

Reflections on Kenya's National Assembly and Senate Community Land Bills

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1. Background

In Kenya, the question of land has been on the national agenda since the colonial era. This is because land, as a means of production and livelihood, is at the center of national development and growth. It is notable that the settlement patterns in the country largely follow land use patterns. Further, competition for land as a resource is a key driving factor behind the frequent conflicts and skirmishes in the pastoralist communities. Similarly, antagonism for land resources is, likewise, intense in the arable parts of the country, the only difference being that the inhabitants of these areas have chosen the courts as the preferred forum for disputation.

It is recognized that the land tenure system that was created in Kenya, starting in the 1950s, overlooked those communities that shared land resources and whose culture and level of development did not encourage or support individual land ownership. It is in this context that the National Land Policy, 2009, (NLP) and the constitution of Kenya, 2010 have sought to make adequate provisions for the recognition, protection and registration of community rights over land and its resources. These efforts have been undertaken against the backdrop of a realization that previous identification and individualization of land rights, against community rights, undermine communal protection and management of resources found within the common lands.

This paper highlights the background to the land question in Kenya and discusses the current drive and debate regarding the enactment of a community land law in the country.

2. Defining Community Land

In common literature and legislation, community land is described as land that is possessed, occupied and used by communities according to the customary law of the society in which it subsists. The applicable customary law defines the rights, rules and responsibilities governing the ownership and management of the land. Such land includes farms, forests, rangelands and wetlands inhabited by the community.

3. Primacy of community land in Kenya

It is estimated that 66% of Kenya's land mass falls under the constitutional classification of community land.¹ It is therefore evident that a majority of Kenyans live and obtain their sustenance within community land. For this and other reasons, it is critical that the law defines and protects the rights of persons occupying community land. Unfortunately, six years after the promulgation of the constitution of Kenya 2010, the National Assembly and the Senate are still wiggling with the politics and procedures of enacting a Community Land Act and have failed to provide the leadership necessary to sanction this legislation. This state of parliamentary capture is informed, not by the difficulties of legislative enactment but, by the politics which attends community land.

¹ Kamere Mbote P, Land tenure, land use and sustainability in Kenya: Towards innovative use of property rights in wildlife management IELRC WORKING PAPER 2005 – 4.

In Kenya, despite the prevalence of communal land, the land and its resources are under a constant threat of annihilation by third parties because it is not adequately recognized and protected under the law. It is this lacuna that the constitution of Kenya 2010, seeks to address through the promulgation of the envisaged Community Land Act. It is intended that the Community Land Act shall provide security of tenure for community land and its resources.

4. Legal and constitutional context of community land

In Kenya, the ownership, usage and management of land is a controversial and sensitive subject which is always at the center of our politics and governance. The key reason for this is that Kenya has large tracts of land considered as community land but which is unregistered. This land is always an attraction for commercial land speculators and is a constant recipe for confusion and conflict.

The constitution of Kenya 2010, recognizes that the politics of land is a constitutional issue and, in Chapter V, devotes a whole Chapter to establishing a framework which is directed at administration of land. By way of definition, the constitution designates three land regimes: public, community and private land.²

Community land is vested in communities identified on the basis of ethnicity, culture or similar interest.³ The constitution decrees that any unregistered community land is to be held by the county government on behalf of the community for which it is held.⁴ This is to say that county handhold of community land is a transitional position which ceases once such land is vested in the community by way of registration.

The recognition of community land as a separate and distinct category of land under the constitution is a welcome gesture directed at fulfilling the need to secure land tenure for a majority of Kenyans who have hitherto been left out of individual titling systems. It is to be remembered that previous government policies placed emphasis on private tenure and issuance of individual title(s) as the only means of achieving security over land. This unhappy situation was altered by the National Land Policy, 2009 and the transformation entrenched in the constitution of Kenya, 2010. Under the Article 61 (2) of the constitution, communities may now hold land as legal pluralistic entities.

Three statutes are key in the registration and administration of community land: the Land Registration Act, 2012, the Land Act, 2012 and the National Land Commission Act. To these, add the yet to be enacted Community Land Act.

