forest was not Ogiek land.⁴⁴⁹

The right to life provision in the Constitution has the potential to accord protection to indigenous peoples' land rights in Kenya. The main hurdle would be, as held in the *Kemai case*, proof of title to the land and that it is the sole basis of their livelihood.⁴⁵⁰ While the constitutional right to life is yet to be positively interpreted by Kenya's courts, some common-law jurisdictions have interpreted the right to life to entail protection from deprivation of one's livelihood.⁴⁵¹ The *Ain O Salish Kendro (ASK) & others v Government of Bangladesh* case arose after the government of Bangladesh evicted a community in Dhaka to pave the way for a government project.⁴⁵² The High Court held that 'any person who is deprived of the right to livelihood, except according to just and fair procedures established by law, can challenge that deprivation as offending the right to life'.⁴⁵³

⁴⁴⁸ As above 14-16.

⁴⁴⁹ As above 13-14.

⁴⁵⁰ As above 13-16.

⁴⁵¹ See *Ain O Salish Kendro (ASK) & others v Government of Bangladesh & Others*, Writ Petition No 3034 of 1999, (1999) 2 CHRLD; see also *Kerajaan Negeri Johor & Another v Adong bin Kuwau & Others* [1998] 2 MLJ 158, (1998) 2 CHRLD 281 (Malaysia).

⁴⁵² *Ain O Salish Kendro (ASK) & others v Government of Bangladesh* as above 393.

⁴⁵³ As above 393.

Similarly, the Malaysian case of *Kerajaan Negeri Johor & Another v Adong bin Kuwau & others* involved allegations of the violation of the right to life by an indigenous hunter-gatherer community after the Government decided to build a dam on their traditional habitat without appropriate consultation and engagement.⁴⁵⁴ The Malaysian Court of Appeal upheld the decision of the lower court and stated that it is ‘a well established principle that deprivation of livelihood may amount to deprivation of life itself’.⁴⁵⁵

In *Makwanyane*, the South African Constitutional Court upheld the right to life as ‘the most fundamental of all human rights, the supreme human right’.⁴⁵⁶ Accordingly, the state is obliged by the Constitution to take positive measures to guarantee the right to life.⁴⁵⁷ Such measures in the Kenyan context would include the protection of the lands and natural resource rights of indigenous peoples on which they solely depend. Currie and de Waal argue that it is unlikely that the South African courts would need to extend the right to life to impose positive obligations on the state given that South Africa’s Constitution enshrines socio-economic rights whose interpretation would accord similar protection.⁴⁵⁸ While that is theoretically true, it is instructive to note that the South African Constitutional Court has linked the realization of socio-economic

⁴⁵⁴ *Kerajaan Negeri Johor & Another v Adong bin Kuwau & Others* (n 451 above) 281.

⁴⁵⁵ As above 281.

⁴⁵⁶ See *S v Makwanyane* (n 427 above) para 217; see also D Yoram ‘The right to life, physical integrity and liberty’ in H Louis (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981)114.

⁴⁵⁷ *S v Makwanyane* (n 427 above) para 117; 353.

⁴⁵⁸ See Currie and De Waal (n 443 above) 290.

rights to the right to life.⁴⁵⁹ In Kenya, where socio-economic rights are not expressly enshrined in the Constitution, the right to life presents one of the most realistic avenues for progressive interpretation likely to yield meaningful protection of the rights demanded by indigenous peoples that are necessary for their survival.

The Botswana case of *Sesana and others v Attorney General*⁴⁶⁰ which would similarly serve as persuasive authority in Kenya found that unlawful termination of basic and essential services of an indigenous community abridges the right to life.⁴⁶¹ The case is important in Kenya given the fact that the High Court in Botswana found a violation of the right to life and linked it to the denial of basic sources of the indigenous community's livelihood. It is particularly useful as a comparable persuasive authority given the fact that Botswana, like Kenya, does not have directive principles of state policy, and has also not enshrined socio-economic rights in the Constitution.

In the *Sesana* case, the Government of Botswana, in a bid to forcefully relocate the Basarwa (also known as the San, an indigenous community) from their traditional territories in the Central Kalahari Game Reserve, terminated basic and essential services such as water and food.⁴⁶² The Court held that such forceful relocation and termination of services was unlawful and

⁴⁵⁹ See *Khosa & 2 others v Minister of Social Development & 2 others* 2004(6) SA 505 (CC) para 41, 44, 52, 80, and 82.

⁴⁶⁰ *Sesana and others v Attorney General* (n 72 above).

⁴⁶¹ As above, H12 (4); H13 p229.

⁴⁶² *Sesana and Others v Attorney General* (n 72 above) H11 and H12.

unconstitutional.⁴⁶³ The particular circumstances of the San and the Ogiek in Kenya are quite similar and it will be demonstrated in later sections that Kenya's High Court may have arrived at a comparable finding had it been presented with all the available legal resources in support of the Ogiek and applied them objectively.

The Indian case of *Tellis and others v Bombay Municipal Corporation and others* held that the right to life entailed positive duties on the state to guarantee a community's right to a livelihood, albeit linked to directive principles of state policy.⁴⁶⁴ Kenya's High Court sought to distinguish the *Tellis* case in the *Kemai case* by arguing that, while the right to life was wide and far reaching, what it protected was deprivation of life beyond the established procedures of law.⁴⁶⁵ Although Kenya does not have directive principles of state policy, such an interpretation is restrictive and fails to go beyond the purpose and object of the right to life clause in the Constitution. According to the Kenyan High Court, the eviction of the Ogiek was lawful and that, in any case, the community had never challenged the many evictions they claimed to have endured until the present matter.⁴⁶⁶

In so deciding, the Kenyan High Court ignored the fact that, while the Ogiek had not previously challenged their eviction in court, they had asserted their rights in other ways, including through

⁴⁶³ As above. H10-H13.

⁴⁶⁴ *Olga Tellis v. Bombay Municipal Corporation* 1985, 3 SCC 545 -The Indian Supreme Court held that forced eviction would result in a deprivation of the ability to earn a livelihood. The Court further noted that the ability to earn a livelihood was essential to life and thus the forced evictions would result in a violation of the right to life as embodied in Article 21 of the Indian Constitution.

⁴⁶⁵ *Ogiek case* (n 3 above) 13.

⁴⁶⁶ *Ogiek case* (n 3 above) 13.

peaceful mediation and political negotiation with the state since 1968.⁴⁶⁷ The Court's argument also fails to consider fundamental barriers that could have prevented the community from contesting their evictions in court, such as indigence, illiteracy, lack of appropriate legal know-how and capacity. The community was also relying on their customary laws and traditions to prove ownership of their lands, which, as noted above, were subordinated to the written law.

It is submitted that in certain cases, particularly those involving poor communities where the outcome of the case would have far-reaching implications for the community, courts of law should consider all these factors before dismissing the case on a technicality. It is also submitted that, on the basis of the comparative jurisprudence surveyed above, which has persuasive value in Kenya's courts, indigenous peoples in Kenya should be accorded equal protection of their land rights as the prime basis of their livelihood. The right to life, in the view of these other courts, includes protection of one's livelihood. In the case of indigenous peoples, this means protection of their traditional lands.

Kenya is also a party to a number of international and regional treaties whose monitoring mechanisms have called upon member states to interpret the right to life positively.⁴⁶⁸ The UN Human Rights Committee has for instance noted that 'the right to life has been too often narrowly interpreted ... [T]he expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive

⁴⁶⁷ See Kimaiyo (n 120 above) 22-30.

⁴⁶⁸ Some of the treaties that Kenya has ratified that protect the right to life include the ICCPR, ICESCR, and the African Charter.

measures.⁴⁶⁹ Such measures would include according legal recognition and protection to the traditional lands of indigenous peoples.

The African Commission has interpreted the right to life to entail the protection of the lands of indigenous peoples whose survival depends on access to such land.⁴⁷⁰ In *Social and Economics Rights Action Centre (SERAC) and another v Nigeria*, the African Commission found that the pollution and environmental degradation of Ogoni land by Government agents and private actors was a violation of the Ogoni people's right to life.⁴⁷¹ According to the African Commission, the acts of the Nigerian State 'affected the life of the Ogoni community as a whole.'⁴⁷² Implicitly, the Commission also found a link between the right to food and the rights to life and dignity, which are protected by the African Charter.⁴⁷³ In finding a violation of the right to food by Nigeria in the *SERAC* case, the Commission called on the State not to destroy the Ogoni's food sources or 'prevent them from feeding themselves'.⁴⁷⁴ Indigenous peoples' food sources are predominantly their traditional lands, and as such preventing them from accessing and controlling these resources constitutes a violation of their right to life.

⁴⁶⁹ Human Rights Committee, General Comment 6: The right to life, 30 April 1982, para. 5, U.N. Document HRI/GEN/1/Rev. 6 of 12 May 2003, p. 128; see art 6 ICCPR.

⁴⁷⁰ See *Social and Economics Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), 260 para 67; para 70 (*SERAC* case).

⁴⁷¹ *SERAC* case (n 470 above) para 67 and 70; see art 4 of African Charter.

⁴⁷² *SERAC* as above.

⁴⁷³ As above para 64-66; arts 4 and 5 African Charter.

⁴⁷⁴ As above para 65 and 66.

4.3 Non-discrimination and equality

Kenya's Constitution provides for non-discrimination in the enjoyment of fundamental rights in Kenya. It provides in part that 'every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex'.⁴⁷⁵ The enjoyment of these rights is 'subject to respect for the rights of others and for the public interest' as well as the specific limitations envisaged in each of the enshrined rights.⁴⁷⁶ Section 82 of the Constitution defines discrimination and is the express provision that outlaws its practice.⁴⁷⁷

By virtue of these provisions, indigenous peoples are protected from discrimination. Non-discrimination here would entail exercising their land rights according to their preferred mode of tenure. Tribe is one of the express grounds stipulated as a possible basis for discrimination. The fact that this ground is expressly acknowledged means that all tribes are equal in the eyes of the Constitution and are entitled to equal treatment by the law.⁴⁷⁸ Their land and resources are therefore protected by the Constitution as equitably as are lands and resources belonging to all other Kenyans. Discrimination by the law or practice against their preferred mode of land use, control, access and ownership is by extension prohibited.

⁴⁷⁵ Sec 70 Constitution of Kenya.

⁴⁷⁶ As above.

⁴⁷⁷ See sec 82(1) (2) as above; According to sec 82(3) discriminatory means 'affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other connection, political opinions, colour, creed or sex whereby persons of one such description are not made subject or accorded privileges or advantages which are accorded to persons of another description'.

⁴⁷⁸ Sec 82(1) (2) Constitution of Kenya.

The non-discrimination provisions⁴⁷⁹ enshrined in Kenya's Constitution, provide, at least in theory, a constitutional basis for indigenous peoples to assert their land and resource claims in accordance with their preferred way of life. However, while the non-discrimination clause in the Constitution seems to protect communities relying on customary laws, the repugnancy clause renders the applicability of customary law uncertain in case of a conflict with written laws.⁴⁸⁰ Courts of law in Kenya have generally given more weight to the repugnancy clause than its overall effect, which is to discriminate against particular groups who seek reliance on their traditional laws.⁴⁸¹

Notwithstanding these provisions, discriminatory practices against indigenous peoples persist in Kenya.⁴⁸² Indeed, Kenya recently acknowledged that in the past it did not take any active measures to preserve and protect minorities.⁴⁸³ In a bid to rectify this situation, it stated that 'there has been a gradual acceptance of their status and there are efforts being made to not only recognize these minorities, but also encourage their survival and protection'.⁴⁸⁴ Similarly, a recent study by the African Union's NEPAD Peer Review Mechanism⁴⁸⁵ reveals that 'post-

⁴⁷⁹ Sec 82 as above.

⁴⁸⁰ See Lenaola *et al* (n 169 above) 243.

⁴⁸¹ As above.

⁴⁸² See Kenya APRM Report (n 2 above) 14; Stavenhagen Kenya Mission Report (n 35 above) para 22-24; IWGIA (n 35 above) 468.

⁴⁸³ Second Periodic Report of Kenya to the UN Human Rights Committee (n 154 above) para 212.

⁴⁸⁴ As above para 212.

⁴⁸⁵ The New Partnership for Africa's Development (NEPAD) is 'a pledge by African leaders based on a common vision and a firm and shared conviction, that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth in the world

independence politics in Kenya have been characterized by ethnicity, reflecting patterns of super-ordinate and subordinate ethnic relations and inequality'.⁴⁸⁶ Indigenous peoples whose population size is generally smaller than the dominant tribes have thus endured policies that did not take account of their particular circumstances, preferred way of life and cultural dynamics.⁴⁸⁷

It is instructive to note that similarly situated common-law countries, such as South Africa and Botswana, have employed non-discrimination clauses to protect their indigenous peoples' land rights. The South African Constitutional Court, as we have seen, in the landmark decision in *Alexkor Ltd and another v Richtersveld Community and others* held that failure to respect indigenous customary property rights is invariably discriminatory.⁴⁸⁸ Apart from progressively interpreting constitutional provisions against discrimination, courts have an obligation to ensure that marginalised communities by virtue of their particular circumstances are protected according to their preferred way of life and culture.

The *Sesana* case in Botswana highlighted the relative powerlessness of indigenous communities when pitted against dominant communities.⁴⁸⁹ The High Court held that 'equal treatment of un-

economy and body politic' (NEPAD Declaration (2001) adopted in Abuja, Nigeria in October 2001). The African Peer Review Mechanism (APRM) is a programme under NEPAD aimed at encouraging states to among others make self assessment on their human rights, rule of law and democratic standards. The APRM process has been significant in its forthright approach of engaging states in self-assessment of their economic and human rights record – including their deficiencies. Reports of the APRM which so far have covered Ghana, Rwanda, South Africa and Kenya have made useful recommendations to the states concerned which if implemented would transform the human rights landscape on the continent.

⁴⁸⁶ Kenya APRM Report (n 2 above) 14.

⁴⁸⁷ Stavenhagen Kenya Mission Report (n 35 above) para 22-24.

⁴⁸⁸ *Alexkor Ltd v Richtersveld Community* (n 72 above) para 34.

⁴⁸⁹ *Sesana and Others v Attorney General* (n 72 above) H9.3.

equals can amount to discrimination’.⁴⁹⁰ The significance of such a position in the Kenyan context can not be underestimated given the fact that most indigenous peoples have historically been marginalized in practice and in law, to the extent that it is imperative that measures are instituted to address the discrimination. Some of the measures may require affirmative action and mechanisms to redress the historical injustices committed against indigenous peoples.⁴⁹¹ While affirmative action initiatives may be conceived as a form of preferential treatment, their true purpose is to correct existing inequality. As argued by Kameri-Mbote:

Substantive equality seeks to address the shortcomings of formal equal equality and seeks to ensure that equality is achieved. The quest for substantive equality will lead to some form of discrimination or differential treatment. This is justified on the account of levelling the playing field, it being recognised that equal rights will not deal with past injustices occasioned by formal equality that does not take into account structural distinctions.⁴⁹²

Given that non-discrimination is a constitutionally entrenched right in Kenya, it should be interpreted with the aim of according all Kenyans equal protection of the law. Where inequality exists, certain measures, including affirmative action initiatives, should be adopted to rectify the situation. Applicable international standards and norms require states not to discriminate against indigenous peoples’ customary law interests in their lands.⁴⁹³ The United Nations Committee that monitors the implementation of the International Convention on the Elimination of All Forms of

⁴⁹⁰ As above, H9.3 (33).

⁴⁹¹ See Kymlicka (n 124 above) 4.

⁴⁹² P Kameri- Mbote ‘Gender considerations in Constitution making: engendering women’s rights in the legal process’ (2003) *University of Nairobi Law Journal* 156.

⁴⁹³ Arts 5(d) (v) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Racial Discrimination (CERD),⁴⁹⁴ to which Kenya is a party, has implored 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.’⁴⁹⁵

The international instruments prohibiting discrimination include the ICCPR and CERD, both of which have been ratified by Kenya.⁴⁹⁶ Article 2(1) of the ICCPR stipulates that ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.⁴⁹⁷ Further, article 26 of the Convention guarantees equal protection before the law.⁴⁹⁸ The norms enshrined in articles 2(1) and 26 have been

⁴⁹⁴ As above.

⁴⁹⁵ CERD *General Recommendation XXIII* (n 71 above) para 5.

⁴⁹⁶ ICCPR ratified by Kenya on 1 May 1972; CERD ratified by Kenya on 13 September 2001.

⁴⁹⁷ See also HRC General Comment 18, Non-discrimination (Thirty-seventh session, 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), para 18 describing discrimination as ‘any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms’.

⁴⁹⁸ Art 26 ICCPR ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

invoked to give effect to the rights of indigenous peoples.⁴⁹⁹ The African Charter on Human and Peoples' Rights similarly prohibits discrimination on the basis of various grounds, including race, ethnic origin, language, social status and other status.⁵⁰⁰ Inclusion of ethnic origin as one of the grounds may be deemed a tacit acknowledgment of the ethnic diversity on the continent and the need to respect and ensure that each group, irrespective of its political or social status, deserves equal treatment and protection of the law. These non-discrimination provisions are important standards in indigenous peoples' pursuit of recognition and protection of their lands and resource rights. According to Thornberry, the most direct non-discriminatory standards that have the potential to give meaning to indigenous peoples' rights are provisions of the CERD.⁵⁰¹ The Committee on CERD has called on states parties to among others:⁵⁰²

- i. Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- ii. Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;

⁴⁹⁹ See also with reference to minorities HRC General Comment No 23 (n 100 above) para 6.2 'Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population....'; see Thornberry (n 37 above) 131.

⁵⁰⁰ See arts 2, 3 & 19 African Charter.

⁵⁰¹ See P Thornberry 'The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and caste/descent-based discrimination in J Castellino & N Walsh (ed) *International Law and Indigenous Peoples* (2005) 17.

⁵⁰² CERD General Recommendation 23 (n 71 above).

- iii. Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- iv. Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- v. Ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and to practice their languages;
- vi. Recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.

The Committee recognizes that discrimination lies at the root of indigenous dispossession and jeopardizes the survival of indigenous peoples as distinct cultures.⁵⁰³ The issue of land features prominently, and the Committee has called for the protection of indigenous peoples' communal lands as a means of eliminating violations of the human rights of indigenous peoples resulting from discriminatory land rights policies and laws.⁵⁰⁴

Like the HRC, the Committee considers periodic state reports, and in its observations it has criticized the lack of meaningful legal recognition of communal indigenous lands within states, decriing the resultant instability of indigenous life.⁵⁰⁵ The Committee has called upon states to '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

⁵⁰³ CERD General Recommendation 23 (n 71 above).

⁵⁰⁴ A Huff 'Indigenous land rights and the new self-determination' (2005) 16 *Colorado Journal of International Environmental Law & Policy* 328.

⁵⁰⁵ As above.

traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories'.⁵⁰⁶ Of particular interest is the affirmation by the Committee that the doctrine of *terra nullius* is racially discriminatory and as such inconsistent with principles of fundamental human rights.⁵⁰⁷ The Committee referred specifically to the Australian High Court's decision in *Mabo*⁵⁰⁸ which rejected the doctrine of *terra nullius*, calling this judgment a significant development for indigenous peoples' land rights.⁵⁰⁹

Non-discrimination further demands that adequate and appropriate consultation and participation mechanisms be instituted to ensure that indigenous peoples are involved in the ownership, control and management of their traditional lands and resources.⁵¹⁰ In this regard, the HRC has recommended that state parties 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'.⁵¹¹

ILO Convention No 169 similarly urges states to consult indigenous peoples 'with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to

⁵⁰⁶ Huff (n 504 above).

⁵⁰⁷ Ninth Periodic Report of Australia, CERD/C/223/Add.1, CERD Report in A/49/18, para 540.

⁵⁰⁸ *Mabo v Queensland* (n 72 above).

⁵⁰⁹ CERD Ninth Periodic Report of Australia (n 507 above) paras 540.

⁵¹⁰ HRC General Comment No 23 (n 100 above); *Länsman v Finland* (n 100 above) para 9.5; *see also at the Inter American Commission in Mary and Carrie Dann v United States* (n 73 above) para 140.

⁵¹¹ CERD General Recommendation 23 (n 71 above).

their lands’.⁵¹² Indeed, according to one of the fundamental principles of this convention, ‘the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation of plans and programmes for national and regional development which may affect them directly.’⁵¹³ Accordingly, consultation should take place prior to the project commencement, preferably during the design stage, in order to ensure that indigenous peoples’ views are taken into account. Such consultation should be conducted in good faith with the overall aim of seeking agreement or consent of the affected peoples, using appropriate procedures and institutions that are representative of the indigenous peoples themselves. Consultation should therefore consist not merely of the passing of information to indigenous peoples about envisaged projects, but should also encompass the principles of prior, free and informed consent.⁵¹⁴ In terms of ILO Convention No 169, consultation and participation of indigenous peoples should also take place when considering legislative and administrative measures impacting upon and affecting them.⁵¹⁵

The UN Special Rapporteur on Indigenous Peoples similarly advises that a better practice to address the problem of indigenous peoples’ exclusion ‘from a human rights and ecological

⁵¹² Art 15(2) ILO Convention No 169; see also art 30 UN Declaration on Indigenous Peoples (providing for the right of indigenous peoples ‘to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources’).

⁵¹³ Art 7(1) ILO Convention No 169.

⁵¹⁴ Art 16 as above.

⁵¹⁵ Art 6(1) (a) as above.

perspective would be to involve the pastoralist and forest communities in the management and benefits' of such projects.⁵¹⁶ The Special Rapporteur has therefore called upon states to respect indigenous peoples' rights to consultation and participation 'based on the full recognition of indigenous peoples' rights to their lands, territories and natural resources'.⁵¹⁷

4.4 Protection from deprivation of property

The fundamental basis for the protection from deprivation of property in Kenya is section 75 of the Constitution. The section provides in part:

(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied-

- a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and
- b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
- c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

⁵¹⁶ Stavenhagen Kenya Mission Report (n 35 above) para 54.

⁵¹⁷ See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65, E/CN.4/2003/90, 21 January 2003 para 66.

The Constitution therefore protects against deprivation of property of all description.⁵¹⁸ Rights in land constitute property and are accordingly secured by this provision. However, although the provision, similar to the one on the right to life, envisages negative duties (protection from deprivation) it similarly imposes positive obligations on the state to ensure that the protection it offers is in fact enjoyed. The property clause is particularly important for indigenous peoples by virtue of its express recognition and acknowledgement that there may be various interests or rights over property of diverse descriptions.⁵¹⁹ Property includes land and natural resources.⁵²⁰ This is construed to encompass all forms of property holding, including communal and individual property.⁵²¹ Rights holders may only be deprived of such property in accordance with established legal mechanisms and procedures upon prompt payment of full compensation.⁵²² Accordingly, indigenous peoples' land rights are constitutionally protected, and, in the event of any abrogation, they are entitled to assert them before the Kenyan High Court.⁵²³

⁵¹⁸ Sec 75 Constitution of Kenya.

⁵¹⁹ Sec 75(1) as above.

⁵²⁰ See sec 2(19) of the Interpretation of General Provisions Act Laws of Kenya Cap 2 -which defines immovable property as 'including land and other things attached to the earth or permanently fixed to anything attached to the earth'.

⁵²¹ See the Response by Kenya on the Endorois case (n 3 above) para 3.1.2 stating that: Land as property is recognized under Kenya's legal system and the various methods of ownership are recognized and protected. These include private ownership (for natural and artificial persons), communal ownership either through the Land (Group Representatives) Act for adjudicated land otherwise called the group ranches or the trust lands managed by the County Council within whose area of jurisdiction it is situated for the benefit of the persons ordinarily resident on that land and gives effect to such rights, interests or other benefits in respect of the land as may, under the African Customary Law for the time being in force and applicable thereto vests in any tribe, group, family or individual (*currently still under consideration on file with the author*).

⁵²² Sec 75(1) Constitution of Kenya.

⁵²³ Sec 84 as above stipulates that any person may apply to the High Court for redress in case of violation of any of the fundamental human rights and freedoms enshrined in the Constitution.

The property clause in Kenya's Constitution protects against deprivation of property and does not encompass the right to ensure that everyone is entitled to property. Some legal entitlements to certain rights associated with the property are a prerequisite to claim deprivation. Land and natural resources as property embody a bundle of rights, which include user rights (*usufructus*), ownership, access and control.⁵²⁴ The Constitution protects and guarantees these rights in accordance with the applicable legal title/holding of the property. This is governed by a myriad of statutes that regulate ownership, access, use and control of the land.⁵²⁵

Indigenous peoples in Kenya own, control, access and use lands according to the various land laws in force. Some indigenous peoples demand protection of both their communal territories and individual land holdings. The Ogiek, for example, while seeking protection of their communal forests have also sought to secure individual land holdings to which they have registered individual titles.⁵²⁶ The pastoralists, on the other hand, demand recognition and protection of their group land rights.⁵²⁷ The state should recognise and protect whatever form of land tenure indigenous people elect to use, whether individual or communal.

⁵²⁴ See PL Onalo *Land law and conveyancing in Kenya (1986) 18*; see also *Report of the Constitution of Kenya Review Commission, Volume One, the Main Report (2003) 311*.

