

THE RECOGNITION OF INDIGENOUS PEOPLE'S LAND RIGHTS IN KENYA AND  
THE FAILURES IN THE ENFORCEMENT

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**Declaration**

I, IVY NATALIE SHIECHELO OMONDI, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: .....

This Research Proposal has been submitted for examination with my approval as University Supervisor.

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## DEDICATION

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## ABBREVIATIONS

**AChHPR-** African Charter on Human and People's Rights

**ACtHPR-** African Court of Human and People's Rights

**ACmHPR-** African Commission on Human and People's Rights

**FPIC-** Free Prior and Informed Consent

**ILO-** International Labour Organization

**ICCPR-** International Covenant on Civil and Political Rights

**ICESCR-** International Covenant on Economic Social and Cultural Rights

**UDHR-** Universal Declaration of Human Rights

**UNDRIP-** United Nations Declaration on the Rights of Indigenous People

## Constitutions

Constitution of Kenya (2010)

## Statutes

- *Community Land Act* (Act No. 27 of 2016).
- Forest Act (2005)
- *Land Act* (Act No 6 of 2012).
- *Land Registration Act* (Act No 3 of 2012)
- *National Land Commission* (Act No 5 of 2012).
- *Legal Aid Act* (No 6 of 2016)

## Cases

- Francis Kemei, David Sitienei and Others v The Attorney General & 3 others (1999)eKLR.
- *William Arap Ng'asia & 29 Others suing on the behalf of over 43,000 Other Members of the Endorois Community v. Baringo County Council and Koibatek County Council* (2000)eKLR.
- *African Commission on Human and Peoples' Rights v The Republic of Kenya* ACmHPR Comm. 006/2012.
- *Centre of Minority Rights Development (CEMIRIDE) (on behalf of the Endorois community) v Kenya* ACmHPR Comm. 276/2003.
- *Rangal Lemeiguran & Others v Attorney-General & Others* (2006) AHRLR 281

## International law

### Hard Law

ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989) UNTS 169.

*ILO Convention Concerning the Protection and Integration of Indigenous of other Tribal and Semi-Tribal Populations in Independent Countries* (26 June 1957) UNTS 107.

*Convention on Biodiversity*, 29 December 1993, 2226 UNTS 208.

### Soft Law

Rio Declaration on Environment and Development, A/CONF.151/26(Vol.I) (12 August 1992).

UNGA *Declaration on the Rights of Indigenous People* UN A/Res/ 61/295 (13 September 2007).

Office of the High Commissioner for Human Rights, General Recommendation No. 23: Indigenous People Fifty-first session, 1997. UN Doc. A/52/18.

### Regional Instruments

African Charter on Human and Peoples' Rights (1981).

African Convention on Nature and Natural Resources UNTS Vol 479.

American Convention on Human Rights OAS, 18 July 1978

*American Declaration on the Rights of Indigenous People*, OAS 15 June 2016.

## ABSTRACT

For many years indigenous land rights were yet to be recognised and catered for in law. Indigenous communities have faced repeated violations on their collective right to own property in particular, the right to access their lands and territories. Land is considered essential for their survival. These violations led to the consideration of indigenous people's claims during the formulation of the Constitution of Kenya 2010. Among the concerns raised by these communities are; legal recognition, identification, equality, non-discrimination, right to self-determination and the right to land resources.

Recently, there have been various efforts that have been made in the form of the enactment of both international law and national law that provide for the rights of indigenous people. Despite these steps taken by the Kenyan government and the international community, there still exist reports of continued forceful evictions by the Kenyan government. This illustrates a clear indication that the enactment and promulgation of these laws is not sufficient in the realisation of their rights if implementation is not executed. The study seeks to illustrate the failures in the implementation of these rights and the possible reasons for this failure.

## 1.0 CHAPTER ONE: INTRODUCTION

### 1.1 Background

The indigenous communities of Kenya have experienced severe economic deprivation and marginalization.<sup>1</sup> This can be traced back to colonial and post-independence times where land injustices were experienced.<sup>2</sup> With time, Kenya and the international community has attempted to recognise the rights of indigenous people including their land rights. Currently the elaborate definition of indigenous people is non-existent due to their diverse nature.<sup>3</sup> However, the Constitution attempts to identify indigenous people through the definition of marginalized communities.<sup>4</sup> There exist two types of indigenous communities in Kenya; the hunters and gatherers and the pastoralists.<sup>5</sup> Land is considered an important part in the survival of these indigenous communities.<sup>6</sup>

Kenya has attempted to recognise these rights in its constitution and in various legislations. On the other hand the international community has enhanced efforts to recognise indigenous people's rights through the enactment of the United Nations Declaration on the Rights of Indigenous People, and the International Labour Organization Conventions. However, Kenya is among the many States that has neither signed nor ratified these two ILO Conventions that recognise indigenous people's rights.<sup>7</sup>

Despite these efforts, there exists a discrepancy between the laws recognising their rights and the implementation of these laws by the Executive. This is evident especially in the inefficient restitution of their land and the forceful evictions experienced by the indigenous people.<sup>8</sup> There are various indigenous communities that have raised claims with regards to

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<sup>1</sup> Report of the African Commission's Working Group on Indigenous Populations/Communities, ACmHPR, 2012.

<sup>2</sup> Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Report), 2004.

<sup>3</sup> United Nations Department of Social and Economic Affairs, *The Concept of Indigenous People* PFII/2004/WS.1/3.

<sup>4</sup> Article 260, *Constitution of Kenya* 2010.

<sup>5</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in Kenya, 26 February 2007, UN Doc A/HRC/4/32/Add.3.

<sup>6</sup> Perera J, *Land and cultural survival: The communal rights of indigenous people in Asia* Asian Development Bank, 2009

<sup>7</sup> [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210\\_COUNTRY\\_ID:103315](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:103315) on 22/01/2018

<sup>8</sup> Report of the African Commission's Working Group on Indigenous Populations/Communities, ACmHPR, 2012.

the violations of their land rights such as the Ogiek, the Endorois, the Chamuka and the Sengwer.

### **1.2 Statement of the Problem**

Indigenous people's land rights have been acknowledged by various national and international laws. However, despite the acknowledgement of these rights, there have been cases and reports of forced evictions by various indigenous communities. It can be deemed that the implementation and enforcement of these rights is failing. Regional and National courts have issued judgements and orders in favour of these indigenous communities, however, the implementation of the judgements has been evidenced to be non-existent. In addition to that, Kenya has not ratified the salient international instruments that provide for these rights. The study is aimed at analysing the existing the existence of laws acknowledging indigenous people's land rights and illustrating the failure in implementing these laws.

### **1.3 Objectives of the study**

The objectives of the study are to;

- i. Highlight the present laws that recognise indigenous peoples' land rights
- ii. Illustrate the Executive's failure in the implementation of these rights despite the provisions in the law
- iii. Analyse the possible reasons that have resulted in implementation failures.

### **1.4 Hypothesis**

Indigenous people have faced numerous violations on their right to access their ancestral lands and territories. The hypothesis is aimed at illustrating the laws recognising land rights in Kenya and proving a discrepancy in the enforcement of the laws. Also, the hypothesis will indicate the possible enhancement of the laws recognising indigenous people by ratifying international instruments.

### **1.5 Research Questions**

In order to fully analyse the recognition and enforcement of indigenous people's land rights, the paper will address the following research questions;

- a) What are the laws recognising indigenous people land rights?
- b) Whether there has been enforcement of the laws in the granting of the provided land rights.
- c) What is the role of the executive?
- d) What are the reasons for the Executive's failure in implementation?

### **1.6 Justification of the Study**

The justification of the study is that although there exist an array of laws and policies recognising indigenous people's rights, there is evidence of failure in the implementation of these laws and policies. Indigenous communities continue to experience forced evictions being executed by various officials of the government. Provisions in the Constitution and other legal instruments clearly outline the right to own property collectively and individually. Thus posing the question as to what reasons have led to the failure in upholding these rights.

The findings of this study may be useful in the formulation of implementation mechanisms in order to ensure that the rights of indigenous communities are realized as per Article 40 Constitution and other relevant instruments.

### **1.7 Scope and Limitations**

The most prominent limitation of this study is the inability to conduct field research due lack of funds. Taking into consideration the nature of the topic, the utilisation of field research is likely to be more effective. The indigenous communities inhabit remote areas which have proven timely and costly.

The Study is also geographically limited in that it will focus on indigenous communities in Kenya. Further, it solely analyses indigenous people with regard to their land rights.

### **1.8 Literature Review**

The Literature review is aimed at highlighting the works of authors who have written articles and institutional reports on this topic. The issue of protecting indigenous people's rights has been written by many people both locally and internationally. One of the prominent works on

indigenous peoples land rights is by the United Nations special rapporteurs on the rights of indigenous people.

