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Articles

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List of Acronyms

GLA	Government Land Act
IBEAC	Imperial British Eastern Africa Company
ITA	Indian Transfer Act
LAA	Land Adjudication Act
LGRA	Land (Group Representatives) Act
NCC	Narok County Council
RLA	Registered Land Act
TLA	Trust Land Act

I. Introduction

The loss of ancestral land poses a greater challenge for Africa's indigenous peoples than for their counterparts in developed countries because they have more limited access to legal protection.[1] Furthermore, the national legal framework of most African countries still largely mirrors the policies and designs of their respective former colonial governments. This framework remains hostile to indigenous peoples. The absence of sufficient legal protection has left many of these peoples vulnerable to legal usurpations and evictions.[2]

The existing Kenyan national laws recognize and protect the land rights of indigenous peoples like the Maasai and Ogiek. Government's

1. Owen J. Lynch, *Legal Challenges Beyond the Americans: Indigenous Occupants in Asia and Africa* 9 ST. THOMAS L. REV. 93, 93-94 (1996).
2. *Id.* at 95.

failure to enforce the laws and to prosecute government officials who abuse the public trust undermines these land rights. The Maasai's struggle to retain these land rights has become a crisis, generating extensive press coverage recently.[3] That struggle has roots in two controversial land agreements with the British government, which are the watersheds of the Maasai's land loss. The conflict underlying this problem manifests itself in a contest of ownership interests between pastoralists and agriculturists.

The British government pursued land policies that were unfavorable to the Maasai's land rights beginning with a 1904 agreement concerning the Maasai and its legal ramifications. Later, the independent Kenya government adopted policies and laws skewed toward land privatization. These laws favored agriculturists at the expense of the Maasai.

Using Maasai and Ogiek as case studies, this paper investigates the legal status of land rights of indigenous people in Kenya in order to evaluate the legal protection afforded these rights under its existing national laws. This paper applies the aboriginal title doctrine within the legal framework of international norms and demonstrates that the Loita Maasai's aboriginal title over the Naimina Enkiyio forest was not extinguished. Also, this paper presents an economic analysis of the Naimina Enkiyio forest property rights to show that the Loita Maasai would be better custodians of the forest than the Narok County Council (NCC).

Section II of this paper reviews the institutional background of the land tenure of the Maasai society during the pre-colonial, colonial and post-colonial period. It points out that in the pre-colonial period the Maasai maintained an efficient organization based on communal land ownership, which the British disrupted with two controversial land agreements shortly after Kenyan became a protectorate. Then the independent Kenya government unsuccessfully introduced private communal ownership to the Maasai.

Section III discusses the evolution of Kenyan land law, including land policy for Europeans settlement and formalization of African land rights. Section IV provides legal analysis of the constitutional, statutory

3. East African Standard, *Maasai demand "Their" Land from British Ranches,* August 14, 2004, *at* http://www.eastandard.net/archives/\august/sat14082004/headlines/news1408421.htm. The Maasai presented a memo to the Office of President, the Ministry of Justice and Constitutional Affairs, and the Ministry of Lands and Housing. The memo demanded the government not to extend the lease of British ranchers whose leases were about to expire but instead revert the title to the Maasai. They also sought compensation for injustices committed on them by the colonial government. *See also* Daily Nation, *The Maasai Seek 10 Billion Kenya Shillings for All Their Lost Land,* Aug 26, 2004 http://www.nationmedia.com/dailynation/nmgindex.asp (registration required to access article).

and case law pertaining to the legal protection of Maasai and Ogiek land rights. To apply the jurisprudence of the aboriginal title doctrine to the Loita Maasai case in particular, this paper employs Professor Anaya's analysis.

Finally, Section V features an economic analysis of the Naimina Enkiyio forest ownership rights. It demonstrates that the Loita Maasai would be better custodians of the forest than the NCC.