⁵²⁵ Some of these laws include those creating and defining substantive property rights in land Registered Land Act (Cap 300), the Indian Transfer of Property Act, 1882; those providing for transition from customary land tenure to individualisation of tenure systems by registration Land Adjudication Act (Cap 284), the Land Consolidation Act (Cap 283), the Registration of Titles Act (Cap 284); registration of group interests (Land (Group Representatives Act (Cap 287) and those regulating transactions in land (Land Control Act (Cap 302). Other applicable laws include those regulating land use such as the Agriculture Act (Cap 318), the Public Health Act (Cap 242) the Chiefs Act (Cap 128) and the Physical Planning Act (Act no 6 of 1996) see *Report of the Constitution of Kenya Review Commission, Volume One, The Main Report, Nairobi, 2003, 315*; see also Wanjala (n 21 above) 25-41.

⁵²⁶ Kimaiyo (n 120 above).

⁵²⁷ Lenaola et al (n 169 above) 256.

As already stated, Kenya's land tenure regime is mainly tailored to protect and guarantee private/individual land tenure. While the Constitution makes express provision for protection of trust lands according to community needs and aspirations⁵²⁸ (surveyed in greater detail later in the next Chapter), current land laws and policies have 'facilitated the erosion of communal land tenure rights'.⁵²⁹ Such a situation emerges from the fact that most indigenous peoples' traditional lands and territories are not registered to an individual and are instead held in trust by county councils, which can part with the lands to individuals upon registration.⁵³⁰

To exacerbate the problem, some of the lands claimed by indigenous peoples have been declared Government land or protected lands with little if any consultation with the traditional land holders (indigenous communities) or 'prompt payment of full compensation', as required by the Constitution.⁵³¹ That is done on the basis that such lands vest in the states and that the indigenous communities making such claims have no legal proof that they are the title holders of those lands. The irony of the matter is that an expectation of proof of title is engendered by the state through formal legal procedural requirements, which is often an uphill battle given the hierarchy of Kenya's laws which favour individual land holdings.

The dispossession of the traditional lands of indigenous peoples constitutes a violation of their fundamental rights to property. However, as discussed in the preceding section, indigenous

⁵²⁸ Sec 114-120 Constitution of Kenya.

⁵²⁹ See *Lenaola et al* (n 169 above) 242.

⁵³⁰ Sec 115-116 Constitution of Kenya.

⁵³¹ Sec 75 as above.

peoples' property rights derive from their customary laws. These laws are considered subsidiary to written laws. Through Kenya's written laws, indigenous peoples were and continue to be disinherited of their traditional lands. This is notwithstanding the fact that the communities' lands constitute property protected by the Constitution on the basis of their African customary laws.⁵³²

The constitutional protection of property of any description⁵³³ would include communal land as sought by certain indigenous communities. However, 'both the rigidity of the constitutional provisions on property and land as well as the weak protection of rights of people occupying the so-called 'communal' land are problematic and contribute to social instability'.⁵³⁴ Such land is of paramount importance to communities whose livelihoods are dependent on it. It is therefore imperative that the Constitution accords equal protection to all forms of land ownership from deprivation. In order to rectify that anomaly, courts of law have a duty to give positive content to the property clause to have regard to indigenous peoples' lands rights.

The Constitution permits compulsory acquisition of property for the public benefit.⁵³⁵ However, such expropriation by the state must be in accordance with established legal procedures and upon payment of prompt and full compensation.⁵³⁶ Individuals and communities who are aggrieved by such expropriation have a right of direct access to the High Court to seek remedies. Proof of title

⁵³² Sec 82(c) Constitution of Kenya.

⁵³³ Sec 75 as above.

⁵³⁴ See SBO Gutto, Land and property rights in modern constitutionalism: Experiences from Africa and possible lessons for South Africa in Wanjala (n 21 above) 246.

⁵³⁵ Section 82(1) (a) (b) Constitution of Kenya.

⁵³⁶ Sec 82(1) (c) as above.

to the appropriated land is required before a determination of the appropriateness of the compulsory acquisition and the amount of compensation. In such circumstances, indigenous peoples, who may not be able to prove legal title to these lands, have often lost their lands without any compensation on the basis that the lands belong to no one. Courts have a duty to rectify such rigid interpretations that base their determination of title on registered proprietors. Courts ought to look beyond written laws to establish ownership of lands claimed by indigenous people based on their African customary laws and traditions.

Although the current Constitution of Kenya provides that land may be expropriated to promote the public benefit,⁵³⁷ courts might not interpret this provision to encompass land restitution and land redistribution. Indeed, as long as the Constitution does not expressly state that land redistribution and restitution amounts to public interest for purposes of expropriation, it is unlikely that such a move would withstand a constitutional challenge.⁵³⁸ To facilitate equitable land redistribution, an amendment to the Constitution to expressly provide for land redistribution as one of the grounds for compulsory acquisition of land would be required. This is due to the fact that while such an exercise would theoretically be in public interest for the sustenance of harmony and peace in the country, most of that land would be acquired to be granted to individuals, a position that the courts might adjudge not to be to the public benefit.⁵³⁹ According to AJ van der Walt, such a restrictive interpretation 'is not unfounded, because at least two

⁵³⁷ Sec 75(1) (a) as above.

⁵³⁸ See AJ van der Walt *Constitutional Property Law* (2005) 243, note 240.

⁵³⁹ See *Trinidad Island-Wide Cane Farmers' Association Inc and Attorney General v Prakash Seeream* (1975) 27 WIR 329 (CA) (Trinidad & Tobago); *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 (Australia) both cited in Van der Walt (n 538 above) 243, note 240.

foreign courts have indeed decided that an expropriation was not for a public purpose if the property was transferred to another private person'.⁵⁴⁰ It is therefore imperative to expressly include land redistribution as one of the public benefit purposes, to avoid such measures being declared unconstitutional.

In South Africa, the Constitution expressly defines the term 'public interest' as including 'the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources'.⁵⁴¹ According to AJ van der Walt, 'to avoid the courts following the narrow interpretation the provisions in section 25(2) were framed to make this abundantly clear'.⁵⁴² Given that there is no guarantee that courts in Kenya will interpret public benefit to encompass land redistribution and restitution to individuals or communities, it is crucial that an express provision of a similar nature be adopted. Such a provision could also guard against arbitrary acquisition of land for other purposes in the name of public benefit, which would end up in the hands of undeserving individuals. It is instructive that the current Constitution provides that one may contest the legality of compulsory acquisition in the High Court as well as the amount and payment of compensation.⁵⁴³ That guarantee is important to ensure that such expropriation is only used for purposes for which it is designed. Where there is expropriation of lands on public interest prompt and full compensation shall be made to affected communities.

⁵⁴⁰ As above; see also cases where courts have indeed interpreted public purpose to include transfer of property to individuals for purposes of land reform as amounting to public interest in Van der Walt (n 538 above).

⁵⁴¹ See sec 25(4) (a) Constitution of South Africa.

⁵⁴² Van der Walt (n 538 above) 244.

⁵⁴³ See sec 75(2) Constitution of Kenya.

As stated earlier, it is of paramount importance that indigenous peoples are consulted whenever decisions regarding their lands are made. Courts have the capacity to rule on whether indigenous peoples were appropriately consulted before a decision to expropriate their lands is made. Any other form of acquisition of communal lands for private purposes by individuals and/or corporations should be set aside unless made for the benefit of the community after due consultation and within established legal procedures.

Indigenous peoples' traditional lands constitute property as protected by international instruments.⁵⁴⁴ The norms and standards enumerated by these instruments are useful benchmarks for domestic courts while interpreting the constitutional provisions. The right to property as sought by indigenous peoples has been positively interpreted by the African regional human rights treaty monitoring body. In particular, the African Commission on Human and Peoples' Rights has held that land can constitute property for the purposes of article 14 of the Charter.⁵⁴⁵ The Commission has also held that the right to property includes the right to have access to one's property and not to have one's property invaded or encroached upon.⁵⁴⁶ The Commission has further recognised that 'owners have the right to undisturbed possession, use and control of their

⁵⁴⁴ Anaya (n 37 above) 142 citing art 17 of the Universal Declaration on Human Rights which states that 'everyone has the right to own property alone as well as in association with others' and that 'no one shall be arbitrarily deprived of his property'; see also arts 14, 20, 21 & 22 African Charter; Arts 1(2), 17, 23, 27 ICCPR. Art 14 African Charter provides: The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. see comparable provision under the Inter American Convention on Human Rights art 21 which provides inter alia that 'Everyone has the right to the use and enjoyment of his property....No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law'.

⁵⁴⁵ *Malawi African Association and Others v Mauritania*, African Commission on Human and Peoples' Rights, Communication Nos. 54/91, 61/91, 98/93, 164/97 & 196/97 and 210/98 (2000) para 128.

⁵⁴⁶ *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, African Commission, Communication. Nos. 140/94, 141/94, 145/95 (1999) para 54.

property however they deem fit'.⁵⁴⁷ The Inter-American Commission on Human Rights has also interpreted the right to property⁵⁴⁸ in the American Convention on Human Rights, as including the traditional lands and resources of indigenous peoples.⁵⁴⁹ The right to property includes 'communal property of indigenous peoples, even if that property is not held under a deed of title or is not otherwise specifically recognized by the state'.⁵⁵⁰

ILO Convention No 169 also emphasizes the need for states to respect and protect the collective aspects of indigenous peoples' land. Article 14(1) of that Convention affirms the following:

The rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

While Kenya is not party to ILO Convention No 169, and therefore not bound by its provisions, its standards reflect the demands made by indigenous peoples all over the world, including those in Kenya.⁵⁵¹ The Convention thus provides a meaningful framework to be emulated by municipal

⁵⁴⁷ *Huri-Laws v. Nigeria*, African Commission, Communication No. 225/98 (2000) para 52.

⁵⁴⁸ *Anaya* (n 37 above) 145; *Awas Tingni case* (n 72 above) para 146-151.

⁵⁴⁹ *Mary and Carrie Dann v United States* (n 73 above) para 130; see also *Maya Indigenous Communities v Belize* (n 73 above) para 115-120; see also *Awas Tingni case* (n 72 above) paras 148 & 149.

⁵⁵⁰ As above.

⁵⁵¹ In fact no African country has ratified this treaty although six African countries ratified its predecessor the ILO Convention No 107 of 1957 on the Protection and Integration of Indigenous and Other Tribal and Semi- Tribal Populations in Independent Countries adopted at the 40th Session of the International Labour Conference on 26 June 1957(Tunisia, Malawi, Guinea-Bissau, Ghana, Egypt and Angola) sourced from <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107>> accessed on 20 June 2007. ILO Convention No 107

jurisdictions. Indeed, according to article 60 of the African Charter, ‘the Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the present Charter are members’. The ILO Convention fits within this international legal framework.⁵⁵² It follows that even in disputes beyond the domestic level, in forums such as the African Commission and the African Court on Human and Peoples' Rights, these institutions ought to be informed and inspired by international norms during their deliberations. Therefore, although not always binding, these international standards point to developing jurisprudence that recognizes indigenous peoples' land rights.

ILO Convention 169 further provides for the recognition of indigenous land tenure systems,⁵⁵³ which typically are based on long-standing custom and traditions. These systems regulate community members' relative interests in collective landholdings, and they also have a bearing on the character of collective landholdings *vis-a-vis* the state and others. Article 15 of the Convention requests states to safeguard indigenous peoples' rights to natural resources

comprises of essentially most of the subject in the ILO Convention 169: land, health and social security, labour and education, but was faulted leading to its replacement due to its integrationist and assimilationist perspective. For a detailed expose of the two Conventions see L Swepston *The Indigenous and Tribal Peoples Convention (No 169): Eight years after adoption* in CP Cohen (ed) *Human rights of indigenous peoples* (1998) 17-36; see also Thornberry (n 37 above) 320-367.

⁵⁵² The ILO is now one of the specialized agencies of the UN, see art 57 and 63 of the United Nations Charter; see Thornberry (n 37 above) 323.

⁵⁵³ Art 17(1) ILO Convention No 169.

throughout their territories, including their right ‘to participate in the use, management and conservation’ of the resources. The concept of indigenous territories embraced by the Convention is deemed to cover ‘the total environment of the areas which the peoples concerned occupy or otherwise use.’⁵⁵⁴

The Convention further calls on states to take steps to identify lands that are traditionally occupied by indigenous peoples, to guarantee effective protection of indigenous peoples' rights of ownership and possession,⁵⁵⁵ and to safeguard their rights to natural resources in the lands occupied by them, including the use, management, and conservation of these lands.⁵⁵⁶ Indigenous peoples ‘shall not be removed from the lands that they occupy’ except where such removal is ‘considered necessary as an exceptional measure’ upon which the ‘relocation shall take place only with free and informed consent’.⁵⁵⁷ The provision further demands that ‘where consent can not be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations’.⁵⁵⁸ Such regulations and national laws should be in tandem with applicable international human rights standards and norms. ‘Whenever possible, indigenous peoples shall have the right to return to their traditional lands as soon as the grounds for relocation cease to exist’.⁵⁵⁹ If ‘return is not possible they shall be provided with lands of equal quality and status to those previously occupied and full compensation for any resulting loss

⁵⁵⁴ Art 13(2) ILO Convention No 169.

⁵⁵⁵ Art 14(2) as above.

⁵⁵⁶ Art 15(1) as above.

⁵⁵⁷ Arts 16(1) (2) as above.

⁵⁵⁸ Art 16(2) as above.

⁵⁵⁹ Art 16(3) as above.

or injury’.⁵⁶⁰ These norms are particularly important since they accord indigenous peoples the right to participate on issues affecting their lands and resources and to be consulted appropriately at all times in that regard.

The United Nations Declaration on the Rights of Indigenous Peoples also provides important standards for the protection of indigenous peoples’ rights to land and natural resources.⁵⁶¹ The adoption of the Declaration took over two decades of global negotiations to accomplish, which importantly included the input of indigenous peoples.⁵⁶² However, before the eventual adoption of the Declaration, African states refused to support it,⁵⁶³ thus holding up the passing of an important tool for protecting the rights of indigenous peoples, due to a number of concerns.⁵⁶⁴

The reservations of the African group included the following issues:

- (a) the definition of indigenous peoples;
- (b) the issue of self-determination;
- (c) the issue of land ownership and the exploitation of resources;
- (d) the establishment of distinct political and economic institutions; and
- (e) the issue of national and territorial integrity.⁵⁶⁵

⁵⁶⁰ Art 16(4) & 16(5) as above.

⁵⁶¹ See articles 10; 26; 27; 28; and 29 UN Declaration on the Rights of Indigenous Peoples.

⁵⁶² See generally Anaya (n 37 above) 63-66.

⁵⁶³ See Resolution of Namibia on behalf of the Group of African States, UN GA, 61st Session, 3rd Comm., UN doc. A/C.3/61/L.57/Rev. 1, 2006; see also AU decision on the UN Declaration on the Rights of Indigenous Peoples, doc. Assembly/AU/Dec. 141 (VIII), 30 January 2007; Africa Group, *Draft Aide Memoire* (n 42 above).

⁵⁶⁴ See Resolution of Namibia as above.

⁵⁶⁵ See Advisory Opinion of the African Commission (n 43 above) para 3.

Following the initial reluctance by African states to adopt the Declaration, the African Commission on Human and Peoples' Rights issued an Advisory Opinion to members of the African Union, which reiterated the significance of this instrument to indigenous peoples all over the world, including those in Africa.⁵⁶⁶ The Advisory Opinion comprehensively responded to each of the African states' concerns. The gist of the opinion was to demonstrate that the apprehension on the part of African states was unfounded. The opinion clarified that the standards and norms enumerated by the Declaration were indeed consistent with the African Charter on Human and Peoples' Rights.⁵⁶⁷

Although there is no empirical evidence as to the influence the opinion had on African states in voting for the adoption of the UN Declaration on Indigenous Peoples,⁵⁶⁸ its considerable weight in their eventual decision to support the Declaration in New York can not be discounted.⁵⁶⁹ The Declaration is therefore a useful tool for indigenous peoples in Africa, as is the case across the globe, due to its entrenchment of standards and norms that seek to accord marginalised groups some dignity and equal treatment by the law.

⁵⁶⁶ See Advisory Opinion of the African Commission (n 43 above) para 3.

⁵⁶⁷ As above.

⁵⁶⁸ The UN Declaration on the Rights of Indigenous Peoples was adopted by a recorded vote of 143 in favour to 4 against, with 11 abstentions. While none of the Africa states voted against there were 3 abstentions (Burundi, Kenya and Nigeria), 14 other African states were absent during the vote see Press Statement, *General Assembly Adopts Declaration On Rights Of Indigenous People: 'Major Step Forward' Towards Human Rights For All, Says President*, UN Doc. GA/10612, (Sep. 13, 2007), available at <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>> accessed 10 August 2008.

⁵⁶⁹ Interview with Robert Eno, during the 42nd Ordinary Session of the African Commission on Human and Peoples Rights in Congo, Brazzaville, on 16 November 2007, parts of which are reproduced in GM Wachira, *The African Court on Human and Peoples Rights*, Minority Rights Group International (forthcoming 2008).

Related to the issue of land rights, article 26 of the Declaration provides that ‘indigenous peoples have the right to own, use, develop and control their lands, territories and resources.’ It further calls on states to ‘give legal recognition and protection to these lands, territories and resources’ ‘with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned’.⁵⁷⁰

The Convention on Biological Diversity⁵⁷¹ is yet another important instrument, to which Kenya is a party,⁵⁷² which lays down useful norms recognising the land and natural resource rights of indigenous peoples. In the words of the Convention, state parties shall ‘respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices’.⁵⁷³ The biological diversity of indigenous peoples encompasses their traditional lands and natural resources which shall be respected, preserved and protected in accordance with their culture and lifestyle. The Convention encourages the equitable sharing of the benefits arising from the utilization of indigenous peoples’ knowledge, innovations and practices.

⁵⁷⁰ Art 26 UN Declaration on the Rights of Indigenous Peoples.

⁵⁷¹ Convention on Biological Diversity adopted in 1992.

⁵⁷² Ratified on 22 July 1994.

⁵⁷³ Art 8(j) Convention on Biological Diversity.

Other standard-setting bodies, such as the World Bank, have also adopted policies that are in line with the emerging standards on the protection of indigenous peoples' land and resource rights.⁵⁷⁴ Although such policies are for the Bank's internal use in reviewing its engagement with states on projects that affect indigenous peoples and are not adopted by states, they are based on applicable norms of existing international human rights instruments.⁵⁷⁵ While not binding, they play a crucial role in states' engagement with indigenous peoples, especially in most countries that have World-Bank-funded projects. Kenya has on certain occasions espoused World Bank policies for purposes of borrowing funds ostensibly for 'indigenous peoples' benefit'.⁵⁷⁶ Of particular importance is the Policy's acknowledgment 'that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend'.⁵⁷⁷ The Bank requires that the projects it finances ensure that a process of free, prior and informed consultation is undertaken. This requirement applies even to projects impacting upon indigenous peoples' lands and resources.⁵⁷⁸

⁵⁷⁴ World Bank Operational Manual, Operational Policies (OP 4.10) January 2007.

⁵⁷⁵ For example it is obvious that the Policy relies on standards enunciated by the ILO Convention No 169 particularly Part II on land. The work of the UN Working Group on Indigenous Populations that resulted in the UN Declaration on the Rights of Indigenous Peoples.

⁵⁷⁶ See the Government of Kenya, Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project - Final Report December 2006 (in file with the author).

⁵⁷⁷ Para 2 World Bank Operational Policy Manual (n 574 above).

⁵⁷⁸ Para 1 & 2 as above.

The right to property is also linked to the right to self-determination in international law, which is relevant for indigenous peoples in the pursuit of their land rights.⁵⁷⁹ The principle of self-determination is a fundamental pillar of the UN Charter.⁵⁸⁰ The principle has since been entrenched in common article 1 of the ICCPR and the International Covenant on Economic Social and Cultural Rights (ICESCR). The article provides that ‘all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.⁵⁸¹ Key to indigenous peoples’ protection is the Convention’s further provision on the right to self-determination that ‘all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.’⁵⁸² It is also instructive that the African Charter entrenches self-determination as a right, worded in an almost similar fashion with the International Bill of Rights.⁵⁸³

While the principle of self-determination as enunciated in the UN Charter, has found expression in several instances – notably the end of colonialism, the general ban on the use of force, and

⁵⁷⁹ See Anaya (n 37 above) 141-148.

⁵⁸⁰ Art 2 UN Charter; The other principles are: peaceful settlement of disputes; and prohibition of the threat or use of force.

⁵⁸¹ Art 1(1) ICCPR; Art 1(1) ICESCR.

⁵⁸² Common art 1(2) ICCPR & ICESCR.

⁵⁸³ Art 20 & 21 African Charter. Some of the relevant provisions include article 20(1) provides ‘All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.’ Article 21(1) ‘All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived.’

access by all racial groups to government – it is its modern application as a human right that affords indigenous peoples a ground for seeking justice and equality in relation to their traditional land rights.⁵⁸⁴ Anaya aptly captures this position and its rationale in a passage that is worth quoting at length:

International human rights texts that affirm self-determination, and authoritative processes that have been responsive to self-determination demands, point to core values of freedom and equality that are relevant to all segments of humanity, including indigenous peoples, in relation to the political, economic, and social configurations with which they live. Under a human rights approach, attributes of statehood or sovereignty are at most instrumental to the realization of these values – they are not themselves the essence of self determination. And for most peoples – especially in light of cross-cultural linkages and other patterns of interconnectedness that exist alongside diverse identities – full self-determination, in real sense, does not require or justify a separate state and may even be impeded by establishment of a separate state. It is rare in the post-colonial world in which self determination understood from a human rights perspective, will require secession or the dismemberment of states.⁵⁸⁵

Indigenous peoples in most states do not demand self-determination in the form of secession but seek the application of this right in ‘the pursuit of their political, economic, social and cultural development within the framework of an existing state’.⁵⁸⁶ Such application has been termed

⁵⁸⁴ Anaya (n 37 above) 8; see also Thornberry (n 35 above) 317.

⁵⁸⁵ As above.

⁵⁸⁶ See A Cassese *International Law* (2005) 62 citing the words of the Supreme Court of Canada in Reference *re Secession of Quebec* 1998) 161 DLR (4th) 385, 437-8; MN Shaw *International law* (2003) 273; see Anaya (n 37 above) 9; M Scheinin M ‘Indigenous peoples’ rights under the International Covenant on Civil and Political Rights’ in J Castellino & N Walsh (ed) *International Law and Indigenous Peoples* (2005) 9; see also J Anaya ‘self determination as a collective human right under international law’ in P Aiko & M Scheinin (ed) *Operationalising the right of indigenous peoples to self determination* (2000) 3-18.

‘internal self-determination’.⁵⁸⁷ Relative to indigenous peoples’ quest for recognition and protection of their traditional land and resources, the right to self-determination has been invoked to prevent states from regarding these lands as *terra nullius* (*belonging to no one*).⁵⁸⁸ The principle has also been invoked to invalidate treaties entered into between indigenous peoples and colonial and other dominant powers, as well as treaties lacking ‘prior and genuine consultation’ of these groups.⁵⁸⁹

The HRC has observed that exercise of the right to self-determination is essential for the realisation of other human rights.⁵⁹⁰ The Committee has relied upon article 1 of the ICCPR (which is the basis for self determination) to interpret other rights protected by the Covenant. In the case of *Apirana Mahuika et al v New Zealand*,⁵⁹¹ the Committee observed that ‘the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27’.⁵⁹² This position is significant to indigenous peoples in relation to their land and resource claims since by virtue of article 1 of the ICCPR they have a right to

⁵⁸⁷ Cassese (n 586 above) 61; Shaw (n 586 above) 273; see also art 3 & 4 UN Declaration on the Rights of Indigenous Peoples.

⁵⁸⁸ Cassese (n 586 above) 63, 81; see also Shaw (n 586 above) 424-6; Western Sahara ICJ advisory Opinion (n 170 above) 12.

⁵⁸⁹ As above; see also generally Brownlie (n 66 above).

⁵⁹⁰ Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994), para 2; see Shaw (n 586 above) 272.

⁵⁹¹ *Mahuika et al. v New Zealand* (n 359 above).

⁵⁹² As above, paragraph 9.2; see similar views by the Committee in *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia*, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000) para 10.3.

‘freely pursue their economic, social and cultural development’.⁵⁹³ The HRC has also emphasized that ‘the right to self determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence’.⁵⁹⁴

However, while the standards enumerated in article 1 of the ICCPR are applicable to indigenous peoples (given that the ‘Committee has concluded that they qualify as ‘peoples’ pursuant to the right to self determination’),⁵⁹⁵ some procedural hurdles stand in the way of their attempt to realize this right under the Convention. This is due to the Committee’s interpretation that self-determination is a collective right and as such ‘an individual could not claim under the Optional Protocol to be a victim of a violation of the right to self-determination enshrined in Article 1 of the Covenant, which deals with rights conferred upon peoples as such’.⁵⁹⁶ Despite this restrictive interpretation, on occasions when the Committee has been seized of communications by individuals alleging violation of the right to self-determination, it has proceeded to review facts submitted by applicants to ascertain whether they raise issues under other articles of the

⁵⁹³ Art 1(1) ICCPR.

⁵⁹⁴ See Concluding Observation of the Human Right Committee on Canada, UN Doc, CCPR/C/79/Add.105 (1999) para 8 in reference to ICCPR article 1(2).