In the final working paper prepared by Mrs. Erica-Irene A. Daes, the illustration of indigenous communities and their relationship to land is highlighted in order to prevent the discrimination and protection of indigenous peoples and minorities.<sup>9</sup> The right to land is an essential part of indigenous communities and it is difficult to separate the concept of indigenous peoples' relationship with their lands, territories and resources from that of their cultural differences and values.<sup>10</sup>

Albert Kwokwo Barume in *Land rights of indigenous peoples in Africa with Special Focus on Central, Eastern and Southern Africa* illustrates how indigenous communities in Africa rely on land for cultural and economic purposes.<sup>11</sup> The book shows how various communities face difficulties in trying to access their lands after eviction by the governments due to the management of natural resources. An example cited by Albert Kwokwo Barume is the Ogiek community in Kenya who were at risk of being arrested, detained or tortured if found accessing the Mau forest which they consider their ancestral home.

The advisory opinion of the ACmHPR on the United Nations Declaration on the rights of indigenous peoples tackles various concerns raised on the rights of indigenous people. In its contribution, it speaks of the lack of definition of the term indigenous people, the right of indigenous people to land, territory and resources.<sup>12</sup>

The country report of the research project by the International Labour Organization (ILO) and the ACmHPR on the constitutional and legislative protection of the rights of indigenous peoples in Kenya highlights the dispossession of land as one of the issues facing indigenous communities in Kenya.<sup>13</sup> It is said that the problem originates from the pre-colonial period. It

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<sup>9</sup> UN Economic and Social Council Final Working paper by Special Rapporteur, *Prevention of discrimination and protection of indigenous peoples and Minorities: Indigenous people and their relationship to land*, 11 June 2001, E/CN.4/Sub.2/2001/21.

<sup>10</sup> UN Economic and Social Council Final Working paper by Special Rapporteur, *Prevention of discrimination and protection of indigenous peoples and Minorities: Indigenous people and their relationship to land*, 11 June 2001, E/CN.4/Sub.2/2001/21.

<sup>11</sup> Barume K. A, *Land Rights of Indigenous People in Africa: with special focus on central, eastern and southern Africa*, IWGIA, Copenhagen, 2010.

<sup>12</sup> Advisory Opinion Of The African Commission On Human And Peoples' Rights On The United Nations Declaration On The Rights Of Indigenous Peoples, 2007.

<sup>13</sup> Mukundi W, *The constitutional and legislative protection of the rights of indigenous peoples: Kenya*, ILO and the ACmHPR, 2009.

also cites the lack of prior consent from the communities in the government's management of natural resources situated in territories occupied by indigenous communities.<sup>14</sup>

José R. Martínez Cobo, who was once the special rapporteur wrote the study of the problem of discrimination against indigenous populations, he highlights the measures that states can take to ensure the prevention of discrimination of minorities.<sup>15</sup>

In the United Nations (UN) special rapporteur report mission to Kenya, it was discovered that the dispossession of lands dates back to the colonial times and post- colonial times.<sup>16</sup> Indigenous communities which are mostly hunters and gatherers face various injustices with regards to land grabbing and dispossession.<sup>17</sup>

### **1.9 Chapter Breakdown**

This study is divided into five chapters. The first Chapter provides a brief introduction and overview to the study by giving the background, statement of the problem, purpose of the study, hypothesis and the research questions.

Chapter two will mainly focus on the theoretical framework with regards to minority rights. The theoretical framework will link indigenous community rights to John Rawls' theory on right to justice with regards to justice and fairness.

Chapter three shall discuss the legal framework on the laws recognising the rights of indigenous people. This will be done by illustrating national law, international law and case law.

Chapter four shall highlight the role of the Executive branch, its failures in the implementation of laws and policies concerning indigenous people and the possible reasons for the said failure.

Chapter five shall provide the summary of the study, recommendations and a conclusion

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<sup>14</sup> Mukundi, *The constitutional and legislative protection of the rights of indigenous peoples: Kenya*, 2009

<sup>15</sup> UNGA, *Programme of Activities for the international decade of the world's indigenous people A/RES/50/157* (29 February 1996).

<sup>16</sup> UNGA, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/4/32/Add.3 (26 February 2007).

<sup>17</sup> UNGA, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*

### **1.10 Chapter summary**

This chapter serves as a basic introduction to understanding issue faced by indigenous communities with regards to the implementation of their rights. It provides a brief summary of the background on the nature of indigenous people and a description of their way of life. Further, it illustrates the deep connection they have to their lands and territories. The definition of indigenous people is also highlighted in this Chapter in order to give a better understanding as to the distinct nature of indigenous people.

## CHAPTER TWO: THEORETICAL FRAMEWORK

### 2.1 Introduction

As illustrated in Chapter one, there has been a plight by indigenous communities in Kenya to have their land rights recognised and implemented. This has led to the communities seeking redress in both national courts and regional courts.<sup>18</sup>

This paper adopts the theory of Justice illustrated by John Rawls in order to fully analyse the enforcement of indigenous people's rights.<sup>19</sup> This theory will be used to illustrate the interconnectivity between justice and fairness as portrayed by John Rawls and its relevance in the implementation of indigenous people's land rights. In this theory, Rawls addresses the view of justice as fairness in a liberal society and highlights the various ways a society can achieve justice.<sup>20</sup> Rawls illustrates the essential nature of justice in a society and the need to abolish or reform laws and institutions that are unjust.<sup>21</sup>

### 2.2 Theoretical Framework: Rawls Theory of Justice

Rawls theory of justice provides a framework addressing the societal problem concerning the plight of indigenous people. According to Aristotle, justice is defined as giving each and every person his or her due.<sup>22</sup> He points out that justice is said to be done when the wrongdoing is erased or lessened in one way or another.<sup>23</sup> It is with this regard that sacrificing delivery of justice to a few persons in order for certain advantages to be enjoyed by many is considered unacceptable.<sup>24</sup> The right to justice is therefore inviolable and justice should be accompanied by fairness.<sup>25</sup> For instance, the evacuation of an indigenous

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<sup>18</sup> African Commission of Human and People's Rights v Republic of Kenya, ACtHPR Application No 006/2012.

<sup>19</sup> Rawls J, *A Theory of Justice*, Harvard University Press Cambridge, Massachusetts, 1971,1999, 4, p3.

<sup>20</sup> Rawls J, *A Theory of Justice*, 1971.

<sup>21</sup> Rawls, *A Theory of Justice*, 1971, p3.

<sup>22</sup> Aristotle, *Nicomachean ethics*, 15ed, Oxford University Press, 2009, 1129b-1130b5.

<sup>23</sup> Sweetland L, 'Intergrating justice and fairness as a resolution to indigenous environmental harm' Published Thesis, Arizona State University, May 2014.

<sup>24</sup> Rawls, *A Theory of Justice*, 1971, p3.

<sup>25</sup> Rawls, *A Theory of Justice*, 1971, p4.

community from their ancestral land in order to allow for tourism developments and conservation can be deemed as unacceptable. Kenya has been applauded as one of the States that has enacted laws to tackle various societal issues.<sup>26</sup> However, it has been criticized for its failures in the implementation of the said laws which have resulted in injustices.<sup>27</sup>

An injustice can only be tolerated if it seeks to avoid a greater injustice.<sup>28</sup> Rawls provides two principles of justice that give ways in which rights are to be assigned in the society and how the benefits should be distributed.<sup>29</sup> The first principle is the principle of equal liberty that says 'each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others'.<sup>30</sup> The second principle is the difference principle, which provides for the manner in which social and economic inequalities are to be arranged in order to be reasonably expected to be to everyone's advantage, and attached to positions and offices open to all.<sup>31</sup> He implies that material differences should be justified only on the basis that they benefit the least advantaged.<sup>32</sup> It can be perceived that any inequality is justifiable regardless of how slight it is to those who will experience the most detriment. The difference principle assesses the justice of the basic institutional structure based on whether it is of greater advantage to the least advantaged group. This can be related to gender-based and historically oppressed groups.<sup>33</sup> Minority groups such as indigenous people can be categorised under this. The difference principle adopts an egalitarian approach. Thomas Hobbes in his book *Leviathan*, calls for the state of nature. Man should be allowed to live in liberty without interference or hindrance from anyone.<sup>34</sup> According to the African Commission in defining indigenous people, they pointed out that it is more relevant to highlight their main characteristics thus allowing for their identification. The main characteristics are self-identification, special attachment to their traditional land and a state of marginalization. Interference by the government can be construed as disallowing them to live in liberty according to Hobbes.

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<sup>26</sup> Human Rights Watch, *World Report 2017*

[https://www.hrw.org/sites/default/files/world\\_report\\_download/201801world\\_report\\_web.pdf](https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf) on 1/02/2018.

<sup>27</sup> Prof Sihanya B, 'Constitutional implementation in Kenya 2010-2015: Challenges and prospects' *Friedrich Ebert Stiftung*, Kenya, Occasional Paper 5.