The Land Act, 2012, provides for the conversion of community land to public land or private and vice versa.⁵ Significantly, the Land Act is categorical that community land shall be managed in accordance with community land law.⁶ The Land Registration Act lays down a framework for the registration of

² Article 61(2).

³ Article 63(1).

⁴ Article 63(3).

⁵ Section 9.

⁶ Section 37.

community land⁷ whilst the National Land Commission Act, 2012 sets down the framework for the management and administration of unregistered community land.⁸ The value and effectiveness of these statutes, in the recognition and protection of community land, should be amplified and expanded with the immediate enactment of an appropriate Community Land Act.

It is our view that an effective Community Land Act should aim to achieve the following objectives:

- i. Recognize customary land and resource ownership.
- ii. Document and register the land.
- iii. Yield the control and management of rights over such land to communities.

5. Why is land tenure security important?

The management and use of land is defined by the applicable land resource tenure systems.⁹ This guarantees rights over land and ensures their protection. Security of tenure ensures that the owner(s) of the land shall not be arbitrarily deprived of their rights and resources.¹⁰

The absence or inadequate availability of security of tenure often leads to conflict over the land and even environmental degradation of it in circumstances where competing users fight over the use and management of this resource. On the other hand, a guarantee on security of tenure leads to improved governance of tenure rights, development of the land and protection of the biodiversity on the land(s). For community land in which there is found the incidence of wildlife, security of tenure may encourage long term investment in protection and conservation measures. In specific terms, an investor seeking involvement in the conservation of wildlife will be able to ascertain who to negotiate with in order to obtain the necessary consent and approval.

6. Developments in safeguarding community land

i. The National Land Policy, 2009.

The National Land Policy (2009), is premised on the objective of 'guiding the country towards efficient, sustainable and equitable use of land for prosperity and posterity.' The policy, formulated in the years 2007 to 2009, has as its prime target the consideration and creation of coherence in the land sector and to provide an answer to 'the land question' in Kenya. The land question manifests itself in several ways: the fragmentation of arable land; the breakdown in land administration systems and processes leading to illegal alienation of land; disparities in land ownership leading to 'poverty amidst plenty'; inequality, and; other aspects of poor land resource management.

⁷ Section 8.

⁸ Section 5(2)

⁹ Land tenure rights define who can own, use and manage land areas and resources, for how long and under what conditions. Land tenure rights can include user rights as well as ownership rights.

¹⁰ Land tenure security guarantees the existence of your land rights, provides certainty that others will recognize your rights and ensures protection through legal remedies when rights are violated.

The NLP gives a synoptic view of the challenges of land ownership in Kenya by setting out the historical perspective and the resultant legal and social problems. The issues, as set out in the NLP, manifest in the following terms:

- a. Population growth in areas without systemic land administration and a lack of community participation.
- b. Urbanization without sound planning policies.
- c. Multiplicity of legal regimes in management of land.
- d. Disparities in land ownership between genders and trans-generational discrimination.
- e. Lack of capacity to gain access to clearly defined enforceable land rights.
- f. Inadequate environmental management and conflicts on land.

These concerns, acknowledged and identified in the NLP, are restated in paragraph 1.5.1 as Land Policy Principles. The NLP hopes to achieve equity in access to land, effective regulation of land matters, sustainable land use and the creation of a market for land.

Paragraph 66 of the NLP requires the government to;

- a. Document and map existing forms of communal tenure, whether customary or non-customary, in consultation with the affected groups, and incorporate them into broad principles that will facilitate the orderly evolution of community land law;
- b. Repeal the Trust Land Act (Cap 288);
- c. Define, in the Land Act, the term “community” and vest ultimate ownership of community land in the community
- d. Lay out, in the Land Act, a clear framework and procedures for:
 - (i) The recognition, protection and registration of community rights to land and land based resources taking into account multiple interests of all land users, including women;
 - (ii) Restitution of illegally acquired parts of trust land to the affected communities;
 - (iii) Governing the grant to, and regulation of, use rights to members;
 - (iv) Reversion of former Government land along the Coastal region to community land after planning and alienation of land for public usage;
 - (v) Governing community land transactions using participatory processes;
 - (vi) Accountability of groups, individuals and bodies entrusted with the management of community land, and community participation in the allocation, development and disposal of community land
 - (vii) Incorporating mutually reinforcing customary mechanisms for land management and dispute resolution;
 - (viii) Members opting out of the communal arrangements and buying out of non-members;
 - (ix) Reviewing and harmonizing the Land (Group Representatives) Act (Cap 287) with the proposed Land Act;
 - (x) Setting apart of community land for public use; and
 - (xi) Vesting fish landing sites to appropriate local institutions.
 - (xii) Invest in capacity building for communal land governance institutions and facilitate their operations; and
 - (xiii) Facilitate flexible and negotiated cross-boundary access among communities.