⁵⁹⁵ As above para 8; see also ‘Concluding Observations on Mexico, UN doc. CCPR/C/79/Add.109 (1999); Concluding Observation on Norway, UN doc CCPR/C/79/Add.112 (1999); Concluding Observation on Australia, Un doc. CCPR/CO/69/AUS (2000); Concluding Observation on Denmark, UN doc. CCPR/CO/70/DNK (2000); Concluding Observation on Sweden, UN Doc. CCPR/CO/74/SWE (2002)’ all cited in Scheinin (n 586 above) 12 fn 35-39.

⁵⁹⁶ See *Lubicon Lake Band v Canada* (n 73 above) para 13.3; *Ivan Kitok V Sweden*, Communication 197/1985, UN Doc. A/43/40 (1988), para 6.3; *JGA Diergaardt et al v Namibia* (n 592 above) para 10.3; see Shaw (n 586 above) 272.

Covenant.⁵⁹⁷ The Committee has found a link and reformulated alleged breaches of self-determination (article 1) with issues under article 27 of the Convention.⁵⁹⁸ The Committee's jurisprudence and standards as established by article 27 of the Convention are revisited in the discussion (which immediately follows) of the right to culture as a fundamental standard in the recognition and protection of indigenous peoples' land and resource rights.

Under the African human rights system, individuals on their own and as members of collectives have a right to approach the African Commission on Human and Peoples' Rights to litigate any of the fundamental rights enshrined in the Charter, including the right to self-determination.⁵⁹⁹ In fact, one of the unique features of the African Charter is that it 'exemplifies the interplay between individual and group rights'.⁶⁰⁰ These 'rights phrased as 'peoples' rights' are stipulated on the

⁵⁹⁷ See for example *Lubicon Lake Band v Canada* (n 73 above) para 13.4; Shaw (n 586 above) 272-3 arguing that 'the right to self determination provides an overall framework for the consideration of the principles relating to democratic governance'; see also J Castellino 'The right to land international law & indigenous peoples' in Castellino & Walsh (n 586 above) 110.

⁵⁹⁸ *Lubicon Lake Band v Canada* (n 73 above) para 32.2; see Thornberry (n 37 above) 129.

⁵⁹⁹ For a detailed discussion on admissibility under the African Charter see Viljoen (n 396 above) 61-99; see also the art 56 African Charter which provides that: Communications relating to human and peoples' rights referred to in art 55 (relates to communications other than inter-state communications) received by the Commission shall be considered if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organization of African Unity,
4. Are not based exclusively on news disseminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

⁶⁰⁰ Arts 19-24 African Charter; see P Alston 'Peoples' rights: Their rise and fall' in P Alston (ed) *Peoples' rights* (2000) 266.

basis of equality, right to existence, own and dispose of wealth and natural resources, development, peace and security and satisfactory environment'.⁶⁰¹ While the jurisprudence of the African Commission on group rights, and particularly the right to self-determination is not very developed, it has had occasion to consider their application in among others the *Katangese*⁶⁰² and the *Ogoni* cases.⁶⁰³ In the *Katangese case*, the Commission did not find a violation of the right to self-determination. It, however, affirmed the applicability of this right in 'any of the following ways: 'independence, self government, local government, federalism, confederalism, unitarism, [and] any other form of relations that accords with the wishes of the people'.⁶⁰⁴ In an apparent endorsement of internal self-determination, the Commission was of the view that 'Katanga is obliged to exercise a variant of self determination that is compatible with the sovereignty and territorial integrity of Zaire'.⁶⁰⁵

The Commission's view is similar to that later held by the Supreme Court of Canada in the *Reference re Secession of Quebec* case that 'international law expects that the right to self determination will be exercised by peoples within the framework of existing sovereign states and

⁶⁰¹ See F Ouguerouz *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Rights and Sustainable Democracy in Africa* (2003) 203; P Nobel 'The concept of "peoples" in the African Charter on Human and Peoples' Rights' in P Nobel, P (ed) *Refugees and development in Africa* (1987) 15.

⁶⁰² Communication 75/92, *Katangese Peoples Congress v Zaire*, 8th Annual Activity Report in (2000) AHRLR 72 (ACHPR 1995) 72-73 (*Katanga case*).

⁶⁰³ *SERAC case* (n 470 above).

⁶⁰⁴ *Katanga case* (n 602 above) para 4.

⁶⁰⁵ As above para 6.

consistently with the maintenance of the territorial integrity of those states'.⁶⁰⁶ From the foregoing, it is unlikely that the Commission or the soon-to-be-established African Court would ever affirm a right to self-determination in a way that would challenge the territorial sovereignty of an African state. In any case, indigenous peoples, including those self-identifying as such in Africa, mostly do not seek to exercise this right beyond the territorial boundaries of independent states.⁶⁰⁷ Instead, they demand recognition and respect for their preferred way of life in accord with principles of equality and justice.⁶⁰⁸ Such recognition and protection of attendant rights by the state, guarantees peoples' right to existence as enshrined in article 20 of the African Charter whose provisions are akin to common article 1 of the ICCPR and ICESCR on the right to self-determination.

In the exercise of the right to self-determination, international standards underscore peoples' ability to 'freely dispose of their wealth and natural resources'.⁶⁰⁹ More importantly, the standards make it mandatory that that 'in no case shall a people be deprived of its own means of subsistence'.⁶¹⁰ The African Commission has had occasion to deliberate on this matter in the *SERAC case*⁶¹¹ and found that Nigeria breached the Ogoni people's group rights relative to

⁶⁰⁶ *Reference re Secession of Quebec case* (n 586 above) 385, 436.

⁶⁰⁷ *Anaya* (n 37 above) 8.

⁶⁰⁸ As above; see *Gilbert* (n 34 above) 610.

⁶⁰⁹ Common art 1 (1) ICCPR & ICESCR; Art 21 African Charter.

⁶¹⁰ As above.

⁶¹¹ *SERAC case* (n 470 above) para 45, 55-58.

articles 21⁶¹² and 24⁶¹³ of the African Charter.⁶¹⁴ According to the Report of the African Commission's Working Group on Indigenous Populations/Communities in Africa, the Ogoni are indigenous peoples in Nigeria, and as such some of the jurisprudence the case establishes is considered to have set important standards that would apply to other indigenous groups on the continent.⁶¹⁵ Apart from finding violation of the group rights of the Ogoni, the decision is important in that it expressly acknowledged that 'with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs'.⁶¹⁶ Furthermore, the Commission reaffirmed the relevance and applicability of international standards in the determination of matters before it alleging violation of the African Charter's provisions.⁶¹⁷ The Commission also called upon the state to engage and consult its peoples on issues and development projects that affect them.⁶¹⁸

⁶¹² Art 21:1 African Charter .All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.
4. State parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. State parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

⁶¹³ Article 24 African Charter: All people shall have the right to a general satisfactory environment favourable to their development.

⁶¹⁴ *SERAC case* (n 470 above) para 70.

⁶¹⁵ IWGIA & ACHPR (n 35 above) 18.

⁶¹⁶ *SERAC case* (n 470 above) para 45.

⁶¹⁷ As above para 48 & 49.

⁶¹⁸ *SERAC case* (n 470 above) para 71.

The African Charter, like the International Bill of Rights, provides a useful framework and avenue for indigenous peoples to enjoy their fundamental human rights, including collective rights. In the *Ogoni case*, the Commission held that the conduct of the Nigerian Government demonstrated a violation of the collective rights of the Ogoni.⁶¹⁹ Indigenous peoples may therefore find recourse in international standards pursuant to the right to self-determination as established internationally and regionally whenever violation of their land and resource rights occurs. Indigenous peoples may thus claim their entitlements before existing treaty monitoring mechanisms such as the HRC and regionally the African Commission or the African Court.⁶²⁰

Specific instruments that enshrine indigenous peoples' rights, such as ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries⁶²¹ and the recently adopted UN Declaration on the Rights of Indigenous Peoples,⁶²² reiterate that self-determination is crucial

⁶¹⁹ As above para 63.

⁶²⁰ See Protocol to the African Charter establishing the African Court on Human and Peoples' Rights adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou, Burkina Faso, on 9 June 1998. OAU/LEG/MIN/AFCHPR/PROT (III). Although the court had already received the requisite number of ratifications and technically come into force on 25 January 2004 for its establishment the 3rd Ordinary Session of the Assembly of Heads of State and Government of the AU decided to integrate it with the Court of Justice of the AU (Protocol of the Court of Justice adopted by the 2nd Ordinary Session of the Assembly of the AU in Maputo, 11 July 2003) Assembly/AU/Dec. 45 (111) which is yet to gain the requisite ratifications to come into force. Judges for this Court were elected for this African Court on Human Rights Court by the AHG/AU at its 6th Summit in Khartoum, Sudan and it is soon hoped to become operational.

⁶²¹ ILO Convention No 169.

⁶²² See UN Declaration on the Rights of Indigenous Peoples; The adoption of the Declaration was a culmination of 'more than two decades of negotiations at the United Nations among Member States, with the participation of indigenous peoples from around the world. The Declaration addresses both individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others. It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them. It also ensures their right to remain distinct and to pursue their own visions of economic, social and cultural development. The Declaration explicitly encourages harmonious and cooperative relations between States and Indigenous Peoples' see statement of the UN High Commissioner for Human Rights Louise Arbour on the adoption of the Declaration at <www.ohchr.org> accessed on 13 September 2007.

to the realization of indigenous peoples' fundamental rights. Article 1(2) of the Convention, for instance, stipulates that 'self-determination as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention applies'. In a tacit concession to the possible limitations of the modern application of the principle of self-determination in independent sovereign states, the Convention further provides 'that the use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law'.⁶²³

It appears that the drafters of the Convention sought to limit the application of the term 'peoples' to internal self-determination in order to avoid the application of this right in its extreme, secessionist form.⁶²⁴ If so, this would be in conformity with the contemporary application of the term 'peoples' relative to self-determination, which is not limited to 'mutually exclusive peoples'.⁶²⁵ Indeed, while self-determination was initially understood within the framework of decolonization, it has since evolved to the 'state acceptable' exercise of the right within the existing territorial framework of independent states.⁶²⁶ Accordingly, the term 'peoples' applies to indigenous peoples for purposes of internal self-determination, which would entail unequivocal demarcation and protection of their lands and natural resources in accordance with their cultures and preferred tenure.

⁶²³ Art 1(3) ILO Convention (No 169).

⁶²⁴ See a detailed expose of the implication of the term 'peoples' in Anaya (n 37 above) 100- 103.

⁶²⁵ As above, 101-2.

⁶²⁶ Shaw (n 586 above) 230.

Similarly, the UN Declaration on the Rights of Indigenous Peoples, whilst guaranteeing the right to self-determination, limits its application to ‘matters relating to internal and local affairs’.⁶²⁷ The provisions guaranteeing self-determination were some of the most contentious and caused lengthy delays throughout the negotiations, but an eventual compromise limiting the exercise to internal and local affairs was reached.⁶²⁸ While the Declaration is not binding on states, and as such does not create international legal obligations, it is a unique instrument negotiated by states and its intended beneficiaries.⁶²⁹ It outlines important norms that would serve as a guide and framework in the protection of indigenous peoples all over the world.⁶³⁰ Importantly, the Declaration serves as a yardstick of states’ compliance with their international human rights obligations relative to indigenous peoples. Such compliance could be measured within the framework of existing human rights treaty-monitoring mechanisms such as the HRC, CERD, the African Commission and the African Court on Human and Peoples’ Rights.⁶³¹

⁶²⁷ Arts 3 & 4 UN Declaration on the Rights of Indigenous Peoples.

⁶²⁸ See a more detailed discussion of the debates surrounding the drafting of the Declaration relative to the principle of self determination see P Thornberry, Self determination and indigenous peoples: Objections and responses, in Aikio & Scheinin (n 75 above) 45-46.

⁶²⁹ Thornberry (n 37 above) 25-26.

⁶³⁰ See <www.iwgia.org/sw248.asp> accessed 20 May 2007.

⁶³¹ Art 60 African Charter; see also art 7 of the Protocol to the African Charter establishing the African Court on Human and Peoples’ Rights.

4.5 Trust lands

Chapter nine of Kenya's Constitution deals with trust lands. Trusts lands 'vest in the county councils within whose jurisdiction [they are] situated.'⁶³² The county councils (local authorities) hold these lands 'for the benefit of persons ordinarily residents on that land.'⁶³³ The importance and vulnerability of these lands is underscored by their express protection by the Constitution. The Constitution further gives legitimacy to customary law by stipulating that rights, interests or other benefits in respect of trust lands shall be governed by the customary law of the ordinary residents.⁶³⁴ However, as we have seen, the application of the customary law of the residents is constrained by the same Constitution through the requirement that such law must not be 'repugnant to any written law'.⁶³⁵ Therefore, despite its provisions on trust lands, the Constitution fails to guard against deprivation of those lands by non-ordinary residents. Indeed, according to Lenaola, Jenner and Wichert 'the constitutional provisions for trust lands, while providing nominal protection for African customary law, also legitimize the continuation of the colonial land system that was designed to transfer customary rights from indigenous communities to settlers'.⁶³⁶

⁶³² Section 115 Constitution of Kenya.

⁶³³ Section 115(2) as above.

⁶³⁴ As above.

⁶³⁵ As above.

⁶³⁶ See Lenaola *et al* (n 169 above) 231.

The low legal status of customary law in Kenya's hierarchy of sources of law has therefore not prevented individuals from expropriating trust lands. On the basis of legislation, outsiders who are not ordinary resident within the trust lands territory have continued to expropriate indigenous peoples' lands. Their actions are attributed by Okoth-Ogendo to the fact that 'customary law was expressly subordinated to colonial enactments and received principles of the common law of England, the doctrines of equity and statutes of general application. Hence, in terms of hierarchy, customary law was essentially residual even in contexts where it would normally exclusively apply'.⁶³⁷ Accordingly, as long as the status of customary law remains subordinate to written laws and limited by the repugnancy clause, trust lands in Kenya will always be subject to expropriation by non-residents.

The potential and capacity for trusts lands to protect and give meaning to indigenous peoples' land rights is therefore constrained by the same Constitution that seeks to protect them. The subordination of customary law to written laws 'in effect, extinguishes customary rights' to land.⁶³⁸ The Constitution further provides that trust lands shall cease to exist upon registration as either government land or private land in accordance with the law.⁶³⁹ The relevant laws for that purpose include: the Land Control Act;⁶⁴⁰ the Land Adjudication Act;⁶⁴¹ the Land Consolidation

⁶³⁷ HWO Okoth-Ogendo 'The tragic African commons: A century of exploration, suppression and submersion (2003)' *University of Nairobi Law Journal* 111.

⁶³⁸ *Lenaola et al* (n 169 above) 243.

⁶³⁹ See sec 116 Constitution of Kenya.

⁶⁴⁰ Land Control Act Laws of Kenya Cap 302.

⁶⁴¹ Land Adjudication Act Laws of Kenya Cap 284.

Act⁶⁴² and the Land (Group Representatives) Act.⁶⁴³ The laws that regulate and provide for a mechanism to register lands in Kenya include: the Registered Land Act;⁶⁴⁴ the Land Titles Act;⁶⁴⁵ the Government Lands Act;⁶⁴⁶ the Registration of Titles Act⁶⁴⁷ and the Registration of Documents Act.⁶⁴⁸ Upon registration, trust land is set aside, extinguishing ‘any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law’.⁶⁴⁹

The Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya revealed the difficulty indigenous peoples have in reclaiming their lands once it is registered to outsiders.⁶⁵⁰ In one particular case, the Commission found that, despite the adjudication and registration process of land in Iloodo-Ariak in Kajiado district to persons who were not local residents to the exclusion of some rightful inhabitants (Maasai indigenous peoples), attempts to seek legal redress were hampered by barriers erected by the Registered

⁶⁴² Land Consolidation Act Laws of Kenya Cap 283.

⁶⁴³ Land (Group Representatives) Act Laws of Kenya Cap 287.

⁶⁴⁴ Registered Land Act Laws of Kenya Cap 300.

⁶⁴⁵ Land Titles Act Laws of Kenya Cap 282.

⁶⁴⁶ Government Lands Act Laws of Kenya Cap 280.

⁶⁴⁷ Registration of Titles Act Laws of Kenya Cap 281.

⁶⁴⁸ Registration of Documents Act Laws of Kenya Cap 285.

⁶⁴⁹ Sec 117(2) Constitution of Kenya.

⁶⁵⁰ See Ndung’u Report (n 1 above) 140-142.

Land Act.⁶⁵¹ The RLA confers an absolute and indefeasible title on the registered owner.⁶⁵²

Indigenous peoples' customary rights in their traditional lands are to that extent extinguished in favour of the registered owner's interests. Such disregard for African customary law entrenches discrimination against indigenous peoples and compromises their ability to claim their traditional lands.

It has not helped that courts of law in Kenya have often followed the reasoning that a registered owner of land acquires an absolute and indefeasible title (unless obtained fraudulently or required by the state in the public interest).⁶⁵³ Kenyan courts of law have also endorsed the statutory position that, for first registrations, irrespective of the land being acquired fraudulently, such title can not be cancelled or rectified.⁶⁵⁴ Such reasoning has resulted in the illegal acquisition of title

⁶⁵¹ As above.

⁶⁵² See sec 27 RLA which provides that: Subject to this Act - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease; see also see sec 28 RLA. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register' see also sec 214 3(1) of the RLA.

⁶⁵³ See *Wanjala* (n 26 above) 174.

⁶⁵⁴ See sec 143 (1) of the RLA Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default..

to land through first registration, particularly in trusts lands belonging mainly to indigenous peoples.

Through first registration, including by fraudulent means, individuals have appropriated lands belonging to indigenous peoples. Most of the indigenous peoples have no title to their traditional lands, which are held in trust by the county council. County councils, in breach of the trust relationship, illegally dispose of the lands, often in collusion with the Commissioner of Lands.⁶⁵⁵

It appears that the objective of the law in protecting first registrants is to deny local communities an opportunity to challenge these illegal acquisitions. It is submitted that such an illegality can not be righted through registration or acquisition of title. The Commission of Inquiry into Illegal/Irregular Allocation of Public Land holds a similar view that illegally acquired titles (despite being first registrations) are not likely to withstand a constitutional challenge.⁶⁵⁶

However, such a position may not hold, in view of the fact that trust lands are governed by customary law, which is subordinate to the written law. Therefore, the position of the RLA would be upheld by the Courts. In any case, such a constitutional challenge has never been mounted in Kenya, and therefore the possibility of mounting a successful challenge is purely speculative.

The Constitution further accords the President extensive powers to set aside trust land for various purposes.⁶⁵⁷ Such purposes include for purposes of the Government of Kenya, a public body

⁶⁵⁵ See Ndung'u Report (n 1 above) 16.

⁶⁵⁶ See Ndung'u Report (n 1 above) 16.

⁶⁵⁷ Sec 118 Constitution of Kenya.

corporate or company and for purposes of prospecting for or the extraction of minerals. However, lack of clear procedural safeguards has led to the abuse of power ‘by government officials in collaboration with professionals and individuals’.⁶⁵⁸ Such abuse of power has involved illegal allotment of trust lands to individuals and companies who are not even inhabitants of the area solely for private gains.⁶⁵⁹ For instance, the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya established that ‘large tracts of trust land in Narok, Kajiado and Laikipia districts’ traditionally occupied by the Maasai indigenous peoples, ‘were illegally allocated to some powerful individuals by County councils’.⁶⁶⁰ Indeed, some of the current land conflicts in Kenya are traced to the practice of its founding President Jomo Kenyatta of awarding large tracts of lands as political rewards to his friends and kinsmen. Kenyatta’s successor, former President Daniel Arap Moi, followed in his footsteps and allocated vast amounts of land for political patronage so that today relatively few individuals own most of the arable land in Kenya.⁶⁶¹

Kenya’s parliament may also grant powers to the County Council through an Act of Parliament to set aside trust land ‘for use and occupation by a public body for public purposes; for purposes of prospecting for or the extraction of minerals; or to any person whom in the opinion of the council is likely to benefit the persons ordinarily resident in that area’.⁶⁶² While the law is clear

⁶⁵⁸ See Ndung’u Report (n 1 above) 53.

⁶⁵⁹ As above.

⁶⁶⁰ As above 143.

⁶⁶¹ As above 9.

⁶⁶² Section 117(1) Constitution of Kenya.

that such setting aside of trust land should be for the benefit of the public and/or the residents of the county council, on various occasion such lands have been set aside for purely private purposes that have little if any benefit for the inhabitants of the area. The current communication before the African Commission on Human and Peoples' Rights by the Endorois is a case in point.⁶⁶³ In this case, mining and prospecting licences were awarded to a private company on land held in trust by the Council on behalf of the Endorois, who allege that they do not derive any benefit from such allotment of their land to the private company.

According to international standards, indigenous peoples' culture and traditions, including their preferred way of managing and controlling their lands, deserve protection by state parties. The unique culture and traditions of indigenous peoples form the essence of their survival and heritage and determine the scope of their demand for most of their other fundamental human rights and freedoms.⁶⁶⁴ Indigenous peoples' special attachment to their traditional lands and natural resources is founded on the need to preserve their distinct culture and way of life.⁶⁶⁵ Indigenous peoples 'conceive of their land as a substance endowed with sacred meanings, which defines their existence and identity and to which they are inextricably attached'.⁶⁶⁶ The 'entire relationship between the spiritual life of indigenous peoples and mother earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but

⁶⁶³ See the *Endorois* case (n 3 above).

⁶⁶⁴ Daes Study (n 96 above) para.18; see also HRC General Comment No 23 (n 100 above).

⁶⁶⁵ As above; see also I Brownlie 'Rights of indigenous peoples in international law' in J Crawford, *The rights of peoples* (1988) 4.

⁶⁶⁶ Asiema & Situma (n 96 above) 150.

a material element to be enjoyed freely'.⁶⁶⁷ The survival of indigenous peoples' culture is therefore dependent on the protection of their land and resources rights.⁶⁶⁸

According to the UN Human Rights Committee, 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.'⁶⁶⁹ The Committee's view affirms the close nexus between indigenous peoples' culture and their traditional lands and resources.

Article 27 of the ICCPR (rights of persons belonging to minorities to enjoy their own culture) provides international norms that have been invoked to give meaning to indigenous peoples' fundamental human rights. Although article 27 does not expressly mention indigenous peoples, according to the HRC, its provisions are applicable to these groups.⁶⁷⁰ The Committee's jurisprudence similarly indicates that 'groups identifying as indigenous peoples fall under the protection of article 27 as "minorities"'.⁶⁷¹ Important international standards relevant for indigenous peoples land and resource rights' protection have emerged from the application of

⁶⁶⁷ Cobo's Report (n 50 above) para 196-197.

⁶⁶⁸ Kymlicka (n 124 above) 43.

⁶⁶⁹ HRC General Comment No 23 (n 100 above) para 7.

⁶⁷⁰ HRC General Comment No 23 (n 100 above) paras 3.2; 7 and 9; Scheinin (n 586 above) 5.

⁶⁷¹ Scheinin (n 586 above) 4.

provisions of article 27.⁶⁷² Through article 27, the Committee's jurisprudence has illustrated that there exists a close nexus between indigenous peoples' culture and their traditional forms of economic life supported by their lands and natural resources.

In the *Lubicon Lake Band* case, the UN Human Rights Committee found Canada to have violated article 27 of the Convention by 'expropriating the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g., leases for oil and gas exploration)'.⁶⁷³ According to the Committee, the state's actions 'threatened the way of life and culture of the Lubicon Lake Band and constitute a violation of article 27 so long as they continue.'⁶⁷⁴ Earlier in the *Kitok* case, despite not finding a violation of article 27, the HRC, nonetheless established that where an 'activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant'.⁶⁷⁵ The activity in question in that particular case was reindeer herding, which is a traditional economic activity of the Sami, and constitutes part of their culture.⁶⁷⁶

The application of norms embodied in article 27 of the ICCPR to give effect to indigenous peoples' land and resource rights has not been restricted to the HRC. The standards enumerated in article 27 of the ICCPR have been invoked by the Inter American Commission on Human

⁶⁷² See for example *Lubicon Lake Band v Canada* (n 73 above); *Kitok v Sweden* (n 596 above); *et al v New Zealand* (n 359 above); Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996); Länsman et al. v Finland (n 100 above) para 32.2.

⁶⁷³ *Lubicon Lake Band v Canada* (n 73 above) paras 2.3; 33.

⁶⁷⁴ As above para 33.

⁶⁷⁵ *Ivan Kitok v Sweden* (n 596 above) para 9.2.

⁶⁷⁶ As above para 4.3.

Rights to find in favour of indigenous peoples with regard to their land and resource rights.⁶⁷⁷

According to the Inter-American Commission, the ‘culture of indigenous peoples encompasses the preservation of the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands.’⁶⁷⁸

ILO Convention No 169 similarly underscores the weight of culture of indigenous peoples in their relationship to their lands and territories. The Convention stipulates that states ‘in applying the provisions of Part II of the Convention, must respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspect of this relationship’.⁶⁷⁹ The Convention also calls upon states to recognize indigenous peoples’ land tenure systems which are based on their traditions, customs and way of life.⁶⁸⁰ Other key and relevant standards for purposes of this discussion enshrined in ILO Convention No 169 include the rights of ownership and possession; and the right to participate in the use, management and conservation of the resources.⁶⁸¹

The preamble to the UN Declaration on the Rights of Indigenous Peoples recognizes territorial rights as one of the inherent rights of indigenous peoples, deriving from their political, economic

⁶⁷⁷ See *Maya indigenous community of the Toledo District v Belize* (n 73 above) para 52; 55; 154; see also *Mary and Carrie Dann v United States* (n 73 above) para 61.