<sup>28</sup> Rawls, *A Theory of Justice*, 1971, p4, para 1

<sup>29</sup> Rawls, *A Theory of Justice*, 1971, p4

<sup>30</sup> Rawls, *A Theory of Justice*, 1971, p53

<sup>31</sup> Rawls, *A Theory of Justice*, 1971, p53

<sup>32</sup> Sen A, *The idea of justice*, Harvard University Press, 2011

<sup>33</sup> Ndahinda Felix, 'Peoples Rights Indigenous Rights and interpretive ambiguities on decisions of the African Commission of Human and People's Rights' 29-57 *African Human Rights Law Journal* (2016)

<sup>34</sup> Hobbes T and Gaskin J, *Leviathan*, Oxford University Press, New York, 1998

There is always a dispute arising as to what is just or unjust in a particular society.<sup>35</sup> However persons with different concepts of justice can agree that institutions can be deemed to be just when there are no arbitrary distinctions between persons in the assigning of basic rights.<sup>36</sup> It is not only laws and institutions that can be deemed to be unjust but also judgements and decisions.<sup>37</sup> Upon consideration of the Kenyan legal framework providing for the said rights, it is evident that they seek to promote the tenets of justice as fairness. The same cannot be said with regards to the implementation actions by the government.<sup>38</sup> Despite rulings by the African Court, indigenous communities have raised concerns as to delayed implementation and lack of inclusion of their communities in the process.<sup>39</sup>

Rawls talks of the need to apply the principles of social justice at the first instance in order to curb the inevitable inequalities that are present at the basic structure of any society.<sup>40</sup> Thomas Pogge who was Rawls' student, points out some inconsistencies with his theory of justice. He is of the opinion that that the assumption by Rawls about the world being a closed society is absurd and the thought of affording equal respect to non-liberal regimes distorts the idea of liberal toleration.<sup>41</sup>

The concept of justice is further elaborated as the 'role of its principles in assigning rights and duties and in defining the appropriate division of social advantages'.<sup>42</sup> Aristotle sees justice as refraining from gaining an advantage by acquiring what belongs to someone else and denying the other person what is due to him.<sup>43</sup> Michael Sandel points out the individualism portrayed in this theory.<sup>44</sup> This individualism fails to consider a person as a part of a community and how the community plays a role in constituting a person.

The principles of justice can be related to indigenous communities with regards to seeking redress in the courts for deprivation of their land rights. Rawls states that the principles of justice are chosen under a veil of ignorance in order to ensure that nobody is advantaged or

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<sup>35</sup> Rawls, *A Theory of Justice*, 1971, p5.

<sup>36</sup> Rawls, *A Theory of Justice*, 1971, p5.

<sup>37</sup> Rawls, *A Theory of Justice*, 1971, p6.

<sup>38</sup> Kamau C, 'Transitional justice as a path to distributive justice: A jurisprudential legal case of land restitution in Kenya' Vol 1 *Strathmore Law Review* (2016), 29.

<sup>39</sup> <http://minorityrights.org/2017/11/13/kenyan-government-task-force-implement-african-courts-ogiek-judgment-deeply-flawed-mrg-opdp-say/> on 22/11/2017.

<sup>40</sup> Rawls, *A Theory of Justice*, 1971, p7.

<sup>41</sup> Pogge T, 'Realizing Rawls' Vol. 87, No. 12 *Journal of Philosophy* (1990).

<sup>42</sup> Rawls, *A Theory of Justice*, 1971, p7

<sup>43</sup> Aristotle, *Nicomachean ethics*, 15ed, Oxford University Press, 2009, 1129b-1130b5.

<sup>44</sup> Sandel M, *Liberalism and Limits of Justice*, Cambridge University Press, Cambridge, 1982.

disadvantaged.<sup>45</sup> Hence, regardless of one's social status, justice is delivered to all. However, evidence of failure in implementing the said laws proves to be contrary to the theory of justice. The government of Kenya has on numerous occasions attempted to deprive indigenous communities of their land rights on grounds of economic and environmental developments even after court orders to do otherwise.<sup>46</sup>

In order to apply the principles of justice coming forth from this process, Rawls states that this can be achieved in four steps. The very first stage is the adoption of principles of justice in the original position.<sup>47</sup> In the second stage, parties prepare a constitution realizing the two principles of justice with the given information about society's political culture and economic development. The third stage is where the parties agree to laws and policies within the framework of the decided constitution. At the fourth and last stage parties have full information about society and judges and administrators apply the rules to particular cases. When the four stages are complete, it gives a full and clear picture of the society's political situation.

This theory addresses the plight of indigenous people in the recognition and implementation of indigenous people's land rights in Kenya. Article 63 of the Constitution of Kenya provides for the recognition of community land.<sup>48</sup> Article 40 also provides for the ownership of property both individually and collectively. Certain actions by the Kenyan government to evacuate indigenous communities from their land can be deemed as sacrificing a few persons in order for certain advantages to be enjoyed by many, hence an outright injustice to the indigenous communities.<sup>49</sup> These actions by the government are deemed to fall short of the ideal conceptualized by Rawls.<sup>50</sup>

Justice as fairness begins with the reform of institutions. In this case, institutions should seek to reform in order to achieve justice and fairness for the indigenous communities in Kenya.

### **2.3 Limitations of the theory**

Rawls states that there may be certain limitations to his inquiry on the principles of justice. First, he says that the principles may not work for the rules and practices of private

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<sup>45</sup> Rawls, *A Theory of Justice*, 1971, p11.

<sup>46</sup> *African Commission on Human and Peoples' Rights v The Republic of Kenya*, ACmHPR Comm. 006/2012.

<sup>47</sup> Rawls, *A Theory of Justice*, 1971, p47.

<sup>48</sup> Article 63, *Constitution of Kenya* (2010).

<sup>49</sup> Mukundi, *The constitutional and legislative protection of the rights of indigenous peoples: Kenya*, 2009

<sup>50</sup> Kamau C, 'Transitional justice as a path to distributive justice: A jurisprudential legal case of land restitution in Kenya' Vol 1 *Strathmore Law Review* (2016), 29.

associations or for the less comprehensive social groups. Second, he says that the principles are likely to only regulate a well ordered society where there is strict compliance. Despite Hobbes' view that man should be allowed to live in a state of nature free from interference, he opines that indigenous people are considered 'savages' and thus those who considered them uncivilized had a duty to modernize them<sup>51</sup>

Timothy Waligore highlights that when looking at justice, we must also look at the history.<sup>52</sup> Rawls claims that providing all citizens with the same package of basic liberties will normally support the self-respect of citizens. However, indigenous peoples have often faced attempts to coercively destroy their existing societies and make them into mere individual citizens. Leonard Choptiany raises questions about the theory with regards to the difference principle in that the difference principle has no specification of the size of inequality allowed in comparison with the amount of advantage provided.<sup>53</sup> It can be perceived that any inequality is justifiable regardless of how slight it is to those who will experience the most detriment.

## **2.4 Methodology**

This research is going to be mainly analysing the relevant Acts and treaties relating to indigenous peoples rights. It will focus on gathering information based on the current challenges of implementation of the already recognised rights. This will entail identifying the main obstacles to the effective implementation of these rights. This paper will also take into consideration the history of the issue of indigenous people's land rights in order to fully establish the background.

The research methods that will be the use of secondary data to carry out a qualitative research study. The data will include domestic law, treaties, conventions, case law and literature works from international human rights organisations. Also books, journal articles, internet sources, newspapers and electronic media such as television will be used further research. This will be conducted via a desktop research.

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<sup>51</sup> Maranga K, *Indigenous people and the roles of Culture Law and Globalization: Comparing Americas, Asias and Pacific*, Universal Publishers Boca Raton Florida, 2013

<sup>52</sup> Waligore T, 'Rawls, self-respect and assurance: How past injustices changes what publicly counts as justice' *Politics*, Vol. 15(1) *Philosophy & Economics* (2016).

<sup>53</sup> Choptiany L, 'A critique of John Rawls theory of justice' Vol 83 *University of Chicago Press* (1973).

## CHAPTER THREE: LEGAL FRAMEWORK

### 3.1 Introduction

In a law dissertation, Chapter three often constitutes an analysis and discussion of the research questions. This is an important part of the study as the analysis of the main issues is done at this stage. One of the main challenges faced by indigenous people is the lack of recognition. This Chapter will analyse whether there exists adequate legal recognition of indigenous people's rights and if so, whether the legal framework is sufficient in addressing their problems. The Chapter will mainly highlight the laws recognising indigenous people's land rights and whether these laws can be deemed as sufficient in effectively recognising indigenous people's rights.