II. Historical Background

A. Pre-Colonial Period

The Maasai's pastoral revolution[4] that fermented in the central part of the Great Rift Valley[5] precipitated their southward migration in the valley. The revolution involved an improvement of late Iron Age technology and acquisition of new heat-resistant breeds of cattle. As a group, the Maasai also adopted a new social organization and religious leadership. The revolution, combined with ecological changes and social process, triggered the Maasai expansion that has gradually led to the modern Maasai.[6]

When the British arrived, the Maasai were at the zenith of their military and economic power. They controlled a large dry tract of grazing lands.[7] The Maasai had developed complex social structures and institutions to deal with ecological uncertainties in a semi-arid region. They had perfected pastoralism and successfully used their military power to keep other ethnic groups off their territories. Livestock formed the basis of their economic and social system. Their social goal was to maximize the size of herds within limits imposed by the constraint of water resources and minerals. Although the land was communally held, livestock was privately owned.[8]

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4. John Galaty, *Maasai Expansion & the New East African Pastoralism*, in BEING MAASAI 61, 66 (Thomas Spear & Richard Waller eds. 1993). Galaty asserts there is no consensus when the revolution began. On one hand, previous studies suggest the revolution could have started five hundred year ago. However, new zooarchaecological and linguistic evidence indicates acquisition of heat-resistant cattle (zebu) and development of new social organization might have occurred much earlier.

5. M. M. E RUTTEN, SELLING WEALTH TO BUY POVERTY: THE PROCESS OF THE INDIVIDUALIZATION OF LANDOWNERSHIP AMONG THE MAASAI PASTORALISTS OF KAJIADO DISTRICT, KENYA, 1890-1990, 114 (Verlag Breitenbach Publishers 1992). The Great Rift Valley is system of faults containing chains of lakes and volcanic mountains stretching 5,600 km from Red Sea to Mozambique.

6. THOMAS SPEAR, KENYA'S PAST: AN INTRODUCTION TO HISTORICAL METHOD IN AFRICA 64 (Longman Publishers 1981).

7. RUTTEN, *supra* note 5, at 6.

8. Smokin C. Wanjala, *Land Ownership and Use in Kenya: Past, Present and*

The central organizing unit of Maasai society was a neighborhood that consisted of several families who coordinated and managed the herding of cattle. Division of labor was regulated according to age and gender. Within each gender, the distribution of social responsibilities was based on age-set organization. Young boys looked after the herd. The young men provided military protection. A council of elders regulated the access rights to grazing land, including water points, and supervised the management of the herd. Women were responsible for building the houses and distributing the milk.

Notwithstanding internal conflicts, the Maasai maintained an efficient economic organization until the late nineteenth century. Then natural disasters undermined their economic and military power.[9] Spread of a contagious cattle disease, Bovine Pleuro-Pneumonia, and subsequent outbreaks of Rinderpest decimated their livestock and seriously weakened the Maasai.[10] Confronted with a possibility of economic and social collapse, the Maasai strategically sought a mutual alliance with the Imperial British Eastern Africa Company (IBEAC).[11] The alliance enabled the Maasai to recuperate and reorganize and gave the IBEAC access to the Maasai's best lands.[12]

In summary, the Maasai maintained an efficient social organization before the arrival of the British. Maasai kept large livestock herds as

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Future, in ESSAYS ON LAND LAW: THE REFORM DEBATE OF KENYA 25 (Smokin Wanjala ed., University of Nairobi 2000). Wanjala argues that it is difficult to ascertain the pre-colonial land tenure because of lack of adequate and authentic literature on the subject. Also, the existing anthropological, ethnographic and historical accounts are biased because they represent Eurocentric view. Finally, the traditional society is diverse and complex.

9. Robert A Blewett, *Property Rights as a Cause of Tragedy of the Common: Institutional Change and the Pastoral Maasai in Kenya*, 21 E. ECON. J. 477, 477 (1995). In this paper, the author argues that the pastoral Maasai commons based on communal ownership is superior to private property. The Maasai maintain a large cattle herd as an insurance against the unexpected effect of drought and disease. This reduces the management cost of the common by promoting cooperation amongst themselves and keeping outsiders off their territories.

10. John Lonsdale, *The Conquest State, 1895-1904, in* A MODERN HISTORY OF KENYA 1895-1980, 16 (Bethwell A. Ogot & William R. Ochieng eds., 1989). The first wave of Rinderpest came from Russia while the second wave advanced along the line of railway construction, brought in by draught oxen from India.

11. Richard Waller, *The Maasai and the British 1895-1904, Origin of an Alliance*, 17 J. AFR. HIS. 534, (1976). Some of the Maasai who survived the disasters sought refugee among neighboring agriculturist tribes. Others adopted different means of livelihood of hunting and gathering.