⁶⁷⁸ *Maya indigenous community of the Toledo District v Belize* (n 73 above) para 120.

⁶⁷⁹ Art 13 ILO Convention No169-Part II (Arts 13-19) ILO Convention 169 deals with Land.

⁶⁸⁰ Arts 13, 14 & 17 as above.

⁶⁸¹ Art 14 &15 as above.

and social structures and from their cultures, spiritual traditions, histories and philosophies. The Declaration also provides that indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used.⁶⁸² They have the right to own, develop, control and use their lands and territories.⁶⁸³ They also have the right to the restitution of the lands, territories and resources which have been confiscated, occupied, used or damaged without their consent or at least they have the right to just and fair compensation.⁶⁸⁴

4.6 Recognition and application of the concept of indigenous title in Kenya

The concept of indigenous title, which is also known as native title or aboriginal title, was described in the *Mabo* case by Justice Brennan of the High Court of Australia as having ‘its origins in and given its content by the traditional laws and customs acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory’.⁶⁸⁵ The doctrine ‘recognizes that those customary indigenous laws regarding land ownership which preceded common law, should be recognized as title generating.’⁶⁸⁶ Indigenous title emanates from

⁶⁸² Art 25 UN Declaration on the Rights of Indigenous Peoples.

⁶⁸³ Art 26 as above.

⁶⁸⁴ Art 27 as above.

⁶⁸⁵ See *Mabo v Queensland* (n 72 above) 58.

⁶⁸⁶ See Gilbert (n 34 above) 585; see also S J Anaya ‘Maya aboriginal land and resource rights and the conflict over logging in Southern Belize’ (1998) 1 *Yale Human Rights & Development Law Journal* 30.

recognition by courts over time that certain indigenous land rights should survive colonization.⁶⁸⁷

The doctrine is based on principles of justice and equality and establishes rights in an indigenous community shown to be occupying the land at colonization.⁶⁸⁸ Several characteristics consistently distinguish aboriginal title from common-law property rights: aboriginal title is held communally, not individually; aboriginal title originates in pre-colonial systems of indigenous law; and once established, it is inalienable to anyone except the Crown or State Government.⁶⁸⁹

The factors to consider in proving aboriginal title include occupation of the land at the time of colonization, period of occupation, exclusivity, continuity on land, social organization and traditional laws and customs with respect to the land; and non-extinguishment.⁶⁹⁰

Although the concept of ‘indigenous title’ is traced to the jurisprudence of the High Courts of Australia, New Zealand and Canada, it has been cited and invoked in a number of other common-law jurisdictions.⁶⁹¹ These include South Africa⁶⁹² and Botswana,⁶⁹³ whose jurisprudence is compared to some of the Kenyan cases.

⁶⁸⁷ TM Chan ‘The Richtersveld challenge: South Africa finally adopts aboriginal title *in Hitchcock & Vinding* (n 96 above) 118; see also TW Bennett & K Powell ‘Aboriginal title in South Africa revisited’ (1999) 15 *South African Journal of Human Rights* 449; K Lehmann ‘Aboriginal title indigenous rights and the right to culture (2004) 20 *South African Journal of Human Rights* 91.

⁶⁸⁸ Chan (n 685 above) 118; see also *Richtersveld Community v Alexkor Ltd and another* 2003 (6) BCLR 583 (SCA) (*South Africa*) para 38-41.

⁶⁸⁹ As above; Bennett & Powell (n 687 above) 449; LAH Note ‘Land Restitution and the Doctrine of Aboriginal Title: *Richtersveld Community v Alexkor Ltd and another*’ (2002) 18 *South African Journal of Human Rights* 437.

⁶⁹⁰ Chan (n 687 above) 119; Bennett & Powell (n 687 above) 463-69.

⁶⁹¹ See Gilbert (n 34 above) 585.

⁶⁹² *Alexkor v Richtersveld* (SCA) (n 688 above) paras 15, 18.

⁶⁹³ See *Sesana and others v Attorney General* (n 72 above).

In South Africa, the Supreme Court of Appeal, in the *Richtersveld* case, pointed to the elements for proving aboriginal title as precedent for proving elements of a customary law interest.⁶⁹⁴ The Supreme Court identified each of the elements of an aboriginal title claim but avoided finding a right under aboriginal title. The elements identified included the fact that: the indigenous Richtersveld Community was a distinct ethnic group,⁶⁹⁵ who occupied the land for a long time⁶⁹⁶ prior to and at the time of annexation;⁶⁹⁷ they enjoyed the exclusive beneficial occupation of the land;⁶⁹⁸ and they had a social and political structure,⁶⁹⁹ that included laws governing the land⁷⁰⁰ which they enforced.⁷⁰¹ The Constitutional Court, in its decision in this case, relied on the same characteristics to illustrate that the Richtersveld community had a right of indigenous law ownership.⁷⁰²

While similar characteristics are discernible in some of the claims made by indigenous communities in Kenya, such as in the case of the Ogiek, the court claimed that it did not have an

⁶⁹⁴ Chan (n 687 above) 124.

⁶⁹⁵ *Alexkor v Richtersveld* (SCA) (n 688 above) paras 15, 18.

⁶⁹⁶ As above, paras 14, 22.

⁶⁹⁷ As above, paras 14.

⁶⁹⁸ As above paras 18, 22, 24.

⁶⁹⁹ As above paras 15, 18, 19.

⁷⁰⁰ As above paras 18, 19.

⁷⁰¹ As above para 29.

⁷⁰² *Alexkor v Richtersveld* (n 72 above) para 62.

opportunity to employ it for want of arguments in support of its application.⁷⁰³ That means that the Court in the circumstances for lack of evidence to support the application of the concept decided to rely only on submissions adduced on the statutory provisions.⁷⁰⁴

On the basis of that finding by the court, it appears and indeed is arguable that had submissions been advanced proving the Ogiek's title to the land, the Court may have arrived at a different verdict. The Court sought to distinguish the Ogiek case and the Australian *Mabo* case, and by extension the application of the doctrine of aboriginal title in Kenya, on the basis that the community did not prove that they had proprietary rights over the land they claimed.⁷⁰⁵

According to the Court, the Ogiek:

were concerned more with hunting and gathering, with no territorial fixity. They traditionally shifted from place to place in search of hunting and gathering facilities. For such people climatic changes controlled their temporary residence. Whether a people without a fixity of residence could have proprietary rights to any given piece of land, or whether they only had rights of access to hunting and gathering grounds - whether a right of access to havens of birds, game, fruits and honey gives title to the lands where wild game, berries and bees are found- were not the focus of the arguments in this case and the material legal issues arising from the various land law regimes were not canvassed before us as they were in the *Mabo* case.⁷⁰⁶

⁷⁰³ *Ogiek* case (n 3 above) 15, 16, 21.

⁷⁰⁴ As above.

⁷⁰⁵ *Ogiek* case (n 3 above) 16.

⁷⁰⁶ *Ogiek* case (n 3 above) 16.

The inference that one can draw from this reasoning is that the court did not consider ‘hunting and gathering with no territorial fixity’ as sufficient to establish proprietary rights.⁷⁰⁷ Alternatively, this passage seems to suggest that the Ogiek should have convinced the Court that despite shifting from place to place they did possess rights to the property in dispute.⁷⁰⁸ If indeed the Court was of the view that the community did not possess property rights to the land for lack of settlement, which seems to have been the case, this would confirm Kenyan courts’ reluctance to recognize rights in land on the basis of pre-colonial African customary law.

From the Court’s apparent questioning of whether a community without a fixed abode can legitimately claim rights to specific lands, the Court reflected the colonial view that such lands were unoccupied and could be appropriated.⁷⁰⁹ Such lands were erroneously regarded as waste lands or *terra nullius* (belonging to no one).⁷¹⁰ The doctrine of *terra nullius*, as we have seen, has since been challenged and declared racially discriminatory for seeking to marginalize indigenous peoples’ way of life and traditions.⁷¹¹ It is therefore unfortunate that the Kenyan High Court seemed to imply that the Ogiek, by virtue of their then lack of territorial fixity, had no proprietary rights to the lands they claimed. In other progressive jurisdictions, such as South Africa, the

⁷⁰⁷ As above.

⁷⁰⁸ As above 21.

⁷⁰⁹ See Law Officers to Foreign Office, 13 December 1989, Foreign Office Confidential Print 113, cited in Mweseli (n 229 above) 7.

⁷¹⁰ See the ICJ ruling on the invalidity and erroneous application of the doctrine in *Western Sahara, Advisory Opinion* (n 170 above) 12; 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.

⁷¹¹ As above.

Constitutional Court has held that ‘a nomadic lifestyle is not inconsistent with the exclusive and effective right of occupation of land by indigenous people’.⁷¹²

Historical accounts of the Ogiek indicate that they are likely to have been among the very first peoples of modern day Kenya.⁷¹³ According to Thomas Spear:

the Ogiek say that have always lived in the areas they inhabit today. This statement is reinforced by the traditions of their neighbours, all of whom recall that the Okiek (or people like them) as present in the area when they arrived and often credit Okiek with granting them land and facilitating their settlement. The kikuyu claim they obtained land from the Okiek (called Athi or Asi in their traditions and that many of the earliest Kikuyu clans were founded by assimilated Okiek.⁷¹⁴

While admittedly due to successive migrations among the early tribes of Kenya different communities were displaced and settled in various other places beyond their original lands, the Ogiek are said to have occupied the Mau forest area by the time of colonialism.⁷¹⁵ Indeed according to the Carter Land Commission Report of 1933:

There is one section of the Mau Dorobo which is usually known as Tinet, who appear to have better claims than most to remain where they are. They reside in the south eastern Mau Forest, do not appear

⁷¹² *Alexkor v Richtersveld* (SCA) (n 688 above) paras 23-24.

⁷¹³ n 13 above.

⁷¹⁴ Spear (n 13 above) 49.

⁷¹⁵ Carter Report (n 252 above) 259 paras 972-985.

to have any very close association with any native tribe, and are strongly opposed to moving; some of them appear to have resided in or near the south eastern Mau forest for many great years.⁷¹⁶

From the foregoing it is evident that the Ogiek, by virtue of their occupation of the Tinnet area in Mau forest from time immemorial and on the basis of the customary laws, possessed proprietary rights to the land in question. In the Canadian case of *Delgamuukw*, the Court acknowledged that ‘conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title.’⁷¹⁷ Similarly, the Kenyan High Court should have found that the Ogiek had aboriginal rights in the land in dispute. As indicated in the Carter Land Commission Report of 1933, the community occupied the subject land for a ‘great many years’ and continued to do so way past the declaration of the area as a forest.⁷¹⁸

In dismissing the Ogiek claim, the Court seems to have implied that even if the Ogiek had aboriginal rights to the land in question, they had ceded them to the government.⁷¹⁹ Such an interpretation by the Court erroneously assumes that the fact that the state had regulated the use of the forest through gazettelement amounted to extinguishment of the aboriginal rights of the Ogiek. However, that is not necessarily the case since regulation does not automatically amount

⁷¹⁶ As above para 983.

⁷¹⁷ *Delgamuukw v British Columbia* (n 72 above) para 152 see also para 126, 153, 198 & 258; see also *Mabo v Queensland* (n 72 above) para 43.

⁷¹⁸ Carter Report (n 252 above) para 983.

⁷¹⁹ *Ogiek* case (n 3 above) 16.

to extinguishment of aboriginal rights.⁷²⁰ The Canadian Supreme Court, in *R v Sparrow*, held that whoever asserts extinguishment must prove clear and plain legislative intent to extinguish aboriginal rights.⁷²¹ The area in dispute in Kenya (Tinet forest) is reported to have been declared a forest area by the colonial authorities and therefore regulated by the Forest Act.⁷²² However, as was held in *Sparrow*, the legislation in question can only extinguish indigenous rights to land if it expressly states that this was the intention of the law.⁷²³ Similarly in Botswana, the High Court has held that the declaration of lands occupied by the San as a game reserve did not extinguish the community's rights to their traditional lands.⁷²⁴

More recently, the Supreme Court of Belize in 2007 reaffirmed that the 'mere acquisition or change of sovereignty did not in and of itself extinguish pre-existing title to or interests in the land'.⁷²⁵ In a similar vein, colonial rule could not have extinguished the aboriginal rights of the Ogiek and it was therefore erroneous for the Kenyan High Court to suggest that it did.⁷²⁶ In the Belize case, the Supreme Court also correctly held 'that neither the several Crown Lands Ordinances nor the succeeding National Lands Act 1992 expressly or by implication overrode or

⁷²⁰ See Supreme Court of Canada in *R. v Sparrow*, (1990) 1 SCR 1076.

⁷²¹ As above, 1076-7.

⁷²² Forests Act Laws of Kenya Cap 385; see *Ogiek* case (n 3 above) 10.

⁷²³ *R. v Sparrow* (n 720 above) 1076-77.

⁷²⁴ *Sesana and Others v Attorney General* (n 72 above) H.6 para 1.

⁷²⁵ In the Supreme Court of Belize, (A.D. 2007) consolidated cases of *Aurelio Cal in his own behalf and on behalf of the Maya village of Santa Cruz and others v the Attorney General of Belize and the Minister of Natural Resources and Environment Claim No. 171 of 2007* and *Manuel Coy in his own behalf and on behalf of the Maya village of Conejo and others v the Attorney General of Belize and the Minister of Natural Resources and Environment Claim No. 172 of 2007*, para 77.

⁷²⁶ *Ogiek* case (n 3 above) 4.

extinguished the already existing Maya people's rights and interests in their lands'.⁷²⁷ Indeed, the Privy Council had long before upheld the common-law position that colonial rule and laws could not simply disregard the rights of the original inhabitants of the colonized territory.⁷²⁸

Similarly, it is arguable the Kenyan Forest Act which was enacted during the colonial rule was not intended to dispossess communities that had rights over the land in question. In the words of Carter Land Commission Report of 1933, the Ogiek (Dorobo) 'had better claims that most to remain' in the forest.⁷²⁹ According to that Commission, the real reason the Ogiek were moved from the forest was not to protect the forest resource but to 'civilize' them.⁷³⁰ The bid to 'civilize' them was not only assimilationist in its design but also disregarded the community's wishes and customary laws and rights. It is therefore not surprising that the community time and gain returned to the forest, sometimes at the acquiescence of the state.⁷³¹ This practice illustrates the fact that the community believed that their customary rights to the Tinet forest were still intact. With no evidence to the contrary, those rights were not extinguished.

It is on record that the Kenyan High Court did not entertain arguments as to whether the enactment of the Forest Act had extinguished the aboriginal rights of the Ogiek, since they were

⁷²⁷ In the Supreme Court of Belize (n 725 above) para 86.

⁷²⁸ *Amodu Tijani v Southern Nigeria (Secretary)*, [1921] 2 A.C. 399 at 407; see other common law cases that have upheld this position in (n 72 above; see also Gilbert (n 34 above) 583-612.

⁷²⁹ Carter Report (n 252 above) 260, para 983.

⁷³⁰ Carter Report (n 252 above) para 984.

⁷³¹ *Ogiek case* (n 3 above) 11 and 12.

not made.⁷³² Despite the lack of submission of arguments of extinguishment by the State, the Court erroneously held that the community ceded their rights over their traditional lands to the government.⁷³³ This finding was based on a narrow interpretation of the statutory provisions, which the court admits denied it an opportunity to analyze all of Kenyan land law.⁷³⁴ Had it done so, it is likely that it would have found that the Ogiek had an aboriginal right to the disputed land, requiring strict proof of extinguishment.

However, it is important to note that even in South Africa, where the doctrine of aboriginal title may indeed be applicable, the courts elected to utilize the more straightforward route of relying on statutory restitution provisions.⁷³⁵ Therefore, while it is important to recognize and apply the doctrine of aboriginal title where there is no alternative cause of action, is useful to provide a clear route for restitution of lands through constitutional and legislative provisions. Chapter six examines some of the legal reforms that could be adopted in Kenya to provide such express protection.

⁷³² As above 15 & 16.

⁷³³ As above 16.

⁷³⁴ As above 15.

⁷³⁵ See Bennett & Powell (n 687 above) 450; see also Chan (n 687 above) 118, see also *Richtersveld Community and others v Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC) para 48 where the Court intimated that the doctrine of indigenous title is an alternative remedy to restitution under the Restitution Act but fell outside the LCC's jurisdiction.

4.7 Chapter conclusion

This chapter has demonstrated that there are resources within Kenya's legal framework that can be used to vindicate indigenous peoples' land rights. These include constitutional guarantees of the right to life, non-discrimination and property rights, the constitutional trust lands provisions, and the concept of aboriginal title. However, the possibilities presented by these resources are attenuated by restrictive interpretation and competing legal protection for the holders of legal title to land. By recourse to comparative jurisprudence and international standards, the chapter has also demonstrated that a progressive judiciary could use existing laws to recognize indigenous peoples' land rights. However, relying on the judiciary alone for such recognition is not enough due to various limitations on courts in applying such alternative legal resources. It is therefore important that the existing legal framework in Kenya be reformed. This is the subject of chapter six. The next chapter, chapter five, surveys some of the legal measures that have been employed in two comparable jurisdictions, South Africa and Namibia, to vindicate indigenous peoples' land rights. In so doing, the chapter tries to identify measures that can be used to inform the development of a suitable legal framework for indigenous peoples' rights in Kenya.

CHAPTER FIVE

VINDICATING INDIGENOUS PEOPLES' LAND RIGHTS IN COMPARABLE JURISDICTIONS: THE CASE OF SOUTH AFRICA AND NAMIBIA

5.1 Introduction

This chapter examines legal resources that vindicate indigenous peoples' land rights in two jurisdictions in Africa: South Africa and Namibia. The choice of these two countries for comparative study is primarily motivated by the fact that, while their indigenous peoples are faced with relatively similar concerns as their counterparts in Kenya, they have both instituted certain legal measures that allow for the vindication of indigenous people's land rights, even if the implementation of these measures remains fraught. The two countries also share a common law tradition with Kenya and as such their jurisprudence and interpretation of their legal framework have persuasive value in Kenyan courts. Additionally, a focus on two African states as case studies - which have a lot in common on land related issues with Kenya and perhaps their take on 'who is indigenous' in their jurisdictions - is more acceptable in political terms than would be the case with other jurisdictions such as Australia, Canada and New Zealand, despite their notable progressive legal developments on indigenous peoples' land claims. That is particularly so when making a case for legal reforms- which is done in chapter six- which are more dependent on political will than legal considerations as would be expected in the case of interpretation of the legal framework by courts of law.

South Africa and Namibia's legal responses to their indigenous peoples' land rights are clearly distinguishable. However, both countries provide lessons that may inform Kenya's quest for a

legal framework that vindicates indigenous peoples' land rights. Some of the legal resources emerge from reforms in their constitutions and legislation as well as progressive interpretation of the legal framework. The focus of this chapter is on those legal reforms that restore and accord legal recognition to indigenous peoples' land rights.

5.2 The case of South Africa

South Africa can be said to have been colonized twice, first by the British and then by its white minority rulers. Despite gaining independence in 1910, South Africa remained under white minority rule until 1994.⁷³⁶ Although the British introduced various laws to govern South Africa during their reign, it was upon South Africa's nominal independence in 1910 that the present legal system became established.⁷³⁷ From this time, South Africa's legal system was developed on the express basis of racial inequality.⁷³⁸ While not uniquely South African in that almost all other colonised states across the world had adopted laws that gave preferential treatment to the colonisers, in South Africa the legal system sanctioned comprehensive racial segregation.⁷³⁹

⁷³⁶ See M Chanock *The making of South African legal culture 1902-1936: Fear favour and prejudice* (2001) 3; 30; see also C Heyns (ed) *Human rights law in Africa* (2004) 1506.

⁷³⁷ See Chanock (n 736 above) 3.

⁷³⁸ As above 31.

⁷³⁹ As above 31 & 32.

In 1994, a democratically elected government ended the notorious apartheid regime under an interim Constitution which was modified and finalised in 1996.⁷⁴⁰ Among the first priorities of the new democratic Government was to rectify a history of racially discriminatory policies and laws.⁷⁴¹ The question of land ownership, redistribution, access and security of tenure reforms was high on the new Government's agenda in order to facilitate an effective mechanism to redress past land injustices.⁷⁴² The level of land dispossession under colonial and apartheid regimes was extensive.⁷⁴³ Various measures were therefore adopted to deal with historical land injustices in South Africa.⁷⁴⁴ These reforms may be classified into three main programmes: land restitution, land redistribution, and security of tenure.⁷⁴⁵ While the reforms were meant to benefit all people who had suffered under the two regimes, as will emerge in this chapter, some of them are particularly important to groups in South Africa self-identifying as indigenous peoples.⁷⁴⁶

⁷⁴⁰ R Chennels and A du Toit 'The rights of Indigenous peoples in South Africa' in Hitchcock & Diana Vinding (n 96 above) 100.

⁷⁴¹ See Note (n 689 above) 422.

⁷⁴² See Van der Walt (n 536 above) 285; see also M Tong '*Lest we forget, restitution digest on administrative decisions (2002)* 61-63.

⁷⁴³ B Cousins 'More than socially embedded: The distinctive character of 'communal tenure' regimes in South Africa and its implications for land policy' (2007) 7(3) *Journal of Agrarian Change* 283.

⁷⁴⁴ Apart from the Constitution, some of the land reforms laws include Restitution of Land Rights Act 22 of 1994; Land Reform (Labour Tenants) Act 3 of 1996; Interim Protection of Informal Land Rights Act 31 of 1996; Communal Property Associations Act 28 of 1996; Upgrading of Land Tenure Rights Act 112 of 1991.

⁷⁴⁵ See Van der Walt (n 538 above) 287; see also W Joubert *The Law of South Africa*, (2004:14 2nd ed) para 76.

⁷⁴⁶ For a more detailed expose on the question of 'who is indigenous in South Africa' see N Crawhall *Indigenous peoples of South Africa: Current trends project to promote ILO Policy on Indigenous and Tribal Peoples* (1999) 2-11; see also Chennels and du Toit (n 740 above) 98.

It is important to be reminded, at this juncture, that, as is the case with other states in Africa, the question of who is indigenous in South Africa is controversial.⁷⁴⁷ Indeed, the term ‘indigenous’ in South Africa’s legal discourse has been used in reference to the languages and legal customs of the majority black African population, distinguishing it from other races.⁷⁴⁸ However, in terms of the criteria proposed by the African Commission’s Working Group of Experts on Indigenous Populations/Communities, whose emphasis is on self-identification and groups that are in a structurally subordinate position, the term has been employed to refer only to the various San and Khoe ethnic groups.⁷⁴⁹ In South Africa, these are peoples who, despite the gains made since the end of apartheid, remain in a subordinate position, are discriminated against, and marginalized. They also continue to demand recognition as indigenous peoples and protection of their fundamental human rights and freedoms.⁷⁵⁰

Given that the focus of this thesis is on groups self-identifying as indigenous peoples, this section discusses the legal reforms that affect indigenous groups in South Africa. While the reforms are not specifically tailored for those groups, some of these reforms have a bearing on the land rights of indigenous peoples. The relevant reforms began in the run-up to the first democratic elections

⁷⁴⁷ n 746 above.

⁷⁴⁸ Sec 6 and 26 Constitution of South Africa.

⁷⁴⁹ ACHPR & IWGIA (n 35 above) 15-17; 89; see also Stavenhagen South Africa Mission Report (n 74 above) 2; Crawhall (n 746 above) 1-11; Chennels and du Toit (n 740 above) 98.

⁷⁵⁰ See Concluding Observations of the Committee on the Elimination of Racial Discrimination on South Africa, CERD/C/ZAF/CO/3, 19 October 2006, para 19 (CERD Concluding Observations on South Africa 2006).

of 1994 and sought to abolish the racially-based land laws of the apartheid state.⁷⁵¹ Some of the pre-1994 reforms also included laws aimed at guaranteeing equal access to land and secure land tenure.⁷⁵² Such reforms were inevitable and generally reflected the political desire at the time to prepare for the enactment of comprehensive land reform laws by the majority-elected Government in 1994.⁷⁵³

After 1994, South Africa embarked on extensive land reform measures⁷⁵⁴ in accordance with the 1996 Constitution.⁷⁵⁵ A brief survey of each of these measures and the extent to which they vindicate indigenous peoples' land rights in South Africa follows.

5.2.1 Restitution of land rights

In a bid to restore land and provide for remedies to individuals and groups who were dispossessed of their lands as a result of past racially discriminatory laws and policies, the post-apartheid legal framework provides for a process of land restitution.⁷⁵⁶ Section 25(7) of South

⁷⁵¹ See Van der Walt (n 538 above) 286; see also Joubert (n 745 above) 87 para 78; the racially discriminatory laws included the Black Land Act 27 of 1913 and the Development and Trust Land Act 18 of 1936.

⁷⁵² See the Abolition of Racially Based Land Measures Act 108 of 1991; the Upgrading of Land Tenure Rights Act 112 of 1991 and the Less Formal Township Establishment Act 113 of 1991.