### 3.2 Indigenous People and their land

The various communities in Kenya each have a different way of life such as fishing, hunting and gathering, pastoralism, agriculture etc.<sup>54</sup> Indigenous communities thus have their distinct way of life. Most indigenous people's economic livelihood consists of hunting and gathering with emphasis on bee-keeping and the gathering of wild fruits.<sup>55</sup> Traditional lands and territories of indigenous people form a key part in their identity.<sup>56</sup> They view the loss of their land is linked to marginalization, discrimination and the underdevelopment of indigenous people's communities.<sup>57</sup> They also face land tenure insecurity, poor political representation and exclusion.<sup>58</sup>

These lands and territories in which they occupy have resulted in shaping their unique identities and practices. Many of these communities have claimed that these unique practices have been submerged into the nations system hence their situation is marked by continuous land loss.<sup>59</sup> The dispossession of indigenous people has been attributed to claims of conservation and the advancement of economic such as oil exploration, logging, mining and compulsory acquisition.<sup>60</sup> The Endorois were evicted in from their ancestral land to pave way

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<sup>54</sup> Ghai Y and McAuslan, *Public law and political Change in Kenya*, Oxford University Press, London, 1970, 3.

<sup>55</sup> *UN Human Rights Council report of the special rapporteur on the rights of indigenous people*, 1 November 2017, UN Doc A/HRC /36/46.

<sup>56</sup> UN Permanent Forum on Indigenous Issues, 'Indigenous Peoples- Land, Territories and Natural Resources, 2007.

<sup>57</sup> UN Permanent Forum on Indigenous Issues, 'Indigenous Peoples- Land, Territories and Natural Resources, 2007.

<sup>58</sup> <https://www.iwgia.org/en/kenya> on 27/12/2017.

<sup>59</sup> Feiring B, *Indigenous People's Rights to lands, territories and resources*, International Land Coalition, 2013.

<sup>60</sup> Mukundi W, Kenya: Constitutional, Legislative and Administrative provisions concerning indigenous people. ILO and ACmHPR, 2009.

for a tourist reserve around the Lake Bogoria region.<sup>61</sup> The Ogiek on the other hand were evicted as a result of climate change and the Kenyan government's efforts to advance conservation.<sup>62</sup> However, there have been studies and reports evidencing that indigenous communities have been at the forefront of conservation of their ancestral lands.<sup>63</sup> Colonial administration also affected certain indigenous communities such as the Ogiek in that they faced displacement. Reports have indicated that over the years, these communities have lost access to land and land-based resources that are key to their livelihoods.<sup>64</sup>

### 3.3 Laws Recognising Indigenous People's Rights

#### National Laws

##### Constitution of Kenya

The Constitution of Kenya 2010 being the supreme law of Kenya has been applauded for upholding the recognition of indigenous people's rights.<sup>65</sup> Article 260, defines minorities and marginalised communities to include hunters and gatherers.<sup>66</sup> This broad definition of indigenous communities has been criticised for its ineffectiveness to protect them. Article 56 provides for the state to put up programmes for the development and enhancement of minorities and marginalized groups.<sup>67</sup> The Article does not expressly state the term indigenous people. In Article 63, the Constitution recognises community land as a land category as well as outlining what community land consists of.<sup>68</sup> The recognition of community complements the recognition of collective land rights in which indigenous people fall under.<sup>69</sup> Ancestral land and land that is traditionally occupied by hunters and gatherers are identified as community land.<sup>70</sup> The National Land Commission is established under Article 67 to deal with land related historical dispossessions and initiate restitution.<sup>71</sup> Community land cannot be disposed of except with the consent of the members through

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<sup>61</sup> <https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights> on 8/12/2017.

<sup>62</sup> Mbote K and Nyukuri E, 'Climate Change Law and Indigenous People in Kenya' *International Environment Law Research Centre*, 2013

<sup>63</sup> Asiema J and Situma F, 'Endangered People's Indigenous Rights and the Environment' *Colorado Journal of International Environmental Law and Policy*, 1994.

<sup>64</sup> Sessional Paper No.3 on National Land Policy 2009.

<sup>65</sup> Browning R, *The Right to development: An emerging jurisprudence*, LLB Dissertation, University of Cape Town, 2011

<sup>66</sup> Article 260, *Constitution of Kenya* (2010)

<sup>67</sup> Article 56, *Constitution of Kenya* (2010).

<sup>68</sup> Article 63, *Constitution of Kenya* (2010).

<sup>69</sup> Korir A, *Kenya at 50: unrealized rights of minorities and indigenous peoples*, Minority Rights Group Report January 2012.

<sup>70</sup> Article 63(2)(d)(ii), *Constitution of Kenya* (2010)

<sup>71</sup> Article 67, *Constitution of Kenya*.

legislation specifying the nature and extent of the rights of members of each.<sup>72</sup> This illustrates efforts to recognise community land rights as opposed to the Repealed constitution that provided for trust lands to be held by county councils.<sup>73</sup> Also, Article 100 provides for the participation of minority groups in the National Assembly and in the Senate.<sup>74</sup> Taking into consideration that indigenous communities are deemed as minorities, their inclusion in participation portrays their recognition and acknowledgement of the historic exclusion.

### Acts of Parliament

The Community land Act entered into force in September 2016. It is aimed at giving effect to Article 63 (5) of the Constitution to provide for the recognition, protection and registration of community land rights.<sup>75</sup> Historically, community land was guided by the customary law of the respective community.<sup>76</sup> However, during the colonial period, individual land systems were introduced.<sup>77</sup> This was executed when the 1915 Crowns Land Ordinance was enacted. This Ordinance provided for the inclusion of native community land as Crown land and Africans were not allowed to hold land for themselves.<sup>78</sup> After independence, the Trust Land Act was enacted to provide guidelines on the holding of community land. Community land was to be held by the County Councils who dictated the administration of the land.<sup>79</sup> During this period, the trust land became lucrative areas for land grabbing and illegal allocation of land.<sup>80</sup> The Community Land Act is the latest Act that recognizes community land. The Act was passed after a long overdue effort to recognise community land which was initiated by the Community Land Bill 2015. The Act recognizes customary land and allows it to be documented for purposes of registration. Customary land rights also have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer.<sup>81</sup> This Act also enables communities to register their land in a more efficient and expedient manner.<sup>82</sup> Following the historical injustices that arose post-independence where community land was grabbed, the Act regulates the conversion of land and allocation of

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<sup>72</sup> Article 63(4), *Constitution of Kenya* (2010).

<sup>73</sup> Section 115, *Constitution of Kenya* (1963) (Repealed).

<sup>74</sup> Article 100, *Constitution of Kenya* (2010).

<sup>75</sup> Preamble, *Community Land Act* (Act No. 27 of 2016).

<sup>76</sup> Kameri-Mbote, P, Property Rights and Biodiversity Management in Kenya, *African Centre for Technological Studies Press*, Nairobi, 2002, 6

<sup>77</sup> Ogenjo O, H.W.O, Tenets of the Crown: evolution of agrarian law and institutions, *African Centre for Technological Studies Press*, Nairobi, 1991

<sup>78</sup> *Crowns Land Ordinance* (1915).

<sup>79</sup> *Trust Land Act* (Cap 288)(Repealed).

<sup>80</sup> *The Ndungu Land Report on illegal land allocation* (2005).

<sup>81</sup> Section 5, *Community Land Act* (Act No. 27 of 2016).

<sup>82</sup> Section 11, *Community Land Act* (Act No. 27 of 2016).

individual rights.<sup>83</sup> In light of all this, the Forest Act of 2005 portrays a possible contradiction to the recognition of community land. The Forest Act provides for the allowance of communities to use the forests according to their customs.<sup>84</sup> The same Act then goes ahead to State that the Minister can issue the gazette of a forest for the preservation of bio-diversity.<sup>85</sup> Such mandates have resulted in the forceful evictions of various indigenous communities such as the Ogiek and the Endorois.

The Land Act of 2012 is another Act of Parliament that provides for the rights of indigenous people. Part IV of the Land Act 2012 recognises community land and provides that it shall be managed in accordance with Article 63 of the Constitution.<sup>86</sup> The Land Registration Act in Section 9 provides for the registration of title for community land.<sup>87</sup> A community land register is to be maintained in every land registration unit.<sup>88</sup> The Registrar of land titles has the mandate to issue a certificate of lease or a certificate of title to the community in question. There have been criticisms of the action by governments to issue title deeds for community land. It has been alleged that this departs from the true meaning of community land and fosters insecurity.<sup>89</sup>

The National Land Commission is an independent body provided for by the Constitution of Kenya.<sup>90</sup> The commission is a new institution with various functions ranging from the management of public land on behalf of the county and national government, to investigate historical injustices of land, to monitor and have oversight responsibilities over land use planning throughout the country. Before the establishment of the National Land Commission and the enactment of the National Land Commission Act, the Ministry of Lands was tasked with all land related functions. The Act broadens the functions and powers of the commission.<sup>91</sup>

The Environment and Land Court Act is another domestic law that can be deemed to recognise the rights of indigenous people. Article 162(2)(b) of the Constitution gives parliament the authority to establish courts with the status of the High Court to hear and

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<sup>83</sup> Section 4(3), *Community Land Act* (Act No. 27 of 2016).

<sup>84</sup> Section 22, *Forest Act* (2005)

<sup>85</sup> Section 22, *Forest Act* (2005)

<sup>86</sup> Section 37, *Land Act* (Act No 6 of 2012).