It is noteworthy that this prescription in the NLP runs through the body of the bill before the Senate. In adopting and realizing these objects, the bill before the Senate reflects the following aspects of the NLP. It embraces the:

- a. Interpretation and import of article 60 of the constitution in common with paragraph 1.4 of the policy.
- b. National Principles of the NLP in paragraph 1.5.1 and therefore makes provision for equitable access to land, secure land rights in communal settings, a system for the management of land, and for sustainable use of community land.

ii. The constitution

Article 60 of the Constitution of Kenya provides the constitutional imprimatur to the NLP. It restates in elaborate terms the principles of the policy and makes provision for the development of national land policy and its periodic revision and legislation. Article 63 (2) of the constitution defines community land which shall vest in communities identified on the basis of ethnicity, culture or similar interest.¹¹ Article 63(2) provides that:

Community land consists of—

- (a) land lawfully registered in the name of group representatives under the provisions of any law;
- (b) land lawfully transferred to a specific community by any process of law;
- (c) any other land declared to be community land by an Act of Parliament; and (d) land that is—
 - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
 - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
 - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).

Part 4 and 5 of Article 63 provides that community land be administered by legislation to be developed by parliament. The Community land bills before parliament aim to provide for land ownership in communities that have identifiable common interest in land use. It is against this background that the National Assembly and the Senate, constituting the national parliament, have prepared Bills to regulate community land now pending before the two houses.

Though the constitution¹² anticipates a unified process, the promulgation of legislation to make provision for the management of community land is within the legal remits of both houses. The issues and objectives are similar, rendering the parallel process wasteful of legislative time and resources. This analysis takes a look at the two bills before parliament and interrogates their contents against the provisions of the constitution and other relevant legislation in force in the land sector.

Notwithstanding the ambiguity in the parallel parliamentary processes, it should be remembered that the recognition of community land as a separate and distinct category of land under the constitution is a

¹¹Article 63(1).

¹²Article 63(5)

welcome gesture directed at fulfilling the need to secure land tenure for a majority of Kenyans who have hitherto been left out of individual titling systems. It is to be recalled that previous government policies placed emphasis on private tenure and issuance of individual title(s) as the only means of achieving security over land. This unhappy situation was altered by the National Land Policy 2009 and the change entrenched in the constitution of Kenya, 2010. Under the Article 61 (2) of the constitution, communities may now hold land as legal pluralistic entities.

It is important to note that the constitution bears a skeleton foundation for the anticipated Community Land Act. Although the constitution defines the terms 'community' and 'community land', it is anticipated that upon enactment, the Community Act shall fulfill the following expectations:

- a. Clearly define the terms community and community land.
- b. Articulate and provide for the realization of bundles of rights in community land.
- c. Offer a process of registration and define the nature of title to be issued.
- d. Stipulate mechanisms for dealing with community land injustices.
- e. Propose an institutional framework for the management of community land.
- f. Provide a mechanism for conflict management and resolution.

iii. Statutory provisions

a. The Land Registration Act (2012)

The Land Registration Act defines community as 'a clearly defined group of users of land identified on the basis of ethnicity, culture or similar community of interest as provided under article 63(1) of the constitution, which holds a set of clearly defined rights and obligations over land and land-based resources. Section 8(1) provides for a Register of Community Land in each registration unit. The register so kept shall have details of the cadastral map of the community land, the members of the community that has interest on the property, land use and the registered representatives of the community. The senate bill provides in detail the structure and management of community land as an elaboration of section 8 of The Land Registration Act, no. 3 of 2012 in Part 2 of the bill.

b. National Land Commission Act (2012)

The National Land commission is established by article 67 of the constitution which gives its functions as, inter alia;

- a. To recommend a national land policy to the national government
- b. To advise the government on a comprehensive national land registration policy.
- c. To monitor and have oversight on land use planning throughout the country.
- d. Conduct research into land and use of natural resources and make appropriate recommendations to appropriate authorities.