⁷⁵³ Van der Walt (n 538 above) 287.

⁷⁵⁴ See South Africa's White Paper on Land Policy Para 2.3 <http://land.pwv.gov.za/legislation_policies/white_papers.htm> accessed 3 May 2008; see also Cousins (n 743 above) 283.

⁷⁵⁵ Sec 25 South Africa Constitution.

⁷⁵⁶ See T Roux 'The Restitution of Land Rights Act' in G Budlender, J Latsky & T Roux *Jutas new land law* (1998) chapter 3; see also Van der Walt (n 538 above) 289-307; Tong (n 742 above) 61-78.

Africa's 1996 Constitution provides that 'a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress'.⁷⁵⁷

The framework and processes of seeking restitution is provided for by the Restitution of Land Rights Act.⁷⁵⁸

Claimants for restitution of land rights in South Africa are either individuals or communities who satisfy the criteria stipulated by the Constitution and the implementing legislation.⁷⁵⁹ According to the Restitution Act, the relevant dispossession is one of a 'right in land', which need not be registered.⁷⁶⁰ A provision that recognizes that there are rights in land that may not be registered is useful for indigenous peoples, even in the Kenyan context. As surveyed in chapter four of this thesis, indigenous peoples' rights in land in Kenya are neither recognized nor registered in accordance with their customs and preferred way of life. It is instructive that the 'right in land' in South Africa can be one of a customary law nature.⁷⁶¹ In Kenya, where most indigenous peoples

⁷⁵⁷ Sec 25(7) Constitution of South Africa.

⁷⁵⁸ The Restitution of Land Rights Act 22 of 1994. The Act has been amended severally through Restitution of Land Rights Amendment Act 84 of 1995, Land Restitution and Reform Laws Amendment Act 78 of 1996, Land Restitution and Reform Laws Amendment Act 63 of 1997, The Land Affairs General Amendment Act 61 of 1998 and the Land Restitution and Reform Laws Amendment Act 18 of 1999 see Tong (n 742 above) 69.

⁷⁵⁹ The Restitution of Land Rights Act as above.

⁷⁶⁰ See sec 1 of the Restitution of Land Rights Act; see discussion of the impact of the expanded definition of a 'right in land' in the Act in Van der Walt (n 538 above) 292-293.

⁷⁶¹ As above; see also Roux (n 756 above) 3A 15.

claim their land rights on the basis of their customary law, a similar or equal provision would be important to safeguard the interests of such communities.⁷⁶²

In accordance with the South African Constitution and the Restitution of Land Rights Act, one may only lodge restitution claims for dispossessions that took place after 19 June 1913.⁷⁶³ The 1913 cut-off date is based on the date when the Black Land Act,⁷⁶⁴ which consolidated most of the colonial-era dispossessions, came into force.⁷⁶⁵ Since most land dispossession in South Africa preceded 1913, it has been argued that the 1913 cut-off date was a political and pragmatic compromise.⁷⁶⁶ The South African political compromise could serve as an example to Kenya. As in South Africa, it is probable that political and practical considerations would determine the most appropriate cut-off date for restitution claims in Kenya. This is because, although it was upon the imposition of colonial rule that the land dispossessions were legally sanctioned in favour of the colonialists, ‘the dispossessions among various communities predate colonialism’.⁷⁶⁷ Certain historical writings in Kenya indicate that the Ogiek, for example, lost most of their lands through invasion by other communities, such as the Kikuyu and the Kalenjin, long before colonialism.⁷⁶⁸ However, it appears that that the imposition of colonial rule and laws

⁷⁶² See Gilbert (n 34 above) 610.

⁷⁶³ Sec 25(7) South Africa Constitution; sec 2(1) Restitution of Land Rights Act.

⁷⁶⁴ Black Land Act 27 of 1913 (repealed 1991).

⁷⁶⁵ Van der Walt (n 538 above) 293; see also J Pienaar & J Brickhill ‘Land’ in Woolman *et al Constitutional law of South Africa* (2nd ed 2007) 48-1.

⁷⁶⁶ As above, 194; see also Roux (n 756 above) 3A, 16.

⁷⁶⁷ Spear (n 13 above) 46-68.

⁷⁶⁸ As above.

was the significant turning point in Kenya's land tenure and land relations. 15 June 1895, the date of declaration of the East African Protectorate, is therefore a possible cut-off date for restitution in Kenya, if such a process is ever adopted.

The South African Restitution of Land Rights Act establishes a specialized Commission⁷⁶⁹ and Court⁷⁷⁰ to deal with the restitution process. The specialized nature of these institutions ensures that they devote their resources and time to redress the question of land dispossession falling within the ambit of the Act. The merits of establishing such institutions for a specified period of time include the need to promptly and efficiently dispense with the restitution process. Since 1995, when the process began in South Africa, close to 94% of all land claims for restitution have been settled.⁷⁷¹ Although it has taken longer than initially intended, that is a significant success.⁷⁷² However, according to Bertus de Villiers, despite the remarkable statistics in terms of settlement of the land claims, they have not contributed to land reform in South Africa.⁷⁷³ This is due to, among others, the fact that most of the settlements have been through cash compensation for land lost and that most of the remaining settlements are rural claims which have been slow and complicated.⁷⁷⁴ That is a useful lesson for a comparable scenario in Kenya given that the majority of indigenous peoples' land claims would fall within the rural category.

⁷⁶⁹ See Restitution of Land Rights Act 22 of 1994, Chapter 2 on Commission on Restitution of Land Rights.

⁷⁷⁰ Sec 22 Restitution of Land Rights Act - The Land Claims Court which has equal status and powers as a High Court within its sphere of jurisdiction.

⁷⁷¹ See B de Villiers 'Land Reform- Commentary (2008) 4 Policy Paper 4.

⁷⁷² See Van der Walt (n 538 above) 298 note 54.

⁷⁷³ See De Villiers (n 771 above) 5.

⁷⁷⁴ See De Villiers (n 771 above) 5.

Ironically, South Africa's restitution policy initially envisaged that the restitution process would be aimed at sustainability rather than once-off settlements. According to South Africa's former Chief Lands Claims Commissioner, Thozamile Gwanya:

the policy framework for settlement of rural claims developed from one of 'equitable redress', i.e. (making sure the claimants are 'put in a similar position to that which they were at the time of dispossession') for the period from 1995, to a broader perspective and a new dimension in 2002 of 'social justice'; ensuring that the settlement is 'sustainable' and the award is more future focused than historic.⁷⁷⁵

However, the former Chief Lands Commissioner acknowledges that the new policy has largely remained pious wishes, principally due to 'lack of commitment and serious lack of capacity [on the part] of the implementing institutions'.⁷⁷⁶ Indeed, despite the fact that the deadline for submission of restitution claims lapsed in December 1998, the South African public has continued to agitate for the 're-opening of the period of the lodgement of claims'.⁷⁷⁷ While that is yet to happen, the continued clamour for such reopening is indicative of the possible inadequacy of the settled timelines or a failure of the restitution process to meet its objectives.⁷⁷⁸

⁷⁷⁵ T Gwanya 'Commission on Restitution of Land Rights: A reflection on what has been achieved and what must still be addressed' paper presented at a conference on land, memory, reconstruction and justice: perspectives on land restitution in South Africa: 13-15 September 2006, Cape Town available at <<http://www.plaas.org.za/events/Past-Events/landmemory/papers/Gala%20dinner%20speech%20-%20Tozi%20Gwanya.pdf/view>> accessed 20 July 2008.

⁷⁷⁶ Gwanya (n 775 above).

⁷⁷⁷ As above.

⁷⁷⁸ As above.

That said, it is important to appreciate the constraints of a process that seeks to restore land rights to communities that were dispossessed a considerable time ago. Restitution of land is undoubtedly a complex affair in terms of the ‘processing and adjudication of land claims’.⁷⁷⁹ The financial implications of the process are also high, a problem that is exacerbated by the fact that funding for the land restitution process in South Africa is mainly reliant on state coffers.⁷⁸⁰ Budgetary constraints are bound to continue to hamper the process as would be the case in Kenya. Land restitution requires a substantial amount of finances to compensate adequately the current title holders of pieces of land that are claimed by indigenous peoples. Additionally, a ‘successful restitution [process] must not only address landlessness. It must also go to the core of unjust expropriation and extinction of one entity’s rights and the terms of their transmission to another entity’.⁷⁸¹ According to Kameiri-Mbote:

Justice entails that that the terms of restitution be mutually agreed by all concerned parties. Failing to do this will amount to perception by those whose rights have been expropriated as legal validation of injustice and will colour their perception of the rights protected by law making their enforcement onerous.⁷⁸²

⁷⁷⁹ A Dodson ‘Unfinished business: The role of the Commission on Restitution of Land Rights after restoration’ available at <<http://www.plaas.org.za/events/Past-Events/landmemory/papers/Dodson.pdf>> 1 accessed 10 August 2008.

⁷⁸⁰ See S Sibanda ‘Land reform and poverty alleviation in South Africa’ paper presented at the SARPAN conference on land reform and poverty alleviation in Southern Africa held at the Human Sciences Research Council, Pretoria 4-5 June 2001 available at <www.sarpan.org.za/EventPapers/Land/20010604Sibanda.pdf> 1 accessed 1 August 2008.

⁷⁸¹ Kameiri-Mbote (n 354 above) 6.

⁷⁸² As above.

It is therefore imperative that in carrying out restitution, the rights of those who currently occupy the land claimed by indigenous peoples are respected and protected. To balance the interests of both parties is an onerous exercise, which can not be compromised without endangering the rule of law. The funding that is required for such an exercise, particularly in order to support the post-restitution process is considerable. However, the scope of this thesis is limited. Accordingly, apart from suggesting that international development agencies and donors should be asked to assist in providing bridging finance to drive a successful restitution process, this subject is left for other research. The limited scope of the thesis also does not allow for a thorough interrogation of the important issue of post-restitution support, which has been lacking in many of the claims that have been settled in South Africa.⁷⁸³

While the South African Government is not solely to blame, given the many other socio-economic challenges it faces in seeking social justice for all South Africa's people after apartheid, it is crucial that at least adequate support is accorded to a process that was at the core of the liberation struggle. At the very least, the State should sort out the institutional weaknesses, inadequate support and inadequate resources which are often cited as causes of the slow progress made with rural claims.⁷⁸⁴ Over and above such support, South Africa should comprehensively address the concerns of indigenous peoples and rural communities, if it is to avoid the kind of social unrest that has emerged in other parts of the continent, such as Kenya and Zimbabwe.⁷⁸⁵

⁷⁸³ B de Villiers, *Land reform issues and challenges: A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia*, Konrad Adenauer Foundation, Occasional Papers, Johannesburg, 2003, 69-72.

⁷⁸⁴ See R Hall & L Ntsebeza 'Introduction' in L Ntsebeza & R Hall (ed) *The land question in South Africa: The challenge of transformation and redistribution* (2007) 9; see also De Villiers (n 781 above) 1.

⁷⁸⁵ See Sibanda (n 780 above) 1; see De Villiers (n 783 above) 1.

As highlighted in the introduction to this thesis, frustration and continued disregard by the State for the concerns of the marginalised was identified as a root cause of the Kenyan conflict. Siphosiphanda, a Director of Tenure Reform, Department of Land Affairs in South Africa notes with caution that ‘in South Africa too, land and land reform, are unquestionably emotive issues, and matters related hereto need to be handled with circumspection and sensitivity by the Government’.⁷⁸⁶ Without a doubt therefore, there is enough motivation for South Africa to be committed, politically and resource wise, to resolve the land issues, lest they get out of hand.⁷⁸⁷

However, the existence of democratic and independent institutions in South Africa, as exemplified by the Constitutional Court, despite recent challenges to that institution,⁷⁸⁸ provides at least some hope and an avenue for the disenfranchised to ventilate their rights. Indeed, a number of communities, including some indigenous peoples in South Africa, have invoked the restitution clause in the Constitution and statutory processes to get back their ancestral lands.⁷⁸⁹

One such community is from the Richtersveld, a large area of land situated in the north-western

⁷⁸⁶ Sibanda (n 780 above) 1; De Villiers (n 783 above) 1.

⁷⁸⁷ See Sibanda as above, 2 the reference by Sibanda on a few sporadic and perhaps isolated instances where the slow process of restitution and land reforms has instigated violence and destruction of property. He cites the case of ‘burning of cane sugar fields in Kwa Zulu Natal where a land claim had been lodged and still needs to be resolved and threatened land invasions in the Wakkerstroom district of Mpumalanga’; see also De Villiers (n 783 above) 1.

⁷⁸⁸ See H Zille ‘The retreat of constitutionalism’ *Wits Public Lecture* 22 July 2008 available at <http://www.law.wits.ac.za/helen_zille_const_lecture.doc> 7 & 12 accessed 30 July 2008.

⁷⁸⁹ See generally Tong (n 742 above); see also Stavenhagen South Africa Mission Report(n 74 above) para 37: ‘Khoen and San communities that have benefited from the land restitution programme include the Riemvasmaak Nama Community, ongoing claims by Steinkopf and Richtersveld Namas; the !Xun and Khwe San communities who were displaced from Schmidtsdrift by a counter-claim; the Kleinfonteintjie Griqua community as well as the Khomani San Community in the southern Kalahari; and resettlement projects in Gudaus, Pella and Witbank. Griqua groups in the Northern Cape have also shown some success with land claims and redistribution projects, including the use of trust laws to gain collective land rights’.

corner of the Northern Cape Province, in South Africa.⁷⁹⁰ The community applied to the Land Claims Court for restitution of their land rights. They alleged that they were dispossessed of their land through racially discriminatory laws as contemplated in the Restitution Act. Although the Land Claims Court dismissed the case,⁷⁹¹ the community, undeterred, appealed to the Supreme Court with success.⁷⁹² The Supreme Court decision was affirmed by the Constitutional Court⁷⁹³ after an appeal by Alexkor Limited, the state-owned company that had benefitted from the dispossessions. The *Richtersveld* case has been hailed as a landmark decision that has the potential to inspire many other communities who have been dispossessed of their land.⁷⁹⁴

While express provisions in the Constitution and legislation in South Africa provide a clear route for restitution of lands through the courts, her indigenous peoples have attempted to explore alternative claims based on their African customary laws.⁷⁹⁵ Although the Richtersveld Community abandoned the aboriginal rights claim they had launched at the Cape High Court in favour of their restitution claim, it is instructive that the Constitutional Court went to great

⁷⁹⁰ *Alexkor Ltd v Richtersveld Community* (n 72 above) para 4; see Y Trahan 'The Richtersveld Community & Others V. Alexkor Ltd: Declaration of a "Right in Land" through a "customary law interest" sets stage for introduction of aboriginal title into South African legal system, 12 *Tulane Journal of International & Comparative Law* 565. The present Richtersveld population descends from the Nama people, who are thought to be a subgroup of the Khoer people. These people were a "discrete ethnic group" who "shared the same culture, including the same language, religion, social and political structures, customs and lifestyle." The primary rule of these people was that the land of their territory belonged to their community as a whole.

⁷⁹¹ *Richtersveld v Alexkor Ltd* (LCC) (n 735 above) para 43.

⁷⁹² *Alexkor v Richtersveld* (SCA) (n 688 above) para 111.

⁷⁹³ *Alexkor v Richtersveld Community* (n 72 above) para 103.

⁷⁹⁴ See Bennett & Powell (n 687 above) 450; see also Chan (n 687 above) 117.

⁷⁹⁵ *Richtersveld v Alexkor Ltd* (LCC) (n 735 above) para 6; see also T Roux 'Pro poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court' (2004) 20 *South African Journal of Human Rights* 522.

lengths to illustrate the applicability of African customary law in proving indigenous land rights.⁷⁹⁶ Indeed, while the Constitutional Court found that the community was entitled to their right to land through the more direct route of the Restitution Act, it acknowledged that the community's rights in the subject land were based on their indigenous law.⁷⁹⁷

In particular, the Constitutional Court found that the indigenous Richtersveld community had a right to the land, not by virtue of the common law, but by virtue of the Constitution.⁷⁹⁸ In what can be termed an affirmation of the independent status of African customary law under the South African Constitution, the Court held that:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution [T]he Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system [I]ndigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.⁷⁹⁹

It is worth noting that the Constitution of South Africa limits the applicability of African customary law only on the basis that it comports with the purpose and values set forth in the Bill

⁷⁹⁶ *Alexkor v Richtersveld* community (n 72 above) para 50-82.

⁷⁹⁷ As above para 62 & 64.

⁷⁹⁸ As above para 51.

⁷⁹⁹ As above para 51.

of Rights.⁸⁰⁰ Importantly for indigenous peoples in South Africa relying on African customary law, the South African Constitution recognizes rights emanating from this system of law.⁸⁰¹ Such rights would likely include land rights of indigenous peoples based on African customary law. The recognition of African customary law by the South African Constitution and the affirmation by the Constitutional Court that it forms part of the South African legal system is significant. The fact that, unlike in Kenya, African customary law in South Africa is not subjugated to other written laws or limited by repugnancy clauses is important for groups and individuals relying on that law to claim their fundamental human rights.⁸⁰² The issue of recognition and status of African customary law is revisited in chapter six.

The South African Constitution further obliges courts of law to apply African customary law whenever it is applicable, ‘subject to the Constitution and any legislation that specifically deals with customary law’.⁸⁰³ This means that African customary law in South Africa has equal force alongside other sources of law, such as legislation and common law, as long as it is in conformity with the Bill of Rights.⁸⁰⁴ A similar provision in Kenya would guarantee indigenous peoples’ rights in their traditional lands since they mainly rely on African customary law to prove these rights.

⁸⁰⁰ Sec 39 (2) Constitution of South Africa; see also *Alexkor v Richtersveld* community (n 72 above) para 51 (referring to customary law) see also para 7 n.8 stating that customary law is synonymous with indigenous law.

⁸⁰¹ Sec 39 (2) Constitution of South Africa.

⁸⁰² See *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) para 32.

⁸⁰³ Sec 211 (3) Constitution of South Africa.

⁸⁰⁴ Sec 39 (3) Constitution of South Africa.

The express acknowledgement that indigenous laws form part of the constitutional framework of South Africa's legal system⁸⁰⁵ is particularly useful for a comparable argument in Kenya, where express provisions for restitution are lacking. Indeed, it has been argued that for those who cannot meet the requirements of the Restitution of Land Rights Act, aboriginal title could provide an alternative ground of action.⁸⁰⁶ As discussed in chapter four, proof of aboriginal title is dependent on the traditions and customs of indigenous peoples.⁸⁰⁷ South Africa's Constitutional Court cited the observations of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria*,⁸⁰⁸ which held that native title required a determination based on the evidence of indigenous law. The Constitutional Court also cited jurisprudence in other jurisdictions seeking to right the wrongs suffered by indigenous communities through dispossession of land, or rights in land based on their indigenous laws.⁸⁰⁹ However, it noted that South Africa's circumstances were unique in that its Constitution expressly made provision for addressing these problems.⁸¹⁰ Such a finding seems to imply that, had the Court not had the express constitutional route of remedying the land dispute, it may have resorted to the concept of aboriginal title. However, given that the South

⁸⁰⁵ *Alexkor v Richtersveld* community (n 72 above).

⁸⁰⁶ See Bennett & Powell (n 687 above); see also TW Bennett *Human rights and African customary law* (1995) 148; see also Chan (n 687 above) 118, see *Richtersveld v Alexkor Ltd* (LCC) (n 746 above) para 48 where the Court intimated that the doctrine of indigenous title is an alternative remedy to restitution under the Restitution Act but fell outside the LCC's jurisdiction a position since overturned by the SCA and the CC.

⁸⁰⁷ See *Mabo v Queensland* (n 72 above) 58; Gilbert (n 34 above) 585.

⁸⁰⁸ *Amodu Tijani v The Secretary Southern Nigeria* (n 726 above) cited in *Alexkor v Richtersveld* community (n 72 above) para 56.

⁸⁰⁹ *Alexkor v Richtersveld* community (n 72 above) para 34 footnote 21 citing: *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 (SCC); *Hamlet of Baker Lake v Minister of Indian Affairs and Others* (1979) 107 DLR (3d) 513 (SCC); *Mabo v Queensland* (n 72 above); *R v Adams* (1996) 138 DLR (4th) 657 (SCC); *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC); *Delgamuukw and Others v British Columbia and Others* (1997) 153 DLR (4th) 193 (SCC); *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

⁸¹⁰ *Alexkor v Richtersveld* community (n 72 above) para 34.

African Constitution and legal framework made provision for restitution, it was not necessary to delve into the applicability of the concept of aboriginal title.

Before moving on to discuss the next issue on the land reform agenda in South Africa, land redistribution, it is important to appreciate that land restitution and indeed the entire land reform agenda should endeavour to consider and balance other public interests. Beyond restoring land rights that were dispossessed during apartheid, the state must also ensure that economic development is not seriously compromised. In other words, while it is important to return previously dispossessed land rights to their indigenous owners, it is equally imperative that, in doing so, the interests of those who previously held them and the goal of economic development are not put in jeopardy.⁸¹¹ Therefore, apart from paying adequate and prompt compensation to current land holders, land restored to claimants should as much as possible remain productively utilised. Otherwise the whole purpose of land reform and the pursuit of poverty alleviation would amount to nought.

In fact, ‘under certain circumstances, it is impossible or even impractical for restitution to take the form of actual physical restoration of the dispossessed land’.⁸¹² However, to avoid a situation where the state uses arbitrary criteria to determine when economic development interests outweigh the actual physical restoration of indigenous peoples’ land rights, there is a need for precise guidelines as to how and when developmental interests should take preference over the return of lands rights. The choice of what should take precedence over the other would need to be

⁸¹¹ See S Nadasen ‘Restitution, reconstruction, reconciliation and redistribution: Land reform-balancing the interests of the dispossessed, the homeless and development’ 1997 (3) *Stellenbosch Law Review*, 363.

⁸¹² As above 360.

made after free, prior and informed consultation with indigenous peoples and due consideration of international norms and standards.⁸¹³

It is instructive that South Africa's Constitution obliges courts of law to consider international law when interpreting the Bill of Rights.⁸¹⁴ Inevitably, such consideration would include the UN Declaration on the Rights of Indigenous Peoples, which, although not binding, is part of public international law.⁸¹⁵ The South African Constitutional Court in *S v Makwanyane* held that 'in the context of section 35(1) (South African Constitution), public international law would include non-binding as well as binding law'.⁸¹⁶ The UN Declaration on the Rights of Indigenous Peoples provides guidance, where physical restoration is not possible, by providing that restitution should then take the form of 'just, fair and equitable compensation'.⁸¹⁷ South Africa envisages such a possibility in its restitution laws, which provide for either 'restitution of property,' or 'equitable redress'.⁸¹⁸ In Kenya, such an alternative is crucial, as will emerge in the next chapter.

⁸¹³ See art 28 UN Declaration on the Rights of Indigenous Peoples.

⁸¹⁴ See sec 39(1) Constitution of South Africa.

⁸¹⁵ See Anaya (n 37 above) 63-66.

⁸¹⁶ *S v Makwanyane* (n 427 as above) para 35; see also J Dugard 'International law and the "Final" Constitution' (1995) 11(2) *South African Journal on Human Rights*, 242.

⁸¹⁷ Art 28(1) UN Declaration on the Rights of Indigenous Peoples.

⁸¹⁸ See sec 25(7) Constitution of South Africa.

5.2.2 Land redistribution and access

Given the inequalities in land holding in South Africa during apartheid, it became imperative to redistribute this resource to previously disadvantaged groups,⁸¹⁹ including indigenous peoples. According to a study by the Human Sciences Research Council of South Africa, approximately 90% of land in South Africa was appropriated by the white settlers.⁸²⁰ Black Africans were ‘confined into reserves in the remaining marginal portions of land’.⁸²¹ It is against this backdrop that the post-apartheid State embarked on an ambitious programme of redistributing land held by the whites to previously disadvantaged groups.⁸²²

Through the property clause, South Africa’s Constitution accords legitimacy to land reform, including land redistribution.⁸²³ While providing that no one may be arbitrarily deprived of property,⁸²⁴ the Constitution allows expropriation of property for public purposes subject to compensation.⁸²⁵ For the avoidance of any doubts, the Constitution defines public interest to

⁸¹⁹ See Joubert (n 745 above) 97 para 88; see also Hall & Ntsebeza (n 784 above) 3.

⁸²⁰ Hall & Ntsebeza (n 784 above) 3.

⁸²¹ As above 3.

⁸²² Hall & Ntsebeza (n 784 above) 8.

⁸²³ See sec 25 of the Constitution.

⁸²⁴ Sec 25(1) as above; see *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002(4) SA 768 (CC), 2002 (7) BCLR 702 (CC) (FNB case) paras 61-109. see a thorough expose of the FNB case with regard to deprivation of property in T Roux ‘Property’ in Woolman *et al Constitutional law of South Africa* (2nd ed 2003) 46:1-37;

⁸²⁵ Sec 25(2) as above; see Roux (n 824 above) 46-2; 28-36 citing the South African Constitutional Court decision in the *FNB* case (n 824 above) para 50 where the Court held that: The purpose of section 25 has to

include ‘the nation’s commitment to land reform and to reforms to bring about equitable access to all South Africa’s natural resources’.⁸²⁶ Those provisions are the basis of the State’s adoption of various land reforms initiatives to facilitate equitable access to land resources, which are significant for indigenous peoples in South Africa.