<sup>87</sup> Section 9, *Land Registration Act* (Act No 3 of 2012)

<sup>88</sup> Odote C, Legal and policy framework regulating community land in Kenya, *Friedrich Ebert Stiftung*, 2010.

<sup>89</sup> Kameri Mbote P, Fallacies of equality and inequality: Multiple exclusions in law and legal discourses, *International Environment Law Research Centre*, 2013.

<sup>90</sup> Article 67, *Constitution of Kenya* (2010).

<sup>91</sup> *National Land Commission* (Act No 5 of 2012).

determine disputes relating to the environment, and use and occupation of and title of land. The Environment and Land court was then established and is governed by the Environment and Land Court Act. The objective of the Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of land disputes.

The Constitution in Article 48 and the Legal Aid Act are aimed at the promotion of access to justice. The service is aimed at determining the legal needs of indigenous persons and of disadvantaged communities in Kenya.<sup>92</sup> This right is particularly important especially to indigenous people taking into consideration their lack of resources as a result of marginalization hence are likely to suffer if the legal aid services are not offered.<sup>93</sup> Mukundi also highlights that judicial processes are relatively expensive thus hindering access to justice especially for indigenous communities.<sup>94</sup> Despite the enactment of the Legal Aid Act in an attempt to promote access to justice has been criticised based on evidence of lower service delivery has been reported with regards to pro-bono services.<sup>95</sup>

#### Case Law

The High Court in Kenya as established by the Constitution of Kenya has unlimited original jurisdiction over all criminal and civil matters.<sup>96</sup> Further, Article 165(3) (b) of the Constitution mandates the High Court to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The African Court and the African Commission have also contributed in its jurisprudence in the recognition of indigenous communities and their land rights. The African Commission was established in 1986 to monitor state parties' compliance with the Charter's provisions when the African Charter of Human and Peoples' Rights (the Charter) entered into force. It is also tasked with promoting and protecting human rights by considering allegations of infringement. The Commission has been applauded for its interpretation of the AChHPR's provisions including the recognition of indigenous people's rights. This is evidenced by the Commission's efforts to define indigenous people.

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<sup>92</sup> Section 35(3a), *Legal Aid Act* (No 6 of 2016)

<sup>93</sup> Tutu D, 'The role of legal aid in the realization of the rights of indigenous people in Kenya' LLM Thesis, University of Nairobi, November 2016.

<sup>94</sup> Mukundi W, Kenya: Constitutional, Legislative and Administrative provisions concerning indigenous people. ILO and ACmHPR, 2009

<sup>95</sup> *Rangal Lemeiguran & Others v Attorney-General & Others* (2006)eKLR.

<sup>96</sup> Article 165(3)(a), *Constitution of Kenya* (2010).

Despite its immense efforts to ensure that human rights are upheld by all State parties, the Commission has been critiqued is the inability to enforce its decisions and recommendations. This has been attributed to the non-binding nature of their decisions thus States fail to implement the recommendations.

### 3.3.2.1 Ogiek

The Ogiek are a group of people inhabiting the Mau Forest since time immemorial. Injustices faced by the Ogiek can be dated back to the pre-colonial period when the British encroached on their ancestral lands to create African reserves. This left them landless having disregarded the communal ownership of land by instituting the individualization of land title for all. Between 1911- 1927, they continued to face evictions from the Mau forest which was considered Crown land.<sup>97</sup> In the 1990's the Mau forest was gazetted and there were numerous attempts to evict them from the contentious land. The government then issued an eviction order in 1999 giving the Ogiek fourteen days to evacuate. It is after this eviction order that the members of the Ogiek community sought a declaration stating that their eviction from the Mau forest was a violation of their rights.<sup>98</sup> They claimed to have lived in the forest since time immemorial and that their livelihoods depended on the inhabitation of the forest.<sup>99</sup> This is because they were hunters and gatherers. This case was determined using the 1969 Constitution. In responding to the applicants claim, the government argued that the area was a protected water catchment area and that the applicants do not belong to the Ogiek community. In this case, the High Court at Nairobi held that there lacked sufficient evidence to prove the existence of discrimination. With regards to the discrimination claim, the judge held that Constitutional rights are subject to limitations. It also held that their eviction did not hinder them from exploiting their natural resources upon the acquisition of a licence and that the applicants were living in a forest without complying with the Forest Act regulations. This case illustrates the failure of the Courts in the acknowledgement of indigenous people's lands and territories. It also illustrates the discrepancy in access to justice by indigenous people based on the inability to provide sufficient evidence before the Court thus the need for the

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<sup>97</sup> Sang J, *Case study 3 Kenya-The Ogiek in Kenya*, 2001, 118

<sup>98</sup> *Francis Kemei, David Sitienei and Others v The Attorney General & 3 others* (1999)eKLR.

<sup>99</sup> *Kemei and 9 others v Attorney General & 3 others* (1999)eKLR.

utilization of legal aid. This has been attributed to the lack of resources and their lack of knowledge.<sup>100</sup>

In *African Commission on Human and Peoples' Rights v The Republic of Kenya* the Ogiek community then sought redress from the African Court of Human and People's Rights on grounds of inhumane evictions and violations of the African Charter by the Kenyan government.<sup>101</sup> The Ogieks submitted that the forceful evictions by the Kenyan government were violations of Article 14 of the AChHPR which provides for the right to property. They also submitted that the evictions were not for the purpose of public interest, thus making them illegal in nature.<sup>102</sup> The court held that the expulsion of the Ogieks from their ancestral lands without prior consent was indeed a violation of Article 14 of the AChHPR.<sup>103</sup>

### 3.3.2.2 Endorois

The Endorois consist of a semi-nomadic group residing near Lake Baringo in the Rift Valley.<sup>104</sup> They experienced forced evictions from their ancestral lands in order to pave way for the establishment of a tourist reserve.<sup>105</sup> In *William Arap Ng'asia & 29 Others suing on the behalf of over 43,000 Other Members of the Endorois Community v. Baringo County Council and Koibatek County Council*, members of the Endorois community brought a petition in the High Court of Nakuru for unlawful evictions of their ancestral home.<sup>106</sup> The Court held that the disputed land had been gazetted by the State according to Sections 114 and 115 of the 1963 Constitution of Kenya (Repealed) to pave way for the establishment of a national reserve thus the evictions were lawful. During the case, there was a question raised as to whether the land around Lake Baringo could be classified as ancestral land taking into consideration the fact that the Endorois are deemed as semi-nomadic.<sup>107</sup> The Court also held

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<sup>100</sup> Mukundi W, Kenya: Constitutional, Legislative and Administrative provisions concerning indigenous people, ILO and ACmHPR, 2009.

<sup>101</sup> *African Commission on Human and Peoples' Rights v The Republic of Kenya* ACmHPR Comm. 006/2012.

<sup>102</sup> *African Commission on Human and Peoples' Rights v The Republic of Kenya*, ACmHPR Comm. 006/2012, para 117.

<sup>103</sup> *African Commission on Human and Peoples' Rights v The Republic of Kenya*, ACmHPR Comm. 006/2012, para 131.

<sup>104</sup> <http://minorityrights.org/law-and-legal-cases/centre-for-minority-rights-development-minority-rights-group-international-and-endorois-welfare-council-on-behalf-of-the-endorois-community-v-kenya-the-endorois-case/> on 16/1/2018.

<sup>105</sup> <http://minorityrights.org/law-and-legal-cases/centre-for-minority-rights-development-minority-rights-group-international-and-endorois-welfare-council-on-behalf-of-the-endorois-community-v-kenya-the-endorois-case/> on 16/1/2018.

<sup>106</sup> (2000)eKLR.

<sup>107</sup> *William Arap Ng'asia & 29 Others suing on the behalf of over 43,000 Other Members of the Endorois Community v. Baringo County Council and Koibatek County Council* (2000)eKLR.

that the land could not be deemed as ancestral following the nomadic nature of the community.<sup>108</sup>

As a result of the High Court decision, the Endorois community filed a petition through the Centre of Minority Rights Development against the Kenyan government for unlawful evictions from their ancestral home and the infringement on their right to self-determination.<sup>109</sup> In its judgement, the Commission held that the Endorois' rights to property had been violated.

### 3.3.2.3 Chamus

The Chamus community sought to be recognised as an indigenous and marginalized community by the court. They claimed that it was unlikely for a person from the community to be elected into parliament following the constituency boundaries thus the need to redefine them in order to enable opportunities for participation.<sup>110</sup> The High Court in this case instructed the then Electoral Commission of Kenya to review the boundaries and in particular ensure adequate representation of indigenous communities in sparsely populated rural areas especially the Il Chamus.<sup>111</sup>

### International Law

Pursuant to Article 2(5) and 2(6), the general rules of international law are applicable in Kenya.<sup>112</sup> The treaties and Conventions that Kenya ratifies form part of the laws of Kenya. Taking this provision into consideration, international treaties on the rights of indigenous people form part of the laws of Kenya. Although the ICCPR is not a comprehensive Covenant that deals with indigenous people's rights, it provides for the protection of ethnic, religious and linguistic minority rights to enjoy in community their own culture.<sup>113</sup> It was among the first UN instruments to afford minorities' exclusive rights.<sup>114</sup>

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<sup>108</sup> *William Arap Ng'asia & 29 Others suing on the behalf of over 43,000 Other Members of the Endorois Community v. Baringo County Council and Koibatek County Council.*

<sup>109</sup> *Centre of Minority Rights Development (CEMIRIDE) (on behalf of the Endorois community) v Kenya* ACmHPR Comm. 276/2003.