It may be said that the broad power of the Commission under the constitution makes it a central player in the management of community lands. The Act,¹³ provides that the Commission shall be a trustee, on behalf of county and national governments, of both public and community land. This is an additional power, supplementary to the provision making the Commission the body responsible for the registration of all interests in land throughout the country.¹⁴ Under section 18 of the Act, the Commission has the responsibility of establishing County land Management Boards that shall oversight the community land management committees to be created under the proposed Community Land Act. The Commission is also mandated to investigate and make recommendations on historical land injustices, and this may include wrongful alienation of community land.

7. Considerations of the Senate & National Assembly Community Land Bills¹⁵

We have undertaken a quick appraisal of the status of the Community Land bill(s). Our inquiries reveal that there are two published bills on community land; one before the Senate and the other before the National Assembly.

i. The Senate: Community Lands bill (No. 38 of 2014)

The Senate Community Land bill is published in supplementary gazette notice number 147 of 2014. It is dated 8th October 2014. Senator Kithure Kindiki introduced it as a private member bill. It matured for debate on 21st October 2014 and received a first reading on 11th November 2014. No further steps have been taken on it.

ii. The National Assembly: Community Lands Bill (No. 45 of 2015)

The National Assembly Community Land bill is published in supplementary gazette notice number 129 of 2015. The bill was introduced to the House by the Leader of the Majority Hon. Adan Duale. It is dated 11th August 2015. It matured for debate on 18th August 2015. It received its first reading on 19th August 2015. It has gone through the second and third readings and was passed by the National Assembly, with amendments, on 21st April 2016 where after it was passed on to the Senate. The Senate, on receipt of the bill, sent it to the relevant committee for comments. When the committee presented it before the full House, it was rejected without debate. The bill now awaits the establishment of a mediation committee of the Senate and the National Assembly. It is this bill which we shall evaluate for purposes of rendering a petition before the Mediation committee.

a. Constitutional anchorage of the bill

Proceedings before the Senate indicate that the bill earlier introduced by Hon. Kindiki has been abandoned in favor of the one that was passed by the National Assembly and handed over to the Upper House. The full citation of the bill now before the Senate is 'The Community Land Bill, 2015.' This bill was originally the National Assembly bill No 45 of 2015.

¹³ Section 2 (e).

¹⁴ Section 2 (a).

¹⁵ See Annexure A which presents a comparative analysis of the bills.

The bill before the Senate is expressed to be made pursuant to article 63 (5) of the constitution. The citation reads:

An ACT of Parliament to give effect to Article 63(5) of the Constitution; to provide for the recognition, protection, and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.

From the outset it is clear that the bill seeks to give effect to the word and spirit of the constitution. The bill expressly provides that its provisions shall be interpreted in such a manner as to give meaning to Article 10 and 60 of the Constitution.¹⁶

b. Key features of the bill

The central features of the Senate bill that resonate with articles of the Constitution are:

- (i) The citation as reproduced above.
- (ii) Ownership and tenure systems in section 4. This section expressly provides that community land 'shall be owned by the community.'
- (iii) Section 5 provides that 'every person shall have the right, either individually or in association with others, to acquire and own property.'
- (iv) Section 5 further recognizes customary land rights and places them on equal footing with freehold or leasehold rights acquired through allocation.
- (v) The adjudication process under the proposed section 8 of the bill is meant to realize Article 67(2)(c) of the constitution.¹⁷ Under the Senate bill, the power to initiate and complete adjudication and gazette community land is vested in the Cabinet Secretary in charge of lands.
- (vi) The right to own and be registered as such under section 13 of the senate bill fulfills the constitutional requirement for equality and the right to own property by all citizens.
- (vii) Under section 12 of the bill, community land may be held as: communal land; family land; as a reserve, or; in any other category of land recognized under this Act or other written law.
- (viii) Section 15 of the Senate bill provides for a community assembly which shall act as a management committee for any and all land owned by the community. This assembly may by two thirds vote alienate any community land. Herein lies a problem which may expose communities to the fraudulent tendencies of management committees of the defunct group ranches structures.
- (ix) The overall aim of part V, (Sections 21 to 26) Conversion of Land is to enable conversion of land and to make it available as a chattel in the market.