12. YASH G. GHAI & J. P. MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT 6 (Oxford University Press 1970). IBEA was initially a private corporation with commercial ties in East Africa. In 1888, IBEA was granted a Royal Charter of Incorporation for the purposes of carrying out policies on behalf of the British government.

insurance against ecological uncertainties such as drought and diseases. They minimized management cost by cooperating amongst themselves and keeping non-Maasai people off their territories. Contacts with the British, however, marked the beginning of the gradual breakdown of their institutions.

B. Colonial Period

In 1895 Kenya was declared a British protectorate after the cancellation of IBEAC's Royal Charter. Six years later, with imported Indian laborers, the British government completed the construction of a Ugandan railway that ran from Mombasa to Lake Victoria. Its construction attracted unprecedented European migration. The British government supported the new European settlement, primarily to recover the cost of building the railroad, which had been underestimated, and to promote economic development.[13]

In 1904 the British government entered into an agreement with the Maasai to create room for more European settlement.[14] The Maasai thereby promised to relocate to two created reserves, Laikipia Reserve in the north and the Southern Reserve in the south. The Maasai requested a grant of an easement to a road connecting the two reserves for communication purposes. They sought to retain at least five acres of land for conducting their traditional ceremonies including circumcision rites.[15] They also demanded establishment and maintenance of an administrative unit in Laikipia to be run by appointed officers known and trusted by the Maasai. Finally, they sought compensation and requested that their land rights in the new reserves be vested to them in perpetuity.[16]

Economic and social factors occasioned the agreement. The Maasai's Rift Valley settlement attracted white settlers for economic reasons. The settlement had the potential suitability for ranching and it was close to the railway.[17] From a social perspective, the agreement served the British interest in gaining a social control tool to "civilize" the

13. SIR CHARLES ELLIOT, THE EAST AFRICA PROTECTORATE 219 (Barnes & Noble Inc. 1966) (1905). The construction cost of the Ugandan railway was about six million pounds and was operating at annual loss.

14. G. H. MUNGEAM, KENYA SELECTED HISTORICAL DOCUMENTS 1884-1923, 327 (East African Publishing House, 1978). The reprinted agreement was signed on August 10, 1904 by Maasai representatives including Chief Lenana and the British Commissioner acting on behalf of the Crown.

15. *Id.* at 328.

16. *Id.*

17. M. P. K. SORRENSON, ORIGINS OF EUROPEAN SETTLEMENT IN KENYA, 191 (Oxford University Press, 1968).

Maasai.[18]

The agreement resulted in reducing the Maasai's territory by sixty percent. It failed to protect the new reserves from further alienation.[19] It lacked a framework for implementation, thus making it easier for both parties to violate it. The government, for example, did not provide an easement for a road connecting the two reserves. In addition, it leased the land that was to be reserved for Maasai traditional ceremonies. The Loita Maasai on the other hand, violated the agreement by refusing to move to the north. The influx of Europeans continued, however, creating demand for new settlements.

In 1911, the colonial administrators entered into another agreement with the Maasai to administratively control them and to make room for more Europeans. The administrators induced the Maasai representatives to sign the 1911 agreement by using threats and misrepresentations of facts.[20] The agreement required the Maasai to relocate to the Southern Reserve from the Laikipia Reserve. The initial implementation of the agreement failed because of climatic conditions and administrative shortcomings. The British attempt to implement it, however, caused considerable property damage to the Maasai, which triggered a lawsuit.

With help from British lawyers, a group of Maasai filed a lawsuit to enjoin the government's wrongful eviction of the Maasai from Laikipia.[21] The Maasai thus became the first group of indigenous peoples in the protectorate to seek legal protection of their land rights.[22] Representing the plaintiffs, A. Morrison and A.D. Home brought an action upon the 1904 agreement, asserting a theory of breach of civil contract.[23] The plaintiffs claimed that, inasmuch as they were not signatories to the 1911 agreement, they were still bound by the 1904 agreement and thus entitled to its provisions.[24] They also argued that the 1911 agreement was not binding because the Maasai signatories lacked the authority to sign it. The plaintiffs sought damages for wrongful confiscation of some of their livestock. In defense, the government argued that the court had no jurisdiction for the reason that both