<sup>110</sup> *Rangal Lemeiguran & Others v Attorney-General & Others* (2006) AHRLR 281

<sup>111</sup> *Rangal Lemeiguran & Others v Attorney-General & Others*

<sup>112</sup> Article 2(5), *Constitution of Kenya* (2010).

<sup>113</sup> Article 27, *International Covenant on Civil and Political Rights*, 999 UNTS 171 (16 December 1966)

<sup>114</sup> Giamondi G, 'Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1' Vol 18 *Yale Human Rights and Development Journal* (2017).

The ILO was founded in 1919 after World War I to afford men and women humane working conditions.<sup>115</sup> The ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries advocates for indigenous people to be accorded all human rights without discrimination.<sup>116</sup> It is an essential requirement to consult the indigenous communities whenever administrative measures which are likely to affect them are being made.<sup>117</sup> Based on the injustices that indigenous communities have faced over the years, the convention provides for states to possess adequate mechanisms and procedures “within the national legal system to resolve land claims by the peoples concerned”.<sup>118</sup> The Convention provides for the principle of free, prior and informed consent in the context of relocation of indigenous peoples from their land in Article 16.<sup>119</sup> In defining FPIC is defined as follows; free, should imply that there is no coercion, intimidation or manipulation, prior should imply consent being sought sufficiently in advance of any authorization or commencement of activities and respective requirements of indigenous consultation/consensus processes. Informed should imply that information is provided that covers a range of aspects, including the nature, size, pace, reversibility and scope of any proposed project or activity; the reason/s or purpose of the project and its duration; locality or areas.<sup>120</sup>

The treaty although binding on State parties has been criticized on its weak enforcement mechanisms with alleged infractions of the Convention are dealt with by filing complaints which end with a nonbinding recommendation issued by a committee to the government.<sup>121</sup>

The ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries provides for the rights of tribal and semi-tribal people in all states.<sup>122</sup> It provides for ‘*the right of ownership, collective or individual, of the members of the populations concerned over the lands which these*

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<sup>115</sup> <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> on 22/01/2018

<sup>116</sup> Article 3, *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries* (27 June 1989) UNTS 169.

<sup>117</sup> Article 6(1) (a), *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries*.

<sup>118</sup> *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries* (27 June 1989) UNTS 169.

<sup>119</sup> UN Commission on Human Rights on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, *Working Paper on the Concept of Free, Prior and Informed Consent*, 2005, UN Doc 2/AC.4/2005.

<sup>120</sup> UN Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, New York, 17–19 January 2005 (E/C.19/2005/3)

<sup>121</sup> Anaya J, *Indigenous people in international law*, Oxford University Press (2<sup>nd</sup> edition), 2004

<sup>122</sup> Article 1, *ILO Convention Concerning the Protection and Integration of Indigenous of other Tribal and Semi-Tribal Populations in Independent Countries* (26 June 1957) UNTS 107.

*populations traditionally occupy shall be recognised.*<sup>123</sup> Just like the ILO Convention on Indigenous and Tribal People, populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.<sup>124</sup> The two ILO Conventions are the only Conventions that exclusively concerned with the protection of indigenous people. Despite the elaborate provisions recognising indigenous people's rights in both the ILO Conventions 169 and 109, Kenya is not a signatory and neither has it ratified them.<sup>125</sup>

In the Convention on Biodiversity, the term local communities was adopted in this Convention at the 1992 Rio Conference to refer to communities that maintain a traditional lifestyle as seen in many African countries.<sup>126</sup> Article 8(j) provides that "Each contracting party shall, as far as possible and as appropriate: subject to national legislation, 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 holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such innovations and practices".<sup>127</sup> This provision also embodies the concept of benefit sharing. The Convention is deemed to be one that is aimed at championing the respect of indigenous people's rights in the conservation of biodiversity with regards to indigenous agriculture, agroforestry, hunting, fishing etc.<sup>128</sup>

The United Nations Declaration on the Rights of Indigenous People was enacted after a recommendation from the United Nations Human Rights Council. The Declaration has been applauded for specializing and focussing on the rights of indigenous people unlike other international instruments like the ICCPR that are considered general.<sup>129</sup> Article 10 of the Declaration provides for indigenous people not to be evicted from their lands or territories without free prior and informed consent. Article 19 of the Declaration provides for

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<sup>123</sup> Article 11, *ILO Convention Concerning the Protection and Integration of Indigenous of other Tribal and Semi-Tribal Populations in Independent Countries*.

<sup>124</sup> Article 12, *ILO Convention Concerning the Protection and Integration of Indigenous of other Tribal and Semi-Tribal Populations in Independent Countries*.

<sup>125</sup> [http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210\\_COUNTRY\\_ID:103315](http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:103315) on 17/1/2018.

<sup>126</sup> Rio Declaration on Environment and Development, A/CONF.151/26 (12 August 1992).

<sup>127</sup> Article 8(j), *Convention on Biodiversity*, 29 December 1993, 2226 UNTS 208.

<sup>128</sup> Home R, *Essay in African Land Law*, Pretoria University Law Press, 2011.

<sup>129</sup> Barelli M, 'The role of soft law in the international legal system: The case of the United Nations Declaration on the Rights of Indigenous People' Vol. 58, *The International and Comparative Law Quarterly* (2009).

consultation and cooperation in good faith between States and indigenous people concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>130</sup> The right to restitution which is an important right following the various injustices experienced by these communities is provided for in the Declaration.<sup>131</sup> In the event of an agreement, just and fair compensation ought to be given to the communities.<sup>132</sup>

The Committee on the Elimination of Racial Discrimination in its recommendation XXIII on the rights of indigenous peoples calls upon States to “ensure that members of indigenous peoples have 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”.<sup>133</sup>

### Regional Instruments

The African Charter on Human and People’s Rights is one the only regional instruments that provides for both individual and collective rights. The Charter provides for non-discrimination of minorities and the right of peoples to economic, social and cultural development "with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind".<sup>134</sup> Enacted in 1969, the African Convention on Conservation of Nature and Natural Resources provides for prior consent in the access of indigenous knowledge and resources from the communities.<sup>135</sup>

The American Convention on Human Rights is the main human rights instrument in the Americas. It provides for the right to property by declaring that "everyone has the right to property".<sup>136</sup> This has been interpreted to include the protection to collective land rights as well. American Declaration on the Rights of Indigenous People was adopted after UNDRIP.<sup>137</sup> The Declaration addresses issues that were not covered by UNDRIP including specific situations relevant to the region such as the rights of indigenous people in voluntary isolation and initial contact and indigenous people affected by armed conflict.<sup>138</sup> Article XXV

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<sup>130</sup> Article 19, UNGA *Declaration on the Rights of Indigenous People* UN A/Res/ 61/295 (13 September 2007).

<sup>131</sup> Article 28, UNGA *Declaration on the Rights of Indigenous People*.

<sup>132</sup> UNGA *Declaration on the Rights of Indigenous People* UN A/Res/ 61/295 (13 September 2007).

<sup>133</sup> Office of the High Commissioner for Human Rights, General Recommendation No. 23: Indigenous People Fifty-first session, 1997, UN Doc. A/52/18.

<sup>134</sup> African Charter on Human and Peoples’ Rights (1981).

<sup>135</sup> Article XVII(2), *African Convention of Nature and Natural Resources*, UNTS Vol 479.

<sup>136</sup> Article 21, American Convention on Human Rights OAS, 18 July 1978

<sup>137</sup> *American Declaration on the Rights of Indigenous People*, OAS 15 June 2016.

<sup>138</sup> <https://www.asil.org/insights/volume/21/issue/7/american-declaration-rights-indigenous-peoples> on 7/12/2017

provides for the Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. The recommendations of the Inter-American Commission on Human Rights and the rulings of the Inter-American Court on Human Rights have contributed to the evolution of international law and inspired decisions by other regional human rights monitoring bodies, such as the African Commission. It can be deemed that international jurisprudence is evident in the Endorois case, where the African Commission obtained guidance from the Inter-American human rights system.

### **3.4 Conclusion**

As evidenced in this Chapter, laws recognising indigenous people's land rights do exist following the historical injustice experienced by them. However, it is evident that Kenya still lacks a distinct Statute that exclusively provides for indigenous people's rights. Currently, the national legal framework lacks exclusivity. With regards to international law, the ILO Conventions 109 and 169 exclusively provide for indigenous people's rights, however Kenya is not a signatory and has failed to ratify the two Conventions. There also exists a contradiction between the Community Land Act and the Forest Act. The various legal provisions for the rights of indigenous communities portray the efforts that have been made in recognising indigenous people and the inclusion of their distinct rights. However, there still lacks an Act of Parliament that consolidates these rights.