The purpose of South Africa’s land redistribution programme ‘is to provide the disadvantaged and the poor with access to land for residential and productive purposes. Its scope includes the urban and rural very poor, labour tenants, farm workers as well as new entrants to agriculture’.⁸²⁷ It is based on the need to make land available to previously disadvantaged groups and individuals who may otherwise not be able to do so, on the free market.⁸²⁸ Although the purpose of land redistribution in South Africa is to diversify land ownership, it has the potential to restore indigenous peoples’ land rights. Given that the process of land restitution is limited by the 19 June 1913 cut-off date for racially based land dispossession and by the 31 December 1998 cut-off date for submission of claims, the land redistribution programme, which has no time limit, may provide a mechanism for satisfaction of some indigenous land claims.

The focus of the first five years of the land redistribution programme, up to the end of 1999, was on the landless poor in South Africa.⁸²⁹ The poor were categorised as households whose monthly

be seen as protecting existing property rights as well as serving the public interest, mainly in the sphere of land reform, but not limited thereto, and also striking a proportionate balance between these two functions.

⁸²⁶ Section 25(4) (a) as above; see Van der Walt (n 538 above) 244.

⁸²⁷ See South Africa’s White Paper on Land Policy para 2.3.

⁸²⁸ See Reconstruction and Development Programme (*RDP*): *A policy framework*, ANC, 1994, 19-20; see also see South Africa’s White Paper on Land Policy para 2.2.

⁸²⁹ See Sibanda (n 780 as above) 5.

income was less than 1500 Rand, which is the equivalent of about 200 US dollars.⁸³⁰ Although poverty levels among that category of people in South Africa, which includes indigenous peoples, remain high, the programme has been relatively successful.⁸³¹ The Programme is reported to have ‘succeeded in embracing the rural poor and placing productive assets in their hands’.⁸³² Therefore, despite the small number of beneficiaries, with the right kind of support, commitment and resources, the programme has great potential to uplift the condition of poor and marginalized communities.

A major constraint of the land redistribution programme is the fact that so far the State has generally relied on market-based land acquisitions.⁸³³ The principle of ‘willing buyer-willing seller’ may present obstacles to land redistribution programmes where there are few willing sellers or where such land is not the land indigenous peoples would claim as ancestral land. While liberal market principles for land redistribution in South Africa are cited as one of the principal reasons for the slow pace of land redistribution,⁸³⁴ any failing in the programme is not due to the lack of a comprehensive legal framework.⁸³⁵ The Constitution of South Africa is

⁸³⁰ As above.

⁸³¹ As above.

⁸³² As above citing, J May, B Roberts, J Govender & P Gayadeen ‘Monitoring and evaluating the quality of life of land reform beneficiaries’ Department of Land Affairs, March 2000.

⁸³³ See R Hall ‘Transforming rural South Africa? Taking stock of land reform’ in Ntsebeza & Hall (n 785 above) 98; see also L Ntsebeza ‘Land redistribution in South Africa: the property clause revisited’ in Ntsebeza & Hall (n 784 above) 107-131; see also De Villiers (n 783 above) 51.

⁸³⁴ Some of the other limiting factors include institutional weaknesses of the relevant departments (land affairs and agriculture); limited budgets for purposes of acquisition of land for redistribution; see Hall & Ntsebeza (n 784 above) 9; see ‘Zuma says land reform must be speeded up’ in *Mail and Guardian Online* 2 May 2008.

⁸³⁵ De Villiers (n 771 above) 1; see also Hall & Ntsebeza (n 784 above) 9.

explicit about the possibility of expropriation of land for purposes of land reform.⁸³⁶ Accordingly, as long as just and equitable compensation is paid to the land owner, the State may employ compulsorily acquire land for redistribution.⁸³⁷ The current slow pace of land redistribution in South Africa can therefore not be blamed primarily on market forces and the lack of a legal framework for such purposes, but rather on politics.⁸³⁸ Indeed, beyond politics, part of the State's reluctance to expropriate land is the fact that it is faced with the enormous challenge of post-transfer support.⁸³⁹ Merely transferring land from whites to blacks does not solve the question of food security and productivity.⁸⁴⁰

In order to achieve land redistribution that benefits indigenous peoples whose lands may not become available on a 'willing buyer-willing seller' principle, the state would need to take a more proactive land expropriation stance within the legal parameters. That would entail the state taking over land compulsorily, especially 'in areas where there is a great demand for it and where land owners are not willing to sell'.⁸⁴¹ Such likelihood is indeed foreseen. Thozamile Gwanya, the former Chief Lands Claims Commissioner and current Director-General of Land Affairs, has indicated that 'where negotiations deadlock after intensive negotiations, expropriation will be

⁸³⁶ Sec 25(2) Constitution of South Africa.

⁸³⁷ Sec 25(2) & 25(3) Constitution of South Africa; see Roux (n 822 above) 46: 28-36.

⁸³⁸ See Hall (n 833 above) 99; see also Van der Walt (n 538 above) 307.

⁸³⁹ Hall (n 833 above) 99.

⁸⁴⁰ As above, 100; De Villiers (n 771 above) 6.

⁸⁴¹ Hall (n 833 above) 99-100.

considered'.⁸⁴² Although, Gwanya envisages expropriation in the context of restitution claims, it is instructive that the Minister of Public Works has tabled an Expropriation Bill in Parliament that will also see land redistribution and access covered.

The draft Expropriation Bill was tabled in Parliament in April 2008.⁸⁴³ Once the Bill becomes law, it is expected that the process of compulsory land expropriation will be speeded up. However, the proposed Bill has been criticized. Critics of the Bill argue that it was conceived in bad faith and designed to flout the constitutional private property protection.⁸⁴⁴ According to Kane-Berman, the Chief Executive of the South African Institute of Race Relations; the Bill 'is both a smokescreen to deceive the supposed beneficiaries of land reform and a means of making the free market a scapegoat for the government's ineptitude'.⁸⁴⁵ Kane seems to argue that the 'willing buyer- willing seller principle', if effectively administered, can rectify the problem of land redistribution. While that could be true, in that the principle guarantees private property owners their land rights, in the circumstances of massive land inequality that South Africa finds herself in, it is necessary that a more radical land acquisition method be adopted. This is particularly so where groups that were historically dispossessed of their land, such as indigenous peoples, may not have the financial resources or political clout to influence land becoming

⁸⁴² Gwanya (n 775 above).

⁸⁴³ See 'New Bill aims to speed up land reform' in Dispatch Online (<http://www.dispatch.co.za/article.aspx?id=193844>) accessed 17 April 2008.

⁸⁴⁴ See 'Bad-faith Expropriation Bill not grounded in South Africa's land realities' sourced at <http://www.sairr.org.za/press-office/institute-opinion/bad-faith-expropriation-bill-not-grounded-in-south-africa2019s-land-realities.html> accessed 17 April 2008.

⁸⁴⁵ As above.

available for sale. In such cases, the State should have the power to expropriate land to rectify the wrongs of the past, as long as it is within the constitutional and legal framework.

5.2.3 Security of land tenure reforms

Security of tenure reforms in South Africa, are aimed at improving the ‘tenure security of all South Africans and to accommodate diverse forms of land tenure, including types of communal tenure’.⁸⁴⁶ The South African Constitution guarantees land tenure security or equitable redress for persons or communities whose land tenure was insecure as a result of racially discriminatory laws and policies.⁸⁴⁷ According to Van der Walt, ‘tenure reform is necessary because apartheid land law had effects on the land rights and interests of black land users that cannot be rectified by the abolition of the apartheid land statutes, by restitution or by improved access to land only’.⁸⁴⁸ In order to secure existing land rights and interests in land that were not adequately protected by the apartheid legal framework, legal reforms that would accord sufficient tenure security to those rights had to be instituted.⁸⁴⁹ The 1996 Constitution of the Republic of South Africa mandated Parliament to enact laws that would provide ‘a person or community whose tenure of land is legally insecure as a result of racially discriminatory laws or practices ... either to tenure which is legally secure or to comparable redress’.⁸⁵⁰

⁸⁴⁶ See South Africa’s White Paper on Land Policy para 2.3.

⁸⁴⁷ Sec 25(6) Constitution of South Africa.

⁸⁴⁸ Van der Walt (n 538 above) 309.

⁸⁴⁹ As above; see also AJ van der Walt ‘The fragmentation of land rights’ (1992) 8 *South African Journal of Human Rights* 431-450.

⁸⁵⁰ Sec 25(6) & (9) Constitution of South Africa.

To give effect to the constitutional requirement that Parliament enact legislation to govern and regulate the constitutional guarantee of security of land tenure,⁸⁵¹ various laws have since been promulgated. The focus of this section is on those laws whose enactment was designed to secure the land rights of previously marginalized communities who lacked such tenure security. These communities in South Africa inevitably include indigenous peoples. While some of the laws predate the post-apartheid state,⁸⁵² the focus is on those laws that were adopted after 1994. Admittedly, the legislation generally applies to all South Africans who were historically discriminated against on the basis of race. Land tenure security for indigenous peoples in South Africa, as is the case in most other colonized states across the globe, was affected by the imposition of colonial laws that subjugated African customary laws.⁸⁵³ This section seeks to examine select legal reforms in South Africa that have sought to reaffirm and recognize customary land rights. That survey is useful for comparable lessons in Kenya that is made in chapter six.

Land tenure reform in South Africa was necessary because the mere abolition of apartheid-based laws, land restitution and improved access to land through land redistribution was not enough to rectify the adverse effects of the apartheid legal regime on the land rights and interests of the

⁸⁵¹ Some of that legislation includes but not limited to: Interim Protection of Informal Land Rights Act Act 31 of 1996; Communal Property Association Act No 28 of 1996; Upgrading of Land Tenure Rights Act No 112 of 1991; Land Reforms (Labour Tenants) Act No 2 of 1996; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998; Communal Land Rights Act No 11 of 2004; Establishment of Less Formal Townships Act No 113 of 1991 and Extension of Security of Tenure Act No 62 of 1997.

⁸⁵² See for example Upgrading of Land Tenure Rights Act No 112 of 1991 and the Establishment of Less Formal Townships Act No 113 of 1991.

⁸⁵³ See C Toulmin & J Quan, *Evolving land rights, tenure and policy in Sub-Saharan Africa* in C Toulmin & J Quan (Ed) *Evolving land rights, policy and tenure in Africa*, DFID/IIED/NRI, London, 2000, 9-10; see also Bennett (n 806 above) 129-132.

state's black population.⁸⁵⁴ The Apartheid State diluted and violated the existing land rights of the Black population.⁸⁵⁵ Pitted against the property regime of the colonizers and the Apartheid State, the land tenure regime of the Black communities was 'weakened and legally undermined'.⁸⁵⁶ In order to revive, upgrade and strengthen these rights, it became imperative that substantive laws in that regard were enacted.

However, the Director of Tenure Reform, Department of Land Affairs of South Africa, Siphosiso Sibanda, acknowledges that land tenure reforms have been 'the slowest and most difficult aspect of the land reform programme'.⁸⁵⁷ Like the constraints on the other land reform programmes (restitution and land redistribution), lack of capacity by the Department, and inadequacy of resources, are cited as hampering security of tenure reform.⁸⁵⁸ Despite those limitations, some laws have been enacted aimed at securing land tenure of previously dispossessed communities that would provide useful lessons in a similar context in Kenya. Admittedly, the laws enacted in South Africa to secure land tenure of previously marginalised groups are more than the three surveyed below.⁸⁵⁹

⁸⁵⁴ Van der Walt (n 538 above) 309.

⁸⁵⁵ See DL Carey Miller (with A Pope) *Land title in South Africa* (2000) 456-458 cited in Van der Walt (n 538 above) 309.

⁸⁵⁶ Van der Walt (n 538 above) 309.

⁸⁵⁷ See Sibanda (n 780 above) 4.

⁸⁵⁸ As above.

⁸⁵⁹ Some of the other laws enacted in South Africa to provide for security of tenure for previously marginalised communities include: Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation Act 18 of 1998. Most of these laws are peculiar to the South African situation given its history of labour tenants and occupiers of lands during the apartheid period. Those statutes were therefore aimed at protecting the occupiers from unfair evictions while granting them some certain land rights where applicable. For a brief legal overview of

5.2.3.1 Communal Land Rights Act of 2004

Of considerable importance to indigenous peoples in South Africa is the Communal Land Rights Act of 2004.⁸⁶⁰ The Act seeks to provide legal ‘security of tenure by transferring communal land to communities, or by awarding comparable redress’.⁸⁶¹ The majority of rural communities in South Africa, including indigenous communities, hold land communally,⁸⁶² which means that the Act is relevant for a wide cross-section of South Africa’s population. The Nama (Khoe), for example, ‘particularly the Richtersveld, communities have managed to maintain communal land for grazing. This extends into the Richtersveld National Park’.⁸⁶³ However, traditional communal landholding during apartheid was largely unregulated, and this left most community members dependent on the whims of the tribal authorities.⁸⁶⁴ ‘At the root of the problem is the fact that during the apartheid era, customary law was interpreted so as to give legal land ownership to traditional leaders, rather than to community members’.⁸⁶⁵ The Communal Land Rights Act,

some of these laws see Van der Walt 308-353. Since the survey in this chapter is aimed at providing comparable lessons that could apply in a Kenyan context the choice of the three laws for a brief examination is done with the Kenyan circumstances in mind. The three laws are seen as offering perhaps the closest and applicable lessons in Kenya.

⁸⁶⁰ Communal Land Rights Act No 11 of 2004; for a critical expose of this Act see Cousins (n 743 above) 281–315.

⁸⁶¹ As above sec 1; see Van der Walt (n 538 above) 334; see also Cousins (n 743 above) 287; see also T Bennett & C Murray ‘Traditional leaders’ in S Woolman et al *Constitutional Law of South Africa* (2005) 26:56.

⁸⁶² See Cousins (n 743 above) 283.

⁸⁶³ See Crawhall (n 746 above) 8.

⁸⁶⁴ Van der Walt (n 538 above) 334; see also C Toulmin & J Quan, Registering customary rights in Toulmin & Quan (n 853 above) 225.

⁸⁶⁵ Toulmin & Quan (n 853 above) 225 citing A Classens & S Makopi ‘South African proposals for tenure reform: The draft Land Rights Bill-key principles and changes in thinking as the bill evolved’ Paper

sought to rectify that misinterpretation of customary law, since traditionally, community land rights vest in the community and not traditional authorities, whose role was purely management of the resource.⁸⁶⁶

Communal lands during apartheid were equally plagued by weak and insecure tenure and inequitable distribution.⁸⁶⁷ The Act therefore sought to rectify that situation by promoting security of tenure, equitable access and fair use, as well as an open and just land administration system of communal lands.⁸⁶⁸ Of key significance to indigenous peoples in South Africa, particularly for those who continue to hold such lands on the basis of African customary law, is the requirement in the Act that community land is to be allocated and administered in accordance with the ‘community’s rules’.⁸⁶⁹ Although such rules are required to be registered with the Director General of Land Affairs,⁸⁷⁰ adoption of such rules is a community affair that is governed by the customary laws, traditions and values of the community. Such rules can be amended or revoked by the community in a general meeting to reflect the changing needs of the community. That possibility is very important given the fact the culture is not static.⁸⁷¹ As will be argued in the Kenyan context in chapter six, it is important to record and restate important rules and

presented at the DFID workshop on Land rights and sustainable development in Sub-Saharan Africa: Lessons and ways forward in Land tenure policy, Sunningdale, UK, 16-19 February 1999.

⁸⁶⁶ Bennett (n 806 above) 152.

⁸⁶⁷ Van der Walt (n 538 above) 334.

⁸⁶⁸ See sec 14-18 of the Communal Land Rights Act of 2004.

⁸⁶⁹ See sec 19 Communal Land Rights Act of 2004.

⁸⁷⁰ As above sec 19(4).

⁸⁷¹ See contrary views that suggest that customary laws once recorded loses its dynamism in TW Bennett, *Source book of African customary law for Southern Africa* (1991) 139.

customary laws governing land relations, in order to have them easily available for interpretation and application. Such recording or restatement does not in any way take away the important attributes of customary law or its dynamism, but rather enhances its applicability when pitted against written sources of law.

Although the Communal Land Rights Act, of South Africa is designed to improve the security, management, and distribution of communal land in line with the non-discrimination and equality norms of the Constitution, it is bound to cause tension as it is likely to be in conflict with certain community customs and traditions.⁸⁷² Such conflicts may arise for instance with regard to the registered administrators⁸⁷³ of communal land and traditional authorities of the community.⁸⁷⁴ That is notwithstanding the fact that a traditional council may exercise the functions of the land administration committee, which is required by the Act to be democratic and gender sensitive given that this is not always the case with traditional authorities.⁸⁷⁵ In fact, one of the criticisms levelled against the Communal Land Rights Act is that it accords traditional authorities too much power relative to the governance of the land resource, which could lead to misuse of those powers to the detriment of the community members.⁸⁷⁶ It is instructive to note that a constitutional case has been launched by some community members challenging *inter alia* that

⁸⁷² Van der Walt (n 538 above) 338.

⁸⁷³ See sec 21 Communal Land Rights Act of 2004; see also sec 24 on the duties of administration Committee.

⁸⁷⁴ Cousins (n 743 above) 285; Bennett & Murray (n 861 above) 26:64.

⁸⁷⁵ See sec 21 & 24 Communal Land Rights Act of 2004; see also section 24; Cousins (n 743 above) 285: see Bennett & Murray (n 861 above) 26:64.

⁸⁷⁶ Cousins (n 743 above) 291; see also Hall (n 833 above) 97.

particular aspect of the Act on the basis that according so much power to traditional authorities is likely to water down the land rights of community members occupying the communal land.⁸⁷⁷

The implementation of the Act is yet to commence and as such, there is limited information on how such conflicts are being resolved. It is important to note that the Act provides for a land administration committee.⁸⁷⁸ Although a recognised traditional authority may perform the powers and duties of a land administration committee,⁸⁷⁹ the Act makes specific provision for the representation of the interests of vulnerable community members.⁸⁸⁰ The additional statutory required membership is likely to safeguard the interests of the community whenever a traditional authority exceeds its powers. They can for instance draw any abuse of power to the attention of relevant authorities in terms of available dispute resolution mechanisms, including courts of law.

Therefore, despite some of the shortcomings of the Communal Land Rights Act, particularly those related to the excessive powers of the traditional authorities, the Act contains important safeguards to secure land tenure of communities, including indigenous peoples, who elect to hold land communally on the basis of African customary law.⁸⁸¹ The Act guarantees security of tenure for individuals and members who constitute the community, through principles of equality and

⁸⁷⁷ See Cousins (n 743 above) 285.

⁸⁷⁸ See sec 21 and 22 Communal Land Rights Act of 2004.

⁸⁷⁹ As above sec 21 (2).

⁸⁸⁰ As above, sec 22.

⁸⁸¹ Sec 19 Communal Land Rights Act of 2004; Cousins (n 743 above) 291; see also Bennett & Murray (n 861 above) 26: 64.

non-discrimination.⁸⁸² Once the implementation of the Act commences, clearer illustrations of its effectiveness to secure the land rights of indigenous communities will become apparent. In the mean time, the Community Property Associations Act, which is discussed immediately below, contains useful provisions whose implementation provides some insight into how the administration of the Communal Land Rights Act may operate in South Africa.

5.2.3.2 The Communal Property Associations Act

The Communal Property Associations Act (CPAs)⁸⁸³ enables communities in South Africa to acquire, hold and manage property communally.⁸⁸⁴ The ‘initial purpose of the CPAs was to enable landless groups and people in receipt of land grants under South Africa’s market-assisted land redistribution programme to pool their resources and acquire land as a joint asset’.⁸⁸⁵ The CPAs are aimed at granting communal rights in land to communities who did not have registered land rights through a group. The CPAs are to provide democratic safeguards to the community as opposed to having traditional communal lands at the hands of unregulated traditional authorities, some of whom abused their power and the community’s trust.⁸⁸⁶

⁸⁸² Sec 4 Communal Land Rights Act of 2004; Given the possible overlaps of powers of traditional leaders and registered administrators which could breed conflict there is need for strict enforcement of the Act if tenure security of communal lands is to be guaranteed as suggested by Bennett & Murray (n 861 above) 26: 65.

⁸⁸³ Communal Property Association Act No 28 of 1996.

⁸⁸⁴ Sec 1 as above.

⁸⁸⁵ See Toulmin & Quan (n 853 above) 224.

⁸⁸⁶ As above.

Some indigenous peoples in South Africa have utilised this Act to register their communal land rights.⁸⁸⁷ Once registered in accordance with a written constitution,⁸⁸⁸ the community may not alienate the common property save for a resolution of the majority of its membership at a general meeting.⁸⁸⁹ Such a provision, if implemented, could guard against unscrupulous officials of the Communal Property Associations from disposing of the property of the association without the consent of the membership.⁸⁹⁰ The requirements of the Act are also aimed at ensuring that there is accountability and proper management of the land resource whilst retaining the communities' values and traditions.

However, South Africa's Communal Property Associations Act has been criticised for its imposition of foreign conditions that are often in conflict with indigenous peoples' traditions.⁸⁹¹ According to Bertus de Villiers, 'in many instances communities have perceived a Community Property Association to be artificial and not reflective or responsive to local needs, and some new landowners were even forced to agree to a legal mechanism simply to speed up their restitution, although the mechanism did not suit their customary, community or cultural purposes'.⁸⁹² He

⁸⁸⁷ See De Villiers (n 783 above) 70; see for example the Richtersveld Community Property Association and some of its achievements to date in Richtersveld declared a World heritage site <http://www.sagoodnews.co.za/environment/richtersveld_declared_a_world_heritage_site.html> accessed 20 May 2008.

⁸⁸⁸ See sec 9 of the Communal Property Association Act No 28 of 1996. The written constitution among others stipulates for elaborate mechanisms and procedures to guarantee fairness and equity in decision making, membership, democratic processes and access to the property by all members.

⁸⁸⁹ See sec 12 (1) as above.

⁸⁹⁰ Cousins (n 743 above) 283-284.

⁸⁹¹ See De Villiers (n 783 above) 71.

⁸⁹² De Villiers (n 783 above) 71.

adds that ‘many Communal Property Associations have become a battle ground for in-fighting, dominance and despotism’.⁸⁹³ This is not surprising given the conflicts of interest that might arise when managing communal property especially where the daily management is vested in a few elites among the community. The Community Property Associations are also seen as a ‘threat to the authority and vested interests of traditional leaders’.⁸⁹⁴ Traditional leaders argue that the imposition of the CPAs is in contravention of the traditional tribal systems which have their own rules and regulations.⁸⁹⁵

Similar problems rocked the Maasai group ranches scheme in Kenya surveyed in chapter three. As discussed there, the Maasai group ranches scheme collapsed partly due to power struggles between the registered representatives of the schemes and the traditional authorities. The schemes were also said to be inconsistent with the community’s concept of land ownership.⁸⁹⁶ While similar problems threaten to undermine the Community Property Association in South Africa, the State has generally failed to provide direction and assist in the ‘development and management of corporate procedures that are appropriate for the land the Community Property Association are holding’.⁸⁹⁷

⁸⁹³ As above.

⁸⁹⁴ See Toulmin & Quan (n 853 above) 224.

⁸⁹⁵ As above.

⁸⁹⁶ See Lenaola *et al* (n 169 above) 248-253.

⁸⁹⁷ See De Villiers (n 783 above) 71.

Therefore, although the concept of CPAs in South Africa, unlike the group ranches scheme in Kenya, seems to be motivated by genuine concerns and need to secure the land rights of previously marginalized communities, they need to reflect the values and needs of the communities they purport to protect. It is crucially important that the interests of the community and the concerns of the traditional leadership are amicably resolved. It has been noted that ‘where CPAs have been imposed on traditional societies, they have not worked; the new structures exist only on paper; there is no capacity to enforce the legal rights of CPA members, and they have proved irrelevant to the day-to day management of land rights’.⁸⁹⁸ Accordingly and as will be argued in the Kenyan context in chapter six, it is imperative that the role of traditional authorities is not be dispensed with. Their role and mandate with regard to the management of community land rights should rather be augmented by the democratically elected officials and regulated by the constitutional values and norms enshrined in the Bill of Rights. These include democratic principles of inclusive decision making, fairness, equality and justice. Failure to uphold such standards should be grounds for any member of the community to resort to the legally established dispute resolution mechanisms within the community and the courts of law.⁸⁹⁹

5.2.3.3 The Interim Protection of Informal Land Rights Act

The Interim Protection of Informal Land Rights Act of 1996 is briefly mentioned here but without a critical analysis of the extent to which applies in South Africa due to the dearth of relevant information. However, the statute is a useful legal framework that seeks to secure land

⁸⁹⁸ See Toulmin & Quan (n 853 above) 224.

⁸⁹⁹ See Bennett (n 806 above) 136-137.

rights of previously marginalised communities in South Africa whose rights were previously unrecognised. The Act provides an insight into the possibility of interim legal measures that can be adopted pending the adoption of comprehensive ones to secure the land rights of marginalized communities whose security of tenure remains unprotected. In other words, given the possibility of overlapping land claims by communities, which may arise upon the reform of laws resulting in the recognition and protection of previously unsecured land rights, adoption of interim legal measures to secure those rights, pending the resolution of the claims, is important.