¹⁶ See section 3. Article 10 provides for national values and principles of governance while article 60 provides for the principles of land policy.

¹⁷ Article 67 (2) The functions of the National Land Commission are—
(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya.

8. Assessing the Community Land Bill

a. The essential elements

In evaluating the Senate Community Land Bill, three essential elements need to be assessed:

- i. The substantive rights protected under the Bill
- ii. The procedural rights, and the
- iii. Institutional arrangements provided to implement the substantive rights.

Substantive rights are the tangible, real rights which are given realization by the processes which support the claim to that right. These practices are the procedural rights that cannot be realized without an effective and accountable institutional framework

Legal elements	Purpose	Examples
Substantive rights	Clarifies the right, whether political, civil, economic, social or cultural rights	<ul style="list-style-type: none"> • The right to use a particular piece of land • Access a parcel of land • Have exclusive use of the land
Procedural rights	Enables the exercise of the substantive right	<p>The right to</p> <ul style="list-style-type: none"> • Obtain information on a piece of land • Participate in the identification of community land • To be consulted on use or management of the land
Institutional responsibilities	Allocates responsibilities to institutions that shall implement the law	<ul style="list-style-type: none"> • Authority to allocate land rights • Responsibility to ensure resources are managed for the benefit of the community • Institutions and procedures for settling land disputes

To attain a meaningful measure of success, the intended statute must obtain an integration of these three elements. Even if substantive rights are guaranteed, if the procedural mechanisms and institutional responsibilities are not catered for, the purpose and objects of the law will never be realized.

A successful implementation of the Community Land Act envisages that the statute should provide for: a system that enables training for those who are to implement the law; a clear declaration of roles and

responsibilities for those who are to implement the law; adequate resources to support the implementation process, and; a transparent and effective system for enforcement of the statute.

b. 5 key principles that must be achieved by the Community Land Bill:

In the assessment of the Community Land Bill, we must ensure that 5 critical elements are met and sustained:

- i. Compliance with the key principles.
- ii. Clarity on who has the rights to land.
- iii. A system that enables the rights holders to secure their land and resource rights against everybody else
- iv. Ensure clarity on roles, responsibilities and procedures for implementing and enforcing community land resource rights.
- v. Enable right holders to claim, monitor enforce and enjoy their rights.

9. International experience and Best practices for community land registration

a. Introduction

The present international pressure geared towards securing community land rights has not been made in vacuity. For a long time, there have been constant reminders in international fora for states to recognize and register community land rights. In May 2002, for example, 82 countries endorsed the UN's Voluntary Guidelines for the Responsible Governance of Tenure of Lands, Fisheries and Forests in the context of Food Security.¹⁸

The UN Guidelines spell out the recognition and protection of tenure rights, identify best practices for registration and transfer of tenure rights, make sure that tenure administrative systems are accessible and affordable, ensure that investment in agricultural lands occurs responsibly and transparently and include mechanisms for resolving disputes over tenure rights. This indicates that many governments accept – at least in theory – that upholding community tenure rights is part of the solution for sustainable development. Whilst this is not being realized quickly enough, there is consolation in the fact that there is now sufficient discernment and understanding that this is an important factor in driving development.

In practice there is also a realization that governments can no longer give away community land without reference to the people who live on that land. Any such action risks severe social conflict and economic instability for anyone who may seek to invest on such land. Indeed, such is the inherent risk in irregular land alienation that it offers the reason why around two thirds of the world's civil wars and conflicts in progress are thought to be related to contested land claims.¹⁹

¹⁸ Accessed at <http://www.uneca.org/publications/voluntary-guidelines-responsible-governance-tenure-land-fisheries-and-forests-context> on 1st July 2016.

¹⁹ Ross M, Natural Resources and Civil War: An Overview. A paper presented at the conference on 'The Governance of Natural Resources Revenues,' sponsored by the World Bank and the Agence Francaise de Development, Paris, December 9-10, 2002.