## CHAPTER FOUR: FAILURES IN IMPLEMENTATION

### 4.1 Introduction

This chapter is devoted towards highlighting the failures in implementing indigenous people's land rights. The African Commission on Human and People's Rights in its recommendation to Kenya highlighted the fact that Kenya was having difficulties in implementing its laws on the rights of indigenous people.<sup>139</sup> By highlighting the Kenya's failure in the implementation of indigenous communities' rights pursuant to the Constitution of Kenya, informed affirmations can be made on whether the rights of indigenous people can be said to recognise.

### 4.2 Failure in Enforcement of Rights

The executive branch of the government is tasked with formulating policy and the implementation of the policies across all sectors.<sup>140</sup> In this case, the Ministry of Lands, Kenya Wildlife Service and the Kenya Forest Service play vital roles in the implementation of the rights of indigenous communities.

#### Sengwer

Despite numerous international, domestic legal frameworks in place, there have been cases of forced evictions of indigenous communities. The Sengwer are identified as a hunter-gatherer community whose lifestyle depends on natural resources and their ancestral lands.<sup>141</sup> Their culture is also deemed to be different from that of the majority and dominant in the society. They inhabit the Embobut forest in the Cherangany Hills and have recently faced forceful evictions to pave way for a European Union Water Towers Protection and Climate Change Mitigation and Adaptation Programme Project<sup>142</sup>. The project is in partnership with the Ministry of Environment and Natural Resources and is aimed at protecting Kenya's water catchment areas in various parts of the country.<sup>143</sup> These evictions have been repeatedly

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<sup>139</sup> Paragraph 196, ACHPR recommendations to Kenya

<sup>140</sup> <http://www.deputypresident.go.ke/index.php/the-executive-branch> on 20/01/2018

<sup>141</sup> African Commission on Human People's Rights, 'Indigenous People in Africa: The forgotten People?' IWGIA, Copenhagen, 2006

<sup>142</sup> Mwanza Kevin, U.N Experts ask Kenya to halt Sengwer evictions from forest land, Reuters <https://af.reuters.com/article/africaTech/idAFL8N1PB53C> on 19/01/2018

<sup>143</sup> Muratha M, Protecting water towers for prosperity <http://www.kenyaforestservice.org/index.php/2016-04-25-20-08-29/news/596-protecting-water-towers-for-prosperity> on 11/01/2018

executed since the 1970s and have been deemed violent.<sup>144</sup> Kenya Forest Service officers have been accused of using excessive forces with particular condemnation after the killing of a Sengwer herder in the Embobut forest.<sup>145</sup> These evictions by the Kenya Forest Service were deemed violations of fundamental rights and freedoms by the Eldoret High Court which then issued an injunction.<sup>146</sup>

In 2013, the President offered the 2,784 Sengwer beneficiaries Ksh 400,000 as compensation to evict the Embobut Forest.<sup>147</sup> Many of the members of the community claim that there lacked free prior and informed consent when executing the conservation project.

### Ogiek

In November 2017, the Kenyan Government gazetted the Task-force on the implementation of the ACtHPR's decision in favour of the Ogiek community. However, there have been concerns raised by the representatives as to the effectiveness of the Task-force.<sup>148</sup> The Task-force is said to lack any Ogiek representative and comprises of officials from the Offices of the President and Deputy President, the Ministry of Environment and Natural Resources, the Ministry of Lands and Physical Planning, the National Treasury, the Office of the Attorney General, the Kenya National Human Rights Commission, the National Lands Commission, the Ministry of Sports and Culture, and the Kenya Forest Service.<sup>149</sup>

Reports have shown that the compliance of court orders by the State is an ongoing challenge.<sup>150</sup> There have been cases of non-compliance and hostility from the police towards the indigenous communities that choose to litigate.<sup>151</sup>

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<sup>144</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14163> on 7/01/2018

<sup>145</sup> Muraya J, Probe launched over death of Sengwer community member, Capital news

<https://www.capitalfm.co.ke/news/2018/01/probe-launched-death-sengwer-community-member/> on 19/01/2018

<sup>146</sup> David Kiptum Yator & 2 others suing as leaders of the Sengwer community v Attorney General & 5 others (2016)eKLR

<sup>147</sup> <https://reliefweb.int/report/kenya/kenya-defies-its-own-courts-torching-homes-and-forcefully-evicting-sengwer-their> on 6/01/2018

<sup>148</sup> Minority Rights Group 'Kenyan government task-force to implement African court's Ogiek judgement deeply flawed' <http://minorityrights.org/2017/11/13/kenyan-government-task-force-implement-african-courts-ogiek-judgment-deeply-flawed-mrg-opdp-say/> on 7/01/2018

<sup>149</sup> Minority Rights Group 'Kenyan government task-force to implement African court's Ogiek judgement deeply flawed' <http://minorityrights.org/2017/11/13/kenyan-government-task-force-implement-african-courts-ogiek-judgment-deeply-flawed-mrg-opdp-say/> on 7/01/2018

<sup>150</sup> Open Society Initiative, *The Impacts of Strategic litigation on Indigenous People's Land Rights*, 21-22 June 2016, at Nairobi

<sup>151</sup> Open Society Initiative, *The Impacts of Strategic litigation on Indigenous People's Land Rights*, 21-22 June 2016, at Nairobi

## Endorois

Despite the victory that was achieved by the Endorois community are still facing evictions and implementation of the decision by the Kenyan government is slow if not there at all.<sup>152</sup>

### 4.4 What are the possible reasons for the failures in implementation?

#### i. Eminent Domain and Indigenous People's Territories

The concept of eminent domain can be dated back to the Roman times.<sup>153</sup> Eminent domain has been defined as 'the inherent power of government to take privately owned property especially land, and convert it to public use, subject to reasonable compensation for the taking'.<sup>154</sup> In Kenya, the emergence of eminent domain is witnessed by the enactment of the Indian Land Acquisition Act of 1894 that provided for compulsory land acquisition to pave way for the railway and a ten mile strip on both sides of the railway during the pre-colonial period.<sup>155</sup> Community land rights were terminated upon occupation by the British where all land that did not have title was possessed by the British rendering many communities landless.<sup>156</sup> The Land Acquisition Act was the dominant law governing compulsory acquisition up until 2012.<sup>157</sup> Currently, the Constitution and the Land Act are the main Statutes that provide for eminent domain. In Kenya community land is protected by the Constitution.<sup>158</sup> The same Constitution in Article 40 also provides for the right to own property individually or in association with others.<sup>159</sup> The State's powers are conferred in the Constitution which provides for the deprivation of property for a public purpose or in the public interest.<sup>160</sup> Despite these powers existing, the process of eminent domain should be in accordance with the law because title belongs to the people of Kenya.<sup>161</sup> The Land Act mandates the National Land Commission to execute eminent domain and requires it to gazette any private land that has been acquired.<sup>162</sup> In exercising eminent domain the government should ensure that just and fair compensation was given to the respective land

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<sup>152</sup> Kimathi L, 'Contesting Local Marginalization through International Instruments: The Endorois Community Case to The African Commission on Human and Peoples' Rights, (2012), 25

<sup>153</sup> Sandefur T, 'A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use' Vol 32 *South West University Law Review* (2003).

<sup>154</sup> *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR

<sup>155</sup> *Indian Land Acquisition Act* of 1894 (Repealed).

<sup>156</sup> Kariuki F, Ouma S, Ng'etich R, 'Property Law' *Strathmore University Press*, 2016, 131

<sup>157</sup> *Land Acquisition Act* (Cap 295) (Repealed).

<sup>158</sup> Article 63, *Constitution of Kenya* (2010).

<sup>159</sup> Article 40, *Constitution of Kenya* (2010).

<sup>160</sup> Article 40(3)(b), *Constitution of Kenya* (2010).

<sup>161</sup> Kariuki F, Ouma S, Ng'etich R, 'Property Law' *Strathmore University Press*, 2016, 131.