The Interim Protection of Informal Land Rights Act of 1996⁹⁰⁰ seeks to accord temporary legal protection to land rights of individuals and communities whose land rights were not recognised during the colonial and apartheid regimes.⁹⁰¹ The purpose of the Act is to secure those land rights that are in existence but not formally recognized or protected. Such rights inevitably include indigenous peoples' land rights on the basis of their African customary laws.⁹⁰²

Although the Act was meant to have lapsed on 31 December 1997, the Minister has powers to extend the application of its provisions for a period of 12 months at a time with approval from Parliament, which has been consistently done to date.⁹⁰³ Enacted as an interim measure, perhaps pending the adoption of a permanent statute to secure informal land rights, the Act continues to accord communities whose rights were otherwise not recognized on the basis of their indigenous

⁹⁰⁰ Interim Protection of Informal Land Rights Act 31 of 1996.

⁹⁰¹ See sec 1 as above.

⁹⁰² As above sec 1(1).

⁹⁰³ Sec 5(2) as above; see Van der Walt (n 538 above) 311-315.

law, some temporary protection. It is expected that permanent legislation to this effect will eventually be enacted.⁹⁰⁴

In the mean time, the Act remains an important legal instrument for indigenous peoples as it protects, amongst others, the ‘people who use, occupy or have access to land in terms of any tribal, customary or indigenous law or practice of a tribe’.⁹⁰⁵ On the basis of the Interim Protection of Informal Land Rights Act, indigenous peoples’ customs, traditions and practices regulate and govern their relationship to their lands.⁹⁰⁶ The Act does not confer any rights in land but merely protects rights already existing but previously not recognised due to racially discriminatory laws and practices.⁹⁰⁷

5.3 The case of Namibia

Namibia was largely administered by South Africa after 1915, following the defeat of Germany in the First World War. South Africa extended its policy of racial segregation to Namibia until this country attained independence in 1990.⁹⁰⁸ The racially discriminatory laws and policies including the regulation of land rights were therefore prevalent during South Africa’s

⁹⁰⁴ Van der Walt (n 538 above) 312.

⁹⁰⁵ Sec 1 (1) Interim Protection of Informal Land Rights Act 31 of 1996.

⁹⁰⁶ As above sec 2.

⁹⁰⁷ As above sec 1(2) (a).

⁹⁰⁸ See Heyns (n 736 above) 1357.

administration of Namibia.⁹⁰⁹ However, land dispossession in Namibia did not commence with the coming of the South Africans. The indigenous San, Himba and Nama people⁹¹⁰ had long been displaced by other black communities, a position that was entrenched and exacerbated by the German colonialists.⁹¹¹ Indeed, ‘while the San are among the original inhabitants of Namibia they were pushed to the margins of their own lands by the southward migration of Bantu cattle herders, beginning around the sixteenth century’.⁹¹²

By the time Namibia got its independence in 1990, land distribution was divided along racial lines.⁹¹³ ‘At independence, 52% of the agriculture farmland was in the hands of the white commercial farmer community, who made up 6% of the Namibian population. The remaining 94% of the population had to put up with owning only 48% of the agricultural land’.⁹¹⁴ According to Hunter, ‘the majority of Namibians populate the communal areas ... without

⁹⁰⁹ See Our land they took, San land rights under threat in Namibia, Legal Assistance Centre 2006, 2.

⁹¹⁰ ACHPR & IWGIA (n 35 above) 16-18; 24; 28-29; see also Daniels (n 200 above) 44; Suzman (n 180 above); J Suzman *Minorities in post independence Namibia* (2002) 20 Like in the case of South Africa this chapter mainly concentrates on the San and the Nama who are the most marginalised community in Namibia in as much as the Himba-an indigenous community- equally face similar land problems in Namibia. For a detailed expose of the problems faced by the Himba with regard to their land rights see generally, SL Haring "God gave us this land": The Ovahimba, the proposed Epupa dam, the independent Namibian state, and law and development in Africa' (2001) 14 *Georgetown International Environmental Law Review* 35-100.

⁹¹¹ See De Villiers (n 783 above) 30; see also Suzman (n 180 above) 3-4.

⁹¹² Legal Assistance Centre (n 909 above) 1.

⁹¹³ As above 33.

⁹¹⁴ See J Hunter ‘Who should own land? An introduction’ in J Hunter (ed) *Who should own the land? Analyses and views on land reform and the land question in Namibia and South Africa*, (2004) 1; see also SL Haring ‘Indigenous land rights and land reform in Namibia’ in Hitchcock & Vinding (n 96 above) 63.

owning it'.⁹¹⁵ While the majority of the black population in Namibia suffered massive human rights violations under the colonial and apartheid regimes,⁹¹⁶ her indigenous peoples, the San, Nama and Himba, continued to do so even after independence.⁹¹⁷ Namibia's indigenous peoples, especially the San, Nama and Himba, have endured double discrimination from the apartheid regime and the majority black population.⁹¹⁸ As minority groups without adequate political representation and clout, they remain at the margins of development and legal processes.⁹¹⁹

Upon independence, the Government of Namibia, like that of post-apartheid South Africa, instituted legal measures to redress land inequalities.⁹²⁰ However, Namibia's reforms have largely ignored the distinct problems faced by her indigenous peoples with regard to recognition and protection of their land rights.⁹²¹ During the apartheid regime, black Namibians including the San, Nama and Himba indigenous peoples were confined to communal areas known as 'homelands'.⁹²² Under a policy known as the 'Odendaal plan', named after its originator Fox

⁹¹⁵ Hunter (n 914 above) 2; Haring (n 914 above) 63.

⁹¹⁶ As acknowledged in the Preamble to the Constitution of Namibia.

⁹¹⁷ Haring (n 914 above) 64.-65; see also ACHPR & IWGIA (n 35 above) 16-18; 24; 28-29.

⁹¹⁸ Suzman (n 180 above) 3-4; Suzman (n 910 above) 20; see also Legal Assistance Centre (n 909 above) 2; ACHPR & IWGIA (n 35 above) 16-18; 24; 28-29.

⁹¹⁹ As above.

⁹²⁰ See Government of the Republic of Namibia, White paper on National Land Policy (1997); see also National Conference on Land Reform and the Land Question, Conference Brief, Windhoek, 1991, 2.

⁹²¹ Haring (n 910 above) 64-66.

⁹²² As above, 64; see also ACHPR & IWGIA (n 35 above) 16-18; 24; 28-29.

Odendaal, tenure in these communal lands was legally insecure and designed to turn black people into a source of cheap labour for the white farms.⁹²³

To appreciate the magnitude of Namibia's land reform needs, it is useful to briefly trace the peculiar issues that face indigenous peoples in that country. Although colonialism and apartheid affected all black people in Namibia, particularly with regard to land relations, the Nama, San and the Himba lost virtually all their lands.⁹²⁴ Through the 'homelands' policy, different ethnic groups were placed in specific communal lands which were largely in their traditional areas and within redrawn boundaries.⁹²⁵ 'The San, for example, were allocated a 'homeland' known as Bushmanland in the northeast, which included some of the lands that they had occupied historically'.⁹²⁶ The Nama were also allocated a homeland known as 'Namaland'.⁹²⁷ However, the lands allocated to these indigenous peoples were but a tiny fraction of their ancestral lands and are mostly desert land.⁹²⁸

⁹²³ As above, 64-65; see also W Werner 'A brief history in land dispossession in Namibia (1993) *Journal of Southern African Studies* 135.

⁹²⁴ See Haring (n 910 above) 71; see also J van Wyk 'The Namibia land conference-a first step towards addressing a burning problem' (1992) *SA Public Law* 31.

⁹²⁵ Haring (n 910 above) 70, 71.

⁹²⁶ As above 71.

⁹²⁷ As above 71.

⁹²⁸ Haring (n 910 above) 71.

Apart from losing most of their lands through colonial and apartheid legal processes, which alienated their arable lands through the creation of freeholds for white farmers,⁹²⁹ the indigenous peoples' land tenure system was substantially altered.⁹³⁰ While the San and Nama had ancestral rights to their traditional lands under their customary laws, the state regulated those rights by classifying all land in Namibia into State, private and communal lands.⁹³¹ According to Amoo, 'the classification was based on the native-settler dichotomy, which made access to private land the exclusive right of the white settlers. The communal lands were the creation of legislation, which, inter alia, deprived the indigenous peoples of their allodial rights'.⁹³² The communal lands, especially among the San and Nama, who according to the state were less organised and therefore had no recognisable traditional authorities, had limited security of tenure.⁹³³ As a result, their land could be alienated at will.⁹³⁴ Indeed, most of the lands under white ownership were appropriated from the traditional lands of the San and Nama who occupied the central and southern part of the country.⁹³⁵ Although the lands occupied by the Bantu tribes (Ovamboland), mainly in the northern part of the country, were classified as communal lands, they largely

⁹²⁹ See F Adams & W Werner *The Land issue in Namibia: An inquiry* (1990) 37; H Bley *South West Africa under German Rule 1894-191* (1971) 104-107; see also Wyk (n 935 above) 31; see also SK Amoo 'Towards comprehensive land tenure reform in Namibia (2001)17 *South African Journal of Human Rights* 88-93.

⁹³⁰ Amoo (n 929 above) 87.

⁹³¹ As above.

⁹³² As above.

⁹³³ As above; see also Haring (n 910 above) 70-81; MO Hinz 'Traditional governance and African customary law: Comparative observations from a Namibian perspective' in N Horn & A Bosl (Ed) *Human rights and the rule of law in Namibia* (2008) 70.

⁹³⁴ As above.

⁹³⁵ See Hinz (n 933 above) 75.

remained unaffected by the colonial and apartheid land dispossessions.⁹³⁶ The fact that the northern part of the country in Ovamboland was less affected by the land dispossessions and that the current ruling elites and political power base of Namibia mainly hail from that region, explains the trajectory of the land reform process.⁹³⁷

The colonial and apartheid regimes imposed their legal systems on Namibia vesting the entire territory in the State.⁹³⁸ However, the State reserved certain pieces of land to the blacks in what became known as tribal or communal lands.⁹³⁹ African customary law applied in the areas reserved for the blacks but they did not enjoy complete ownership rights of the lands. Rather, they ‘had rights of occupation and use or usufructuary rights’.⁹⁴⁰ Upon independence, it became of utmost importance that the laws were reformed to review the relationship of the majority black population relative to their communal land rights. A national land conference was held in 1991⁹⁴¹ to deliberate on the question of land reform in Namibia. The key resolutions that emerged from this conference were the need to redistribute land, and reform the administration of communal land.⁹⁴² The land earmarked for redistribution was private land mainly situated *in commercial*

⁹³⁶ See De Villiers (n 783 above) 40.

⁹³⁷ As above.

⁹³⁸ See Amoo (n 929 above) 91. Some of the laws that vest the entire Namibia territory on the State include: The Transvaal Crown Land Disposal Ordinance of 1903; Crown Land Disposal Proclamation 13 of 1920.

⁹³⁹ As above.

⁹⁴⁰ Amoo as above 91.

⁹⁴¹ See Namibia National Conference (n 920 above).

⁹⁴² See Hinz (n 933 above) 75.

*agricultural lands and held on freehold basis.*⁹⁴³ With regard to communal land, the conference resolved to retain the *status quo* whereby the State would continue owning the communal lands but reform its administration.⁹⁴⁴

So far, Namibia's land reform process has mainly been driven by market forces. The State has ruled out land restitution as an option and retained the communal land tenure system.⁹⁴⁵ A brief survey of the options that Namibia elected to pursue is useful in order to appreciate the extent to which indigenous peoples' land rights in Namibia have been vindicated.

5.3.1 Land restitution in Namibia

Namibia elected not to insist on the return of ancestral lands but rather grant lands to any citizen of the country who did not have land.⁹⁴⁶ This seems to have been a political decision as mentioned earlier based on the fact that most of the colonial and apartheid land dispossessions in Namibia took place 'outside the political base of the governing party'.⁹⁴⁷ Therefore, the question of restoration of land rights to people who had been disposed of their ancestral lands as a result of

⁹⁴³ See presentation by the Permanent Secretary of Namibian Ministry of Lands and Resettlement, Mr. FK Tsheehama, titled 'Land reform in Namibia: Implementation and challenges sourced at <http://land.pwv.gov.za/publications/Land_Summit/Conference_Papers/NAMIBI~1.DOC> accessed 1 June 2008.

⁹⁴⁴ See Hinz (n 933 above) 75.

⁹⁴⁵ As above 41.

⁹⁴⁶ See De Villiers (n 783 above) 35.

⁹⁴⁷ Hunter (n 915 above) 3. The ruling party in Namibia is the South West African People's Organisation, SWAPO main base is in Ovambo land where ancestral lands were not taken to the same extent as in other parts of Namibia where some of the indigenous peoples like the San inhabit; see De Villiers (n 783 above) 35; see also W Werner Land Reform in Namibia: The first seven years. The Namibian Economic Policy Research Unit 1997, 5, cited in De Villiers (n 783 above) 41 note 172.

racially discriminatory laws and policies was rejected.⁹⁴⁸ The effect was to foreclose land restitution in Namibia as an option for the restoration of her indigenous peoples' ancestral land rights. Therefore, unlike in South Africa, Namibia's indigenous peoples were left with little option but to rely on the general provisions of land redistribution to get access to land.

Due to the failure by the State to provide for restitution of land rights, indigenous peoples in Namibia remain under a serious threat of extinction.⁹⁴⁹ Most of the ancestral lands which were lost before and during colonial rule remain in the hands of private individuals.⁹⁵⁰ Since indigenous peoples do not wield influence in the independent political dispensation, they remain marginalised and discriminated against.⁹⁵¹ Their only hope in the realisation of land rights lies in the limited recognition of their communal land rights, which is surveyed later in the section.

5.3.2 Land redistribution in Namibia

After independence in 1990, the Government embarked on land tenure reforms calculated to secure the tenure rights of the black population, increase their access to land and redistribute it.⁹⁵²

The independence Constitution of Namibia entrenched a property clause that guarantees 'all persons in Namibia the right to acquire, own and dispose of all forms of immovable and movable

⁹⁴⁸ See Clause 2 of the National Conference on Land Reform and the Land Question: Conference Brief Windhoek, 1991, clause 2 of the Resolutions cited in De Villiers (n 783 above) note 157; see also Hunter (n 914 above) 3.

⁹⁴⁹ See generally Legal Assistance Centre (n 909 above).

⁹⁵⁰ As above.

⁹⁵¹ As above 2.

⁹⁵² See Namibia White Paper on National Land Policy.

property individually or in association with others and to bequeath their property to their heirs or legatees' subject to possible restriction through legislation on non-citizens.⁹⁵³ Pursuant to this provision, indigenous peoples can apply to own property individually or communally.

However, Namibia's Principles of State Policy as stipulated in the Constitution states that 'land water and natural resources ...shall belong to the state if they are not otherwise lawfully held'.⁹⁵⁴ Accordingly, lands that are not individually owned in Namibia vest in the State.⁹⁵⁵ This means that all communal lands, since they are not registered to an individual or corporation, belong to the State.⁹⁵⁶ This is particularly so since Namibia 'does not legally recognise an 'indigenous' land title in the communal lands'.⁹⁵⁷ According to Haring, the policy of Namibia towards communal lands formerly held by black Africans seems to entrench the inequality and racial discrimination of the past.⁹⁵⁸ On the one hand, the State seeks to protect the land rights of

⁹⁵³ See art 16 (1) Constitution of Namibia.

⁹⁵⁴ See article 100 Constitution of Namibia.

⁹⁵⁵ See Schedule 5 as above.

⁹⁵⁶ Haring (n 910 above) 66; see also Schedule 5(1) Constitution of Namibia which provides: All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.

⁹⁵⁷ As above.

⁹⁵⁸ Haring (n 910 above) 68.

individuals who held land under individual land tenure system, and on the other hand, it declares lands held under communal land tenure, as State land.⁹⁵⁹

Notwithstanding this position, Namibia's Constitution envisages the adoption of affirmative action measures to redress the effects of apartheid. Article 23(2) of the Constitution of Namibia provides 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.' Accordingly, Namibia's supreme law provides a legitimate basis for the adoption of laws and policies that are aimed at redressing not only the majority of her previously disadvantaged peoples but also those indigenous peoples who continue to suffer marginalization. Such measures include recognizing and securing indigenous peoples' land rights through various acts of Parliament.

One such law is the Agriculture Land Reform Act,⁹⁶⁰ which was enacted to provide for the acquisition of land by the Government for purposes of land reform and redistribution. The Act establishes a Land Reforms Advisory Commission and a Lands Tribunal.⁹⁶¹ According to the Act, the beneficiaries of the land acquisition programme are:

⁹⁵⁹ See art 100 the Constitution of Namibia read together with Schedule 5 of the Constitution; see Haring (n 910 above) 66-69.

⁹⁶⁰ Agriculture Land Reform Act 6 of 1995.

⁹⁶¹ As above.

Namibian citizens who do not own or otherwise have the use of agriculture land or adequate agricultural land, and foremost to those Namibians who have been socially, economically or educationally disadvantaged by past discriminatory practices.⁹⁶²

Similar to South Africa, where the land redistribution programme is based on market forces, Namibia's land redistribution programmes is also based on the 'willing buyer-willing seller principle'. The Agriculture Land Reform Act provides for acquisition of freehold land on a willing buyer-willing seller basis. Although the Government may expropriate land upon payment of compensation, this has not yet happened in Namibia.⁹⁶³ The market-based principle of acquiring land for reform has been criticised on the basis that the owners of the lands that should be compensated if appropriated did not acquire the lands fairly and, if anything, not for the value they now demand.⁹⁶⁴ As a result, despite losing their ancestral lands on the basis of racially discriminatory laws and policies Namibia's land reforms process has failed to respond to the indigenous peoples' land claims largely for lack of political will to resolve them.⁹⁶⁵

A case in point is the current stalemate over the proposed construction of Epupa hydro electric power dam pitting the Himba indigenous community on one hand and the State on the other.⁹⁶⁶

The State has failed to adequately consult the Himba indigenous community whose ancestral

⁹⁶² Sec 14 as above.

⁹⁶³ See De Villiers (n 783 above) 35.

⁹⁶⁴ De Villiers (n 783 above) 35, citing Debates of the National Assembly 42, 19-28 October 1998, p 98.

⁹⁶⁵ Legal Assistance Centre (n 909 above) 1-2, note 3.

⁹⁶⁶ See ACHPR & IWGIA (n 35 above) 18; 28-29; see a detailed account of the Himba and their opposition to the construction of Epupa dam see Harring (n 910 above) 35-1000; see also A Corbett 'A case study on the proposed Epupa hydropower dam' in IWGIA *Dams, indigenous peoples and ethnic minorities* (1999) 85.

lands the proposed dam would inundate, including what they term as most important, ‘the graves of their ancestors’.⁹⁶⁷ The graves and the lands the Himba inhabit are of such cultural and spiritual significance that the least the State could have done was to constructively engage them with the aim of reaching consensus. Although plans to construct the dam have temporarily been shelved owing to international pressure, it is telling that Namibia has failed to accord her indigenous peoples due recognition and respect for their land rights.

The Himba case has illuminated and affirmed the notion that since her indigenous peoples’ lack political clout, their land rights can be dispensed with without following due process of law. Indeed, had the principle of ‘wiling buyer-wiling seller’ equally applied to the Himba indigenous peoples’ land rights, the State’s attempt to compulsorily acquire their lands for purposes of construction of the Epupa dam might have taken a different trajectory. That is due to the fact that in respecting the principle of ‘willing buyer willing seller’ principle the Government only buys land that becomes available.⁹⁶⁸ Where such lands are unavailable for acquisition, which has actually been the case for most lands claimed by Namibia’s indigenous peoples, they are left at the margins of the reform process.⁹⁶⁹ It is therefore mischievous of the State to attempt to compulsorily acquire the land of the Himba for ‘public interest’ yet fail to do the same for purposes of the land reform process.

⁹⁶⁷ See Corbett (n 966 above) 85.

⁹⁶⁸ See De Villiers (n 783 above) 41.

⁹⁶⁹ As above.

5.3.3 Security of land tenure reforms

5.3.3.1 Communal land tenure

As mentioned earlier, the 1991 Namibia National Conference on Land Reform and the Land Question resolved to retain the *status quo* whereby ownership rights of communal lands are vested in the State.⁹⁷⁰ However, since the majority of the black population in Namibia occupied and continue to utilise communal lands, it became imperative to improve the administration and tenure security of the communal lands.⁹⁷¹ In this regard, another conference was held in 1996 aimed at deliberating ‘on the role of traditional leaders in the administration of communal land and in the allocation of rights on communal land’.⁹⁷²

This conference resolved to grant traditional leaders the power to allocate communal land rights in accordance with a community’s customary laws.⁹⁷³ The Communal Land Reform Act⁹⁷⁴ has since been enacted to make provision for this relationship and to regulate the administration of communal lands. Pursuant to the Act, the allocation of communal land rights would still be

⁹⁷⁰ See sec 17 Communal Land Reform Act, 5 of 2002; see Hinz (n 933 above) 75; see also MO Hinz ‘Communal land, natural resources and traditional authority’ in M D’Engelbronner, MO Hinz and J Sindana (eds) *Traditional Authority and Democracy in Southern Africa, Proceedings from the workshop, Traditional Authority in the 1990s – Democratic Aspects of Traditional Government in Southern Africa*, 15–16 Nov 1995, CASS 183-88.

⁹⁷¹ See presentation by the Permanent Secretary of Namibian Ministry of Lands and Resettlement, Mr. FK Tsheehama (n 943 above).

⁹⁷² Hinz (n 933 above) 76.

⁹⁷³ Hinz (n 933 above) 76.

⁹⁷⁴ See Communal Land Reform Act No 5 of 2002.

subject to the approval of the Land Board.⁹⁷⁵ This qualification is merely for administrative purposes since ‘ratification can only be refused under circumstances described in the Act, which are basically of a technical nature’.⁹⁷⁶

An important tenure reform with regard to communal lands is the possibility envisaged by the Communal Land Reform Act of conversion from communal lands to leasehold.⁹⁷⁷ Such conversion can only be done by the Minister of Lands upon consultation and permission by the traditional authorities.⁹⁷⁸ Conversion of certain communal lands to leasehold would accord the leaseholders tenure security and the additional advantages of individual title, such as access to finances from financial institutions. Such conversion would be useful for indigenous peoples in Namibia who may opt to convert their communal lands into leaseholds and thereby derive the benefits attendant on such tenure. Indeed, in the absence of restoration of their ancestral lands through restitution of land rights, some of the communal lands indigenous peoples currently hold may not be viable for the traditional livelihoods. They may therefore elect to convert them into leaseholds in order to access private funding to develop the lands, which may not be available in the case of the less secure communal land rights. This is particularly so given the restrictions placed by the Communal Land Reform Act with regard to governance and management of the communal land resource.⁹⁷⁹

⁹⁷⁵ Sec 20 & 24 as above.

⁹⁷⁶ Hinz (n 933 above) 76; sec 24 as above.

⁹⁷⁷ See sec 30 of the Communal Land Reform Act.

⁹⁷⁸ As above.

⁹⁷⁹ See sec 17 Communal Land Reform Act, 5 (2002); see Hinz (n 933 above) 75.

An important advantage of the communal lands to indigenous peoples is that they access, control and utilize their traditional land in accordance with their African customary law. Namibia's Constitution recognises and gives legitimacy to traditional authorities that govern on the basis of African customary law and traditions. The authorities' advise the President on control and utilisation of communal lands.⁹⁸⁰ Traditional authorities in Namibia also exercise various powers, including allocation of access to and control of communal lands in accordance with the community customary laws and traditions.⁹⁸¹ Accordingly, traditional leaders who would also include those from indigenous communities, have some influence on issues related to their peoples' ancestral lands. However, during the colonial and apartheid regimes, the San and Nama indigenous peoples did not have State-recognised traditional authorities.⁹⁸² Indeed, 'while all other communities enjoyed some type of recognition in the apartheid-bound constitution of so-called separate development a representative authority was never established in Bushmanland, the home of some San groups and earmarked for the whole Namibian San population by the apartheid administration'.⁹⁸³ The San traditional authorities and form of governance were therefore not recognized, which meant that their issues, including land concerns, were neglected and largely unaddressed. It is therefore not surprising that the colonial regime continues to alienate the San and Nama lands as if they were owned by no one.⁹⁸⁴

⁹⁸⁰ See sec 102 (5) as above.

⁹⁸¹ Hinz (n 933 above) 76.

⁹⁸² As above 70.

⁹⁸³ As above (footnotes omitted).

⁹⁸⁴ See Haring (n 910 above) 71-81.

The establishment of a Council of Traditional Leaders in 1997 through an Act of Parliament⁹⁸⁵ addressed the issue of official recognition of the traditional authorities of some of the indigenous peoples, particularly the San groups. Pursuant to this Act, three San communities have been accorded traditional authority status.⁹⁸⁶ The Council of Traditional Leaders in Namibia comprises two representatives of each of the 42 officially recognised traditional authorities pursuant to the Traditional Authorities Act of 2000,⁹⁸⁷ which amended an earlier similarly named Act.⁹⁸⁸ However, some of the indigenous groups, including some San groups, such as the Khwe, continue to face reluctance by the state to recognise their traditional authorities.⁹⁸⁹ Consequently, such indigenous communities encounter numerous hurdles in the administration of their communal land rights.⁹⁹⁰

Of note is a recent decision by the Council of Traditional Leaders to require traditional communities in Namibia to restate their African customary laws.⁹⁹¹ According to Manfred Hintz, who is a member of the team that assists traditional communities in Namibia to restate their laws, the restatement of the customary laws is not an attempt to codify the laws but rather to put in writing what a community considers important for its future generations in accordance with

⁹⁸⁵ Council of Traditional Leaders Act, 13 of 1997.