It is thus clear that insecure tenure rights put investors at risk and are significant negative factors which make such land unattractive for any investment. Any investor who ignores the issue of tenure rights sets themselves for failure, sorrow and distress.

To demonstrate this, it is important to remember the words of the African Commission on Human and Peoples' Rights in the Endorois case regarding Kenya in which it stated that denying community land tenure security not only violates human and indigenous peoples' rights but also runs counter to economic development goals.²⁰

In summary, securing community land rights establishes an environment where both the state, as a corporate entity, and the communities, as an independent unit, gain in: reducing conflict; improving the use and management of land in food production, water and land conservation; securing the natural resources and biodiversity on the land thereby attracting investment on community lands, and; the promotion and protection of the rule of law and international treaties

b. International law developments

On the international scene, the overriding principle in contemporary community land registration is the creation of secure land and resource tenure for groups previously disadvantaged in the conventional land cataloging systems. In seeking to create community land legislation, states aim to create a law that respects human rights, and that is participatory in implementation.

Land as a communal resource, in use by a community under customary law, is the most common form of land ownership in Africa. Such a resource is subject to customary law, defined as a framework of rights rules and responsibilities based on community customs and practices, governing ownership of community lands and resources. But, the tenure systems that subsist in Africa emerge as a mixture of policy and written law, drawing from hitherto customs and unwritten laws that anchor claims to land and resources. Those that have benefited from policy and registration are in the minority and community lands lie in the undocumented category. Today, the common requirements for community land legislation are, firstly, clarity on tenure and secondly, an anchorage of community rights to land resources in law. This innovative legislative reform has been utilized by Namibia, Cameroon, Ghana and Botswana to settle questions on customary land rights. The idea of community land legislation is to secure such rights, recognize such entitlements and protect the rights of the community to the land & resources related to land use.

20 Available at: <http://caselaw.ihirda.org/doc/276.03/>. In the Endorois case, the African Commission on Human and

Peoples' Rights (which implements the African Charter on Human and Peoples' Rights) emphasized that communities should not be viewed as passive beneficiaries of development processes, but rather as active stakeholders in development policies. The Commission noted that communities that had been self-sufficient prior to external investments in land often became reliant on assistance following their dispossession. It also observed that the sustainability of economic investments should be measured not just in terms of Gross Domestic Product (GDP), but rather by whether the capabilities of communities had increased and the choices available to communities had improved. This requires, in turn, that community land tenure rights are secured and protected.

The mixture of claims to land resources includes user rights and ownership rights and emerging legislation should make provision to govern both. What does the community own, where does it end and what land resources does the community have access to merely as users for grazing and other activities? It must be evident that the existence 'certainty' and 'protection' of community land rights must be a significant theme running through any legislative proposals on community land legislation.

Encroachment by individuals, investors and the demand for space for urbanization are an immediate danger to community land rights as is the claim by government to forests and vulnerable ecosystems. Unregistered and therefore undocumented community lands are, in the hierarchy of tenure, the first option for both investor and government agency for acquisition and redevelopment. It is notes that the danger to unsecured community lands in Africa starts with basic demographic challenges and population pressure. But investors in agriculture, tourism and he extractive industries tempt governments to acquire and allocate lands that have overlapping claims from communities. However, disputed tenure is a disincentive to investments and devalues the land resource with concomitant negative impact on development of the communities and the general environment.

c. International covenants

Numerous covenants, treaties and declarations recognize and protect the right of communities to own and manage their land.

Kenya's constitution permits all treaties which the state has ratified to be recognized and enforced as part of our law. Protection of communities' right to land takes the angle of the right to property, food, culture, housing, non-discrimination and development.

Annex 1 shows the treaties which Kenya has ratified and which are relevant to community rights to land and natural resources and indicates key aspects of the covenants. This annotation is important because should the envisaged community Land Act settle for provisions that are in violation of any of the international treaties, any person may petition the court for the annulment of either particular provisions or the entire statute.

Annexure B

African Union and other international laws to which Kenya is a party, as relevant to community land and resource rights.