<sup>162</sup> Section 107(1), *Land Act* (Act No.6 of 2012).

owners.<sup>163</sup> Just and fair competition means an equivalent value which could be the contract value or market value and not the speculative value.<sup>164</sup> Fair compensation has been a controversial aspect with regards to ancestral land.<sup>165</sup> It has been claimed to impossible to 'restore' or 'compensate' ancestral land taking into account that the sentimental nature thus inappropriate.<sup>166</sup> Indigenous and marginalized communities have experienced numerous historical injustices as evidenced in reports such as the Truth Justice and Reconciliation Report that was aimed at investigating historical injustices. Over the years, a community whose land is situated on natural resources or is set aside for conservation has suffered in that they are forcefully evicted.<sup>167</sup>

The mere existence of this power poses a threat to indigenous communities and their territories thus illustrating the possible implementation difficulties.<sup>168</sup> The acquisition of indigenous people's land has been criticised in other jurisdictions such as the United States of America.<sup>169</sup> The Native Americans have had their lands and territories acquired by the State for purposes of public use in the name of eminent domain. This poses evidences of the inability to fully implement indigenous people's rights to their land with the presence of the power of eminent domain. It is uncertain as to the extent the central government will use the justification of environmental conservation to claim community land as public land.<sup>170</sup> There have also been claims of the expropriation of the land has not been for a public purpose as required by the Constitution.<sup>171</sup> Cases such as *Manase Guyo & 260 others vs Kenya Forest* have arisen as a result of eminent domain for conservation purposes. This led to the eviction of local communities that claim to base their survival on their land and territories.<sup>172</sup> In addition to that, the victims of eminent domain have made claims that there is the lack of compensation, adequate compensation and prior consent. Representatives from the Kenya Forest Indigenous People's Network have numerously affirmed that their way of life is aimed

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<sup>163</sup> Article 40 (3), *Constitution of Kenya (2010)*

<sup>164</sup> *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR

<sup>165</sup> FAO, 'Compulsory acquisition of land and compensation', *Nations Land Tenure Studies (2009)*,

<sup>166</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others (LCC 156/2009) (2012)*

<sup>167</sup> Constitution of Kenya Review Commission, *Final draft*, 2005,256

<sup>168</sup> Ondili M, 'Eminent domain: The perpetual rights of indigenous people of Kenya to land ownership', *Strathmore Law Review*, 2017

<sup>169</sup> Leeds S, 'By Eminent domain or some other name; A tribal perspective of taking land' Vol 41 *Tusla Law Review* (2005).

<sup>170</sup> Kenya passes long awaited law enabling communities to secure formal recognition of their land rights , *Land Rights Now*, 12 October 2016 <http://www.landrightsnow.org/en/news/2016/10/12/kenya-passes-long-awaited-law-enabling-communities-secure-formal-recognition-their-land-rights/> on 15/01/2018

<sup>171</sup> Article 40 (3), *Constitution of Kenya (2010)*

<sup>172</sup> *Manase Guyo & 260 others v Kenya Forest Services (2016)eKLR*

at protecting the forest and thus the conservation projects can be deemed as excuses from the government.<sup>173</sup>

## ii. Lack of Free, Prior and Informed Consent

The principle of free, prior and informed consent is provided in both the Constitution and international instruments such as the ILO 109.<sup>174</sup> As defined earlier in the study, FPIC requires that indigenous communities are to be informed about any prospective projects on their land and they should also be given an opportunity to object.<sup>175</sup> The UN Permanent Forum on Indigenous Issues has championed for international financial institutions should adhere to FCIP before commencing desired projects.<sup>176</sup> indigenous communities such as the Sengwer have made assertions that they were not consented or informed prior to the commencement of government projects.<sup>177</sup> The lack of FPIC has attributed immensely to the failures in the implementation of indigenous people's land rights.

## iii. Corruption

Dispossession or misappropriation is likely to occur due to corruption in land allocation.<sup>178</sup> The Ministry of Land has been faced with one of the most allegations of corruption. This is taking into consideration the historical land injustices that left many people landless or displaced. The corruption witnessed over the years can be attributed to the failure in implementing indigenous people's land rights. According to the Ndung'u Report, land in Kenya is tainted with injustices such as land grabbing and illegal allocation of land.

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<sup>173</sup> Kenya passes long awaited law enabling communities to secure formal recognition of their land rights , *Land Rights Now*, 12 October 2016 <http://www.landrightsnow.org/en/news/2016/10/12/kenya-passes-long-awaited-law-enabling-communities-secure-formal-recognition-their-land-rights/> on 15/01/2018

<sup>174</sup> Article 40, *Constitution of Kenya (2010)*.

1. <sup>175</sup> OXFAM, Securing Communities' Right to 'Free Prior and Informed' Consent in Kenya's Extractive Sector, [https://kenya.oxfam.org/press\\_release/securing-communities%E2%80%99-right-%E2%80%98free-prior-and-informed%E2%80%99-consent-kenya%E2%80%99s-extractive](https://kenya.oxfam.org/press_release/securing-communities%E2%80%99-right-%E2%80%98free-prior-and-informed%E2%80%99-consent-kenya%E2%80%99s-extractive) on 5/02/2018

<sup>176</sup> United Nations Economic and Social Council, Permanent Forum on Indigenous Issues, "Comprehensive Dialogue with United Nations Agencies and Funds," Twelfth Session, New York, May 28, 2013

<sup>177</sup> Kenya/ Embobut Forest: UN rights expert calls for the protection of indigenous people facing eviction, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14163> on 5/02/2018

<sup>178</sup> Chene Marie, 'Impact of corruption on indigenous communities' [https://www.transparency.org/files/content/corruptionqas/245\\_Impact\\_of\\_corruption\\_on\\_indigenous\\_people.pdf](https://www.transparency.org/files/content/corruptionqas/245_Impact_of_corruption_on_indigenous_people.pdf) on 21/01/2018.

Communities such as the Maasai have faced historical injustices as a result of corruption in the Ministry of Lands. In the Endorois case, an issue arose as to whether the evictions of the Endorois were in order to achieve a public benefit.<sup>179</sup> It was held that the reasons for the evictions did not satisfy the purpose of public benefit. It was held that eviction was not proportionate to the public need the game reserve was claiming to satisfy.<sup>180</sup>

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<sup>179</sup> *Centre of Minority Rights Development (CEMIRIDE) (on behalf of the Endorois community) v Kenya* ACmHPR Comm. 276/2003, para 238.

<sup>180</sup> *Centre of Minority Rights Development (CEMIRIDE) (on behalf of the Endorois community) v Kenya* ACmHPR Comm. 276/2003

## **5.0 CHAPTER FIVE: CONCLUSION, FINDINGS AND RECOMMENDATIONS**

### **5.1 Introduction**

This Chapter is aimed at illustrating the findings of the study, portraying the suitable recommendations and providing a conclusion.

### **5.2 Findings**

Following the study done on the recognition of the rights of indigenous people, Kenya still lags behind in the effectiveness of its laws and in the implementation of the existing laws. As evidenced in Article 260 of the Constitution, the definition of indigenous people is somewhat vague. This is taking into consideration more elaborate definitions of indigenous communities provided for by the ACmHPR and other international frameworks such as the ILO Conventions 109 and 169.

Also having illustrated the various laws in place that recognise indigenous communities and their rights, Kenya is yet to enact a Statute that exclusively provides for indigenous communities' land rights. Moreover, it has also failed to ratify key international legal instruments that exclusively provide for indigenous community rights.

Taking into account the fact that various communities have sought legal redress both in national and international courts for violations of their rights, it can be concluded that the Executive has failed in its implementation role. Such experiences have been faced by members of the Endorois, Sengwer and the Ogiek. These failures have been attributed to corruption and mandates such as eminent domain. Corruption undermines the fairness of institutions and processes thus undermining the ability of a State to fully realise the human rights of its citizens.<sup>181</sup> The government of Kenya has also been critiqued for its unwillingness to comply with the ACmHPR's orders and recommendations on indigenous people. They have been accused of being slow in the implementation of these orders.

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<sup>181</sup> OCHR, The Negative effect of corruption on the enjoyment of human right, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Corruption/OHCHR.pdf> on 20/01/2018

### **5.3. Recommendations**

#### Recommendations to the Executive

The Executive should set up stable implementing institutions tasked with solely implementing the laws recognising indigenous people and the court orders or recommendations from the ACmHPR. The Kenya Forest Service, the Kenya Wildlife Service and the Ministry of Lands should liaise in the realization of effectively implementing indigenous people's rights. This can be done with adequate fund allocations to ensure the effective execution of this mandate. In the event of the formulation of task-force, adequate representation from members of the involved communities ought to be ensured for effective enforcement.

Officials of the various bodies should ensure for FPIC to prevent cases of communities claiming the lacked information. To ensure Article 35 of the Constitution on access to information, the entire process, the reports by the NLC on valuation and compensation should be made available to the public for scrutiny.

#### Recommendations to Parliament

Seeing as the rights of indigenous people are contained in various legal frameworks, parliament should enact legislation that exclusively provides for the rights of indigenous people given its mandate in Article 95 of the Constitution of Kenya. This will aid in the consolidation of all the laws that contain provisions on indigenous people. The legislation should elaborately define indigenous people in addition to the Article 260 of the Constitution which merely highlights marginalized communities as being part of indigenous communities. Parliament should also re-access the powers of eminent domain with regards to community land and ancestral land. As evidenced in the study, eminent domain is the major reason for failure in the enforcement of indigenous people's rights.

As highlighted in the study, Kenya has failed to ratify salient international instruments that exclusively provide for these rights. Parliament should the work towards the signing and ratifying of the key international legal instruments on indigenous people namely; the ILO Conventions 109 and 169. The signing and ratification will create further obligations in the international community having declared consent to be bound by the treaties.

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