⁹⁸⁶ Hintz (n 933 above) 74.

⁹⁸⁷ See Traditional Authorities Act, 25 of 2000.

⁹⁸⁸ See Traditional Authorities Act, 17 of 1995.

⁹⁸⁹ See Daniels (n 200 above) 50.

⁹⁹⁰ As above, 56-58; see also Hintz (n 933 above) 81.

⁹⁹¹ See Hintz (n 933 above) 85.

constitutional requirements, and for persons who deal with these laws outside the community.⁹⁹²

The restatement project, which is being carried out in collaboration with the University of Namibia, Faculty of Law, is expected to document and publicise these laws for future reference.⁹⁹³ The importance of the African customary restatement project can not be overemphasized given the historical marginalisation and exclusion of these laws from the mainstream legal framework. It is expected that by documenting these laws, disputes will be resolved expeditiously in line with the Bill of Rights, especially in view of the establishment of Community Courts.⁹⁹⁴ The establishment of these courts is bound to have positive ramifications for indigenous peoples relative to their indigenous land rights since the courts will adjudicate matters on the basis of African customary law.⁹⁹⁵

Beyond the legal reforms that are aimed at improving land access and tenure security in Namibia, it is significant that international law standards and norms are also applicable. According to article 144 of Namibia's Constitution, 'unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'. Namibia is party to some of the international instruments that accord indigenous peoples protection of their rights, including their land rights. These instruments include: the African Charter on Human and

⁹⁹² Hinz (n 933 above) 85.

⁹⁹³ As above.

⁹⁹⁴ See Community Courts Act No 10 of 2003.

⁹⁹⁵ See sec 19 as above.

Peoples' Rights,⁹⁹⁶ the International Covenant on Civil and Political Rights,⁹⁹⁷ the Optional Protocol to the International Covenant on Civil and Political Rights,⁹⁹⁸ the Convention on the Elimination of Racial Discrimination,⁹⁹⁹ and the UN Convention on Biological Diversity.¹⁰⁰⁰ These instruments contain relevant provisions that protect and provide a forum for indigenous peoples to vindicate their fundamental human rights at the international level.

However, despite the ratification of these instruments and the constitutional provision that such laws form part of Namibia's legal order, they still require domestic incorporation, which is yet to be done.¹⁰⁰¹ Even without the domestication of these instruments, Namibian courts of law are increasingly relying on the jurisprudence emerging from international treaty monitoring bodies and foreign case law.¹⁰⁰² It is therefore expected that indigenous peoples' rights will find legal recourse in courts of law through an interpretation of the domestic legal framework and applicable international standards, as is the case in South Africa, as exemplified by the *Richtersveld* case.¹⁰⁰³

⁹⁹⁶ Ratified by Namibia on 30/08/1992.

⁹⁹⁷ Ratified by Namibia on 28/11/1994.

⁹⁹⁸ Ratified by Namibia on 28/11/1994.

⁹⁹⁹ Ratified by Namibia on 11 November 1982.

¹⁰⁰⁰ Ratified by Namibia on 16 May 1997.

¹⁰⁰¹ See Heyns (n 736 above) 1358.

¹⁰⁰² As above 1357.

¹⁰⁰³ See *Alexkor v Richtersveld* (n 72 above).

5.4 Chapter conclusion

The South Africa and Namibia case studies illustrate that, despite the numerous odds faced by indigenous peoples with regard to the recognition and protection of their land and resource rights, some legal avenues are available to vindicate their land rights. While some are quite comprehensive, as is the case in South Africa, they are not purposely enacted with indigenous peoples in mind, but are meant to redress past and historical discriminatory laws and practices for the black majority population. That said, these reforms invariably apply with equal force to benefit indigenous peoples. However, political considerations seem to play a huge role in the measures that are adopted by a state to redress past racial injustices. While the two countries' racial discrimination histories are very similar, South Africa took a rather more progressive and radical stance, perhaps based on the fact that its black majority was almost completely dispossessed of its lands. Indeed, whites in South Africa under apartheid occupied about 90% of arable land as compared to about 43% in Namibia.¹⁰⁰⁴ In Namibia, the ruling elite and its political support base seems content with the land reforms adopted, save for the pace of those reforms. Indigenous peoples in Namibia on the other hand remain dispossessed and aggrieved.

The land reforms that have been adopted in both countries are reflective of the political environments present in those countries and take into account negotiated compromises. Similarly, a legal framework that protects and recognises indigenous peoples land rights in Kenya would have to be tailored to suit and take into consideration the current and past injustices that have shaped the current legal framework. The recent ethnic clashes in Kenya that are traced to

¹⁰⁰⁴ See Hall & Ntsebeza (n 785 above) 3; De Villiers (n 771 above) 33.

historical land injustices have intensified demands for comprehensive resolution of the underlying root causes of the violence. It is therefore an opportune moment to harness the political momentum to take into account and balance the interests of indigenous peoples as well as those of the majority communities. The next chapter suggests a legal framework for Kenya that would take these issues into account drawing on the lessons that emerged from a review of the situation in Namibia and South Africa.

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.¹⁰⁰⁵ 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.¹⁰⁰⁶

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

¹⁰⁰⁶ 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.¹⁰⁰⁷ The President still retains excessive powers to hire and fire members of Cabinet, despite the adoption of the National Accord and Reconciliation Act in 2008.¹⁰⁰⁸ 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.¹⁰⁰⁹ 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’.¹⁰¹⁰ It would also be useful for

¹⁰⁰⁷ As above.

¹⁰⁰⁸ See the National Accord and Reconciliation Act No 4 of 2008.

¹⁰⁰⁹ See Kagwanja (n 8 above).

¹⁰¹⁰ 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.¹⁰¹¹ 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,¹⁰¹² 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'.¹⁰¹³

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

¹⁰¹¹ 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 2nd 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).

¹⁰¹² 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'.

¹⁰¹³ See Currie and de Waal (n 454 above) 290.

dignity and equality'.¹⁰¹⁴ 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.¹⁰¹⁵ According to Bennett, socio-economic rights such as the 'right to housing, food, employment, health are directly related to land'.¹⁰¹⁶ 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.¹⁰¹⁷ 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 Rights¹⁰¹⁸ and the African Charter on Human and

¹⁰¹⁴ 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.

¹⁰¹⁵ See Bennett (n 806 above) 151.

¹⁰¹⁶ As above.

¹⁰¹⁷ Kenya APRM Report (n 2 above) 14, 22, 48.

¹⁰¹⁸ Ratified by Kenya on 1 May 1972.

Peoples' Rights,¹⁰¹⁹ 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.¹⁰²⁰ 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'.¹⁰²¹ 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'.¹⁰²² 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.

¹⁰¹⁹ Ratified by Kenya on 23 January 1992.

¹⁰²⁰ 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).

¹⁰²¹ Kibwana & Ambani (n 410 above) 55.

¹⁰²² 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.¹⁰²³ 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 power¹⁰²⁴ 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'.¹⁰²⁵

In South Africa and Namibia, the Constitution is the basis for all land reform.¹⁰²⁶ 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

¹⁰²³ See the Constitution of Kenya Review Act Cap 3A of 2000 of the Laws of Kenya.

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

¹⁰²⁵ See para 34 Kenya Draft Land Policy.

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

follow.¹⁰²⁷ 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.¹⁰²⁸ 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.¹⁰²⁹ Private land owners lamented and protested against that decision leading to President Mwai Kibaki stating that the directive would not be carried out.¹⁰³⁰ 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.

¹⁰²⁷ See sec 25 of South African Constitution.

¹⁰²⁸ 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.

¹⁰²⁹ 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> accessed on 5 June 2008.

¹⁰³⁰ 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.¹⁰³¹ Through the instrumentality of the law under colonial rule African peoples were disinherited of their land.¹⁰³² After independence, colonial laws governing land tenure were all virtually retained.¹⁰³³ 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.¹⁰³⁴ Consequently, a significant number of indigenous peoples remain disinherited from their traditional lands.¹⁰³⁵ 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.¹⁰³⁶

¹⁰³¹ 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.

¹⁰³² Ghai & McAuslan (n 18 above) 28.

¹⁰³³ See Okoth-Ogendero (n 1031 above) 124.

¹⁰³⁴ 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.

¹⁰³⁵ As above.

¹⁰³⁶ 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 1895.¹⁰³⁷ 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.¹⁰³⁸ By 1915, through the promulgation of orders in council and ordinances, the British had completely dispossessed Africans of their land in Kenya.¹⁰³⁹ As already stated, the basis of this dispossession was the erroneous assumption that land held by Africans was *terra nullius*.¹⁰⁴⁰ On the basis of this doctrine, which has since been rejected,¹⁰⁴¹ 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.¹⁰⁴²

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

¹⁰³⁷ See Ghai & McAuslan (n 18 above) 3.

¹⁰³⁸ Kibwana (n 114 above) 234.

¹⁰³⁹ Mweseli (n 229 above) 9.

¹⁰⁴⁰ 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.

¹⁰⁴¹ See *Western Sahara* Advisory Opinion (n 170 above).

¹⁰⁴² 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’.¹⁰⁴³ 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’.¹⁰⁴⁴ 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 1911.¹⁰⁴⁵ As discussed in chapter three, these agreements had envisaged 99-year leases. Although the Maasai continue to maintain that they were fraudulent,¹⁰⁴⁶ in 2004, they launched

¹⁰⁴³ Kenya Land Alliance (n 1034 above).

¹⁰⁴⁴ See the Kenya Draft National Land Policy para 25.

¹⁰⁴⁵ 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.

¹⁰⁴⁶ 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.¹⁰⁴⁷ 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.¹⁰⁴⁸ 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’.¹⁰⁴⁹ 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.¹⁰⁵⁰ Like the 1913 verdict of the *Ole Njogo case*,¹⁰⁵¹ where colonial political expedience trumped the legality of the treaties,¹⁰⁵² the position of the Kenyan Government appears to be more political than legal.¹⁰⁵³ 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.¹⁰⁵⁴

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

¹⁰⁴⁷ Hughes (n 241 above) xiv.

¹⁰⁴⁸ 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.

¹⁰⁴⁹ 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.

¹⁰⁵⁰ As above.

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

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

¹⁰⁵³ As above; Hughes (n 241 above) 178-182.

¹⁰⁵⁴ 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.¹⁰⁵⁵ The greatest hurdle the Maasai would face in a legal challenge demanding restitution of their ancestral lands in Kenya is the constitutional property clause.¹⁰⁵⁶ 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.¹⁰⁵⁷ 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.¹⁰⁵⁸ 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.¹⁰⁵⁹ ‘The Ogiek held their land communally with individual members and families exercising rights of use and

¹⁰⁵⁵ Hughes (n 241 above) xiv.

¹⁰⁵⁶ Sec 75 Constitution of Kenya

¹⁰⁵⁷ 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).

¹⁰⁵⁸ See n 13 above.

¹⁰⁵⁹ Carter Report (n 252 above) 259, para 977-985.

occupancy'.¹⁰⁶⁰ 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.¹⁰⁶¹

The case of *Francis Kemai and others v the Attorney General and others*,¹⁰⁶² 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.¹⁰⁶³ Although the community lost the case in the High Court, an appeal is still pending¹⁰⁶⁴ in which the community maintains it has rights over the Mau forest by virtue of Ogiek customary law.¹⁰⁶⁵ Some of the members of the community continue to occupy parts of the forest without legal authority.¹⁰⁶⁶ 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'.¹⁰⁶⁷ 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

¹⁰⁶⁰ See Kimaiyo (n 1057 above) 7.

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

¹⁰⁶² See *Ogiek* case (n 3 above).

¹⁰⁶³ As above.

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

¹⁰⁶⁵ See Kimaiyo (n 120 above) 3.

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

¹⁰⁶⁷ 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.¹⁰⁶⁸ 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.¹⁰⁶⁹

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.¹⁰⁷⁰ Indigenous peoples in other jurisdictions rely on their domestic legal framework and international norms and standards to assert their fundamental human rights.¹⁰⁷¹ 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*,¹⁰⁷² 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

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

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

¹⁰⁷⁰ n 72 above.

¹⁰⁷¹ As above.

¹⁰⁷² *Alexkor v Richtersveld Community* (n 72 above).

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

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'.¹⁰⁷⁴ 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.¹⁰⁷⁵ 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

¹⁰⁷³ *Alexkor v Richtersveld Community* (n 72 above).

¹⁰⁷⁴ Art 21(2) African Charter on Human and Peoples' Rights.

¹⁰⁷⁵ 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.¹⁰⁷⁶

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.¹⁰⁷⁷ 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

¹⁰⁷⁶ See Cousins (n 743 above) 281–315; 282.

¹⁰⁷⁷ 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.¹⁰⁷⁸

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.¹⁰⁷⁹ 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’.¹⁰⁸⁰ 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’.¹⁰⁸¹ 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.¹⁰⁸² 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

¹⁰⁷⁸ See Ghai & McAuslan (n 18 above) 3.

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

¹⁰⁸⁰ As above.

¹⁰⁸¹ As above.

¹⁰⁸² 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.¹⁰⁸³ It rightly proposes that the Government should ‘review all previous acquisitions of community land to facilitate restitution for the affected communities’.¹⁰⁸⁴

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.¹⁰⁸⁵ 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.¹⁰⁸⁶ 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.¹⁰⁸⁷

¹⁰⁸³ Kenya Draft National Land Policy para 53.

¹⁰⁸⁴ Para 68 (c) as above.

¹⁰⁸⁵ See Gutto (n 534 above) 246.

¹⁰⁸⁶ As above.

¹⁰⁸⁷ 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.¹⁰⁸⁸ 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.¹⁰⁸⁹ 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.¹⁰⁹⁰ 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.

¹⁰⁸⁸ See HRW (n 6 above) 12-14.

¹⁰⁸⁹ 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.

¹⁰⁹⁰ 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,¹⁰⁹¹ 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’.¹⁰⁹² 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.¹⁰⁹³ 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

¹⁰⁹¹ Sec 75(1) (a) Constitution of Kenya.

¹⁰⁹² As above.

¹⁰⁹³ 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'.¹⁰⁹⁴ 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.¹⁰⁹⁵ On the basis of this provision and the additional provisions that legitimize adoption of laws to redress the effect of apartheid,¹⁰⁹⁶ various laws have been enacted to provide for land redistribution.¹⁰⁹⁷

As discussed in chapter five, South Africa and Namibia's land redistribution programmes have thus far largely been market-driven.¹⁰⁹⁸ 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.¹⁰⁹⁹ 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.

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

¹⁰⁹⁵ As above sec 16 (2) Constitution of Namibia.

¹⁰⁹⁶ 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.'

¹⁰⁹⁷ See for example the Agriculture Land Reform Act 6 of 1995.

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

¹⁰⁹⁹ 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.¹¹⁰⁰ 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.¹¹⁰¹ 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.¹¹⁰² According to Wanjala, freehold tenure, where individuals own rights in land in perpetuity, should be replaced with leaseholds,

¹¹⁰⁰ See CERD General Recommendation 23 (n 71 above) para 4 (d).

¹¹⁰¹ 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.

¹¹⁰² 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.¹¹⁰³ The State would then be able to redistribute and allocate land on the basis of need.¹¹⁰⁴ 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.¹¹⁰⁵

¹¹⁰³ See Wanjala (n 21 above) 40.

¹¹⁰⁴ As above.

¹¹⁰⁵ 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.¹¹⁰⁶ This is notwithstanding numerous attempts to suppress and subvert African customary law through the elevation of written laws.¹¹⁰⁷ However, due to the imposition of

¹¹⁰⁶ 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).

¹¹⁰⁷ 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.¹¹⁰⁸ This is due to the subjugation of customary laws to written laws and its limited application subject to repugnancy clauses.¹¹⁰⁹ 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.’¹¹¹⁰ 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’.¹¹¹¹

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.¹¹¹² To indigenous peoples, customary land tenure provides tenure security to members of the group.¹¹¹³ 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

¹¹⁰⁸ See Okoth-Ogendo (n 18 above) 63-65.

¹¹⁰⁹ Sec 115(2) Constitution of Kenya.

¹¹¹⁰ See Wanjala (n 26 above) 173.

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

¹¹¹² See Wanjala (n 26 above, 173).

¹¹¹³ 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’.¹¹¹⁴ 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.¹¹¹⁵

The exclusion of the application of African customary law on the basis of repugnancy clauses and inconsistency with any written law¹¹¹⁶ 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.¹¹¹⁷

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

¹¹¹⁵ Sec 3(2) The Kenyan Judicature Act.

¹¹¹⁶ See sec 115(2) Constitution of Kenya.

¹¹¹⁷ 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.¹¹¹⁸ 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.¹¹¹⁹ 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.¹¹²⁰ 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'.¹¹²¹

The Kenyan Constitution protects against discrimination on the basis of tribe.¹¹²² 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

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

¹¹¹⁹ See CERD General Recommendation 23 (n 71 above) para 5.

¹¹²⁰ As above.

¹¹²¹ As above.

¹¹²² 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.¹¹²³ 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.¹¹²⁴ Indeed, the South African Constitutional Court has held that the customary law rule of primogeniture is unjustifiable for unfair discrimination against women.¹¹²⁵ An indigenous woman who as a result of such

¹¹²³ See sec 82(3) of the Constitution of Kenya.

¹¹²⁴ 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.

¹¹²⁵ 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.¹¹²⁶

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.¹¹²⁷ 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.¹¹²⁸ Like that of Kenya, Namibia's Constitution, subjugates African customary to all other written laws,¹¹²⁹ but importantly reserves the administration of all

¹¹²⁶ As above.

¹¹²⁷ 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.

¹¹²⁸ See sec 211(3) Constitution of South Africa.

¹¹²⁹ See art 66 of the Constitution of Namibia.

communal land rights in Namibia to African customary law.¹¹³⁰ Namibia's Constitution provides for traditional authorities to advise the President on the control and utilisation of communal lands.¹¹³¹ 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.¹¹³² 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.¹¹³³ 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.¹¹³⁴ First, the rights of access and use to specific ancestral lands are reserved to related members of that particular

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

¹¹³¹ See sec 102(5) Constitution of Namibia.

¹¹³² See Hinz (n 933 above) 85.

¹¹³³ See sec 115(2) Constitution of Kenya.

¹¹³⁴ 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.¹¹³⁵ The relationship can either be through blood, marriage or such other special connection as determined by the community.¹¹³⁶ Second, the community leadership, which normally comprises of elders, is vested with the right to land resources.¹¹³⁷ They govern and determine the community and individual needs in order to ensure sustainable management of the resources.¹¹³⁸

There is evidence of the existence of clear customary laws governing various relations among the different communities in Kenya.¹¹³⁹ 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.’¹¹⁴⁰ Indeed, pre-colonial African societies had elaborate rules and laws that governed almost every aspect of their communities.¹¹⁴¹ 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.¹¹⁴² He states:

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

¹¹³⁶ 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).

¹¹³⁷ As above.

¹¹³⁸ As above.

¹¹³⁹ Juma (n 5 above) 470.

¹¹⁴⁰ As above.

¹¹⁴¹ See Elias (n 1134 above) 2.

¹¹⁴² 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.¹¹⁴³

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.¹¹⁴⁴

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.¹¹⁴⁵ This requirement applies

¹¹⁴³ Elias (n 1134 above) 5.

¹¹⁴⁴ See Ogot (n 13 above) ix; see Elias (n 1134 above) 2.

¹¹⁴⁵ 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.'¹¹⁴⁶ 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.¹¹⁴⁷ 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,¹¹⁴⁸ such inheritance and marriage, they have not done so with regard to land disputes involving indigenous peoples.¹¹⁴⁹ 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.¹¹⁵⁰ 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

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

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

¹¹⁴⁸ 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.

¹¹⁴⁹ 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.

¹¹⁵⁰ See *Ogiek* case (n 3 above) 15.

experts.¹¹⁵¹ As the court acknowledges, such documentary evidence and verifiable expertise is generally lacking in Kenya.¹¹⁵² Therefore, proof of customary law is reliant on witnesses, whose interpretations may vary.¹¹⁵³ 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.¹¹⁵⁴ 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 restate¹¹⁵⁵ and

¹¹⁵¹ 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’.

¹¹⁵² As above.

¹¹⁵³ 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.

¹¹⁵⁴ See Elias (n 1134 above) 2.

¹¹⁵⁵ 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.¹¹⁵⁶ 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.¹¹⁵⁷ A code inevitably reduces the various customary laws to legally expressed principles that may not reflect the spirit and intention of the custom.¹¹⁵⁸ 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.¹¹⁵⁹

The restatement of African customary laws should be the sole initiative of indigenous peoples and should be done in their own language.¹¹⁶⁰ That way the customs, traditions and rules would not be altered by legal principles as would be the case in the case of codification.¹¹⁶¹ 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

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.

¹¹⁵⁶ See Hinz (n 933 above) 85.

¹¹⁵⁷ 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.

¹¹⁵⁸ As above.

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

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

¹¹⁶¹ 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.¹¹⁶² However, despite these laws being unwritten, they continue to govern indigenous peoples' relationship with their land.¹¹⁶³ 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.¹¹⁶⁴

¹¹⁶² See Elias (n 1134 above) 7.

¹¹⁶³ Cotula (n 273 above) 6.

¹¹⁶⁴ 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.¹¹⁶⁵ 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.¹¹⁶⁶ 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.¹¹⁶⁷ Indeed, an attempt to codify African customary law in KwaZulu-Natal was ‘derided for distortion of customary law’.¹¹⁶⁸ 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.¹¹⁶⁹ Any changes that occur in any culture or

¹¹⁶⁵ Juma (n 5 above) 476.

¹¹⁶⁶ 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.

¹¹⁶⁷ As above.

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

¹¹⁶⁹ 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.¹¹⁷⁰ 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.¹¹⁷¹ Where the custom has changed, courts of law are not bound to follow the precedents and will reflect the new custom.¹¹⁷² 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.¹¹⁷³ 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.¹¹⁷⁴ Such lands are held in trust by the local

¹¹⁷⁰ 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.

¹¹⁷¹ See Bennett (n 871 above) 138-9.

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

¹¹⁷³ See Fitzpatrick (n 1170 above) 455.

¹¹⁷⁴ See sec 115(2) Constitution of Kenya.

authorities where specific communities ordinarily reside.¹¹⁷⁵ Among the Maasai, for example, clear customary rules on land control, access and management exist.¹¹⁷⁶ 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.¹¹⁷⁷

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.¹¹⁷⁸ It is worth noting that all Kenyans have a right to reside in any part of the country, including areas inhabited by indigenous peoples.¹¹⁷⁹ 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’.¹¹⁸⁰ 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.¹¹⁸¹ However, since customary laws are subject to written laws and

¹¹⁷⁵ Sec 115 Constitution of Kenya.

¹¹⁷⁶ See *Lenaola et al* (n 169 above) 237.

¹¹⁷⁷ As above.

¹¹⁷⁸ As above.

¹¹⁷⁹ 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.

¹¹⁸⁰ Section 81 (3) d Constitution of Kenya.

¹¹⁸¹ 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.¹¹⁸² 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.

¹¹⁸² 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.¹¹⁸³ 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.¹¹⁸⁴ 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'.¹¹⁸⁵ 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.¹¹⁸⁶

It is on this basis that a review of the Trust Land Act is called for.¹¹⁸⁷ 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.¹¹⁸⁸ According to Daniel Fitzpatrick, 'the systematic imposition of individualized statutory titles in areas subject to

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

¹¹⁸⁴ As above.

¹¹⁸⁵ As above.

¹¹⁸⁶ See Ndung'u (n 1 above) 147.

¹¹⁸⁷ See Lenaola *et al* (n 169 above) 231.

¹¹⁸⁸ Fitzpatrick (n 1170 above) 465.

customary tenure has generally failed to increase certainty and reduce conflict'.¹¹⁸⁹ 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.¹¹⁹⁰

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.¹¹⁹¹ The indigenous peoples' land rights would in such circumstances be properly recorded and if need be demarcated in the name of the community.¹¹⁹² That would also require state and legal recognition of traditional leadership and structures of indigenous communities.¹¹⁹³ 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

¹¹⁸⁹ Fitzpatrick (n 1170) 465.

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

¹¹⁹¹ 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.

¹¹⁹² See Fitzpatrick (n 1170 above) 465-466.

¹¹⁹³ As above 458.

rights.¹¹⁹⁴ 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.¹¹⁹⁵

That said, it is important to provide for constitutional and legislative recognition of traditional leadership to govern issues relevant to indigenous peoples.¹¹⁹⁶ 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'.¹¹⁹⁷ The policy further proposes that the government 'develop procedures to govern community land transactions using participatory processes'.¹¹⁹⁸ Should these recommendations be implemented, indigenous peoples will begin taking charge and control of their land rights.

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

¹¹⁹⁵ See Cousins (n 743 above) 308-309.

¹¹⁹⁶ 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).

¹¹⁹⁷ See paras 68(e) & (f) Kenya Draft National Land Policy.

¹¹⁹⁸ 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.

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