	<u>Ratified</u>
1) UN Convention on the elimination of all forms of racial discrimination	✓
2) UN Covenant on Civil and Political Rights	✓
3) UN Covenant on Economic, Social and Cultural Rights	✓
4) African Charter on Human and Peoples Rights	✓

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| 5) UN Convention on the Rights of the child | ✓ |
| 6) UN Convention on Biological Diversity 1992 | ✓ |
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In deliberations of international law rights on community land, four key concepts are readily discernible:

- i. The right to own land must be protected by the state
- ii. There must be an official recognition of the right to land
- iii. The proprietary rights of communities over land that is possessory should be given similar protection as that which is titled
- iv. There should be in place a method for restitution or compensation for loss of lands, property by government/investors.

International law protects land resources traditionally used and essential to the survival of the community. Unfortunately, the law does not protect minerals and other non-survival elements not used by the community. The duty imposed on governments is consultation with the communities, compensation for lost land if extraction necessitates displacement and benefit sharing with the community thus losing space. The doctrine of Eminent Domain, as a concept of law, present governments on the face, powers to seize private property for public use. In practice, it is easier to apply the concept to unregistered community lands and others whose title is undocumented. However, the use of eminent domain powers must be necessary and proportionate for the general good of society compensation and consultation follow as basic duties of the state. FPIC – free prior informed consent is a condition for use and administration of community lands.

d. International practice

(i) Namibia

Namibia enacted the Community Lands Act, (2002) which is currently in force. The salient features of the act include: the vesting of community land in the state in trust for the communities that occupy the land; the establishment of traditional authorities that manage allocation of land and have the power to revoke claims to community land, and; determines individual registration regime.

Under the Namibia legislation, community members are registered directly as individual owners with identifiable interest in a community registration area. The community land boards administer the adjudication and registration procedure and rights acquired upon registration are perpetual, transferable and inheritable.

(ii) Tanzania

Tanzania has two statutes dealing with community land. These are: The Land Act of 1999 and the Village Land Act (VLA) of 1999. The VLA is the main legislation on community land. Section 20 of the VLA allows each community to freely determine their rules and practices, provided that such don't contradict Tanzania's other laws or contravene the rights of others.

(iii) Best practices

Prof Knight R S conducted a study for the Food and Agriculture Organization (FAO)²¹ which analysed best practices for statutory recognition of customary land rights. This study considered Mozambique, Botswana and Tanzania as case studies.

This study suggests that for a law to harmonize statutory and customary land rights, it has to be:

- i. Flexible enough to allow the full range of customs within a nation to be expressed and practiced while implementing restrictions that impose basic human rights standards on customary practices, protect against intra-community discrimination, and ensure alignment with the national constitution.
- ii. Create local land administration and management structures that are highly accessible and reflect a local individuals' intimate knowledge of local conditions.
- iii. Establish administrative processes and dispute resolution mechanisms that are simple, clear, streamlined, local, and easy for rural communities to use to claim, prove and protect their land rights.
- iv. Establish appropriate checks and balances between customary/local leadership and state officials, create new, supervisory roles for land administrators, and ensure direct democracy and downward accountability to the people.
- v. Include accessible, pragmatic and appropriate mechanisms to safeguard against intra-community discrimination against women, widows and minority groups.
- vi. Protect community land claims and create real tenure security while allowing for investment in rural areas, ensuring that all development will be sustainable, integrated, and beneficial for local communities.
- vii. Establish good governance in land administration by: creating appropriate mechanisms to ensure the law's enforcement; penalizing state officials who are contravening the law's mandates; and setting up dispute resolution mechanisms that allow for appeal of customary, community-level decisions up into the national justice system.

Knight's report recommends that a statute that seeks to recognize customary land rights should:

- i. Make customary land rights equal in weight and stature to 'formal', certified land rights
- ii. Seek places of overlap between customary rules and formal law and start from there.
- iii. Establish genuine tenure security by placing land ownership in the people themselves, vest ultimate land rights to the land in communities, and create an enforceable fiduciary duty between local land management bodies and community members (the land holders).
- iv. Explicitly protect the land claims of women and other vulnerable groups and establish women's right to hold or own land.
- v. Define 'custom' very flexibly so as to be non-exclusionary and to allow for evolution, flexibility and adaptability over time.

²¹ Legislative Study 105: Statutory recognition of customary land rights in Africa: an investigation into best practices for lawmaking and implementation.

- vi. Be explicit and clear regarding rights of rural communities vis-à-vis the state or external agents, or for the protection of vulnerable groups, leaving no room for interpretations that can weaken these protections.
- vii. Establish procedures for documenting and protecting community lands as a whole first to protect the meta-unit from encroachment, then slowly over time and according to landholders' volition allow for documentation of family and individual lands.
- viii. Create local land administration and management structures that come out of – and look much like – existing local and customary management structures; are easily established; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.
- ix. Establish land administration and management systems that are free or low-cost for the poor.
- x. Integrate customary practices and direct democracy and promote good governance in land administration by establishing systems of checks and balances between rights holders, state land administrators, and local/customary leaders and establishing systems that ensure both downward accountability to community members and upward accountability to the state.
- xi. Locate customary land administration and management systems close to the land and communities they govern.
- xii. Include accessible, pragmatic and appropriate safeguards against intracommunity discrimination.
- xiii. Align legal proof of land claims with customary practice by formalizing landscape-based evidence and allowing oral testimony as proof of land rights.
- xiv. Explicitly protect communal areas, customary rights of way and shared land use and access rights. 15. Provide for and encourage the creation of community bylaws and land and natural resource management plans.
- xv. Create new technical advisory and supervisory roles and responsibilities for state officials.
- xvi. Establish a clear system of judicial appeal leading straight from the lowest level of local customary conflict resolution all the way to highest court of the nation'.
- xvii. Make legal representation for a community's mandatory during negotiations concerning land-sharing agreements with investors, and ensure that all community-investor agreements are written down and considered to be formal contracts, enforceable or voidable according to national contract law.
- xviii. Make customary land transactions legal and enforceable or voidable under contract law.
- xix. Extend compulsory acquisition laws to state expropriation of community common areas, even those that appear to be "unused."

A report on proceedings of a conference on 'Best Practices and Approaches for the Protection of Community Land Rights in Kenya'²² concluded that legislation on community land needs to provide for:

- i. The procedure for the conversion of public land to community land and vice versa, and private land to community land and vice versa in the interest of the community
- ii. The open transaction of community land with the consent of all the players including those people with individual rights within the community land.
- iii. How individual rights within the community should be addressed.

²²Held on 6th -7th June 2013 at the Boma Hotel Nairobi.

- iv. Seeing as all communities are communities of interest-due to the homogeneous interest in the land that they have the legislation should provide for what should be done in the event of the 'interest' of the community being extinguished.
- v. Conceptualize community tenure regime as a hybrid system.
- vi. Ensure that the community land regime is balanced between the county and the national government especially with the devolved government system.
- vii. Provide procedures for multiple registrations for recognition of communal land rights.
- viii. Use the doctrine of acceptable limit of limitation to protect periodic users of land and related resources and to protect community land from co modification.
- ix. Give procedure for benefit sharing and likely resources communities could share for their benefit.
- x. Make procedure for respondent (inter community) relations with regard to sharing of land and related resources; provide inter-communal access to shared resources.

10. Extra-legal concerns in community land utilization

The requirements for obtaining a functional and beneficial use of community land extends far beyond the procurement of a working legal structure. Certain arrangements must be put in place to permit a seamless and unified alignment of social and political dynamics which will allow and encourage positive economic utilization of community land.

It is important that communities take into account their specific demographic and ecological circumstances. This will inform decisions on land use and the consequent sharing of incomes. In decisions on land usage the contest will often be between validity and recognition of the two systems of tenure; individual and collective landholding. To create a balance, there shall be need for innovative, creative and thoughtful harmonizing of interests. Further, skills and knowledge deficit need to be addressed as the community acquires the new rights and access to land. Communities must guard against practices that promote discrimination and inequality. Often this goes beyond the legislative framework. In cultures which look down upon women and children, the leadership must steer the thinking of the people away from this practice. This will require creation of practical space within written law and customary practices.

Further, there should be a deliberate recognition and support for illiterate and poor members of the community so that their rights are not trampled upon. Similarly, the community must find practical means to deal with possible growing transactional difficulties- obtaining security, leasing to outsiders, access and use etc. This will avoid situations of unrecognized and unregistered rights that may pose challenges to community developments. Finally, there shall be need to strengthen the controls and the hand of the community in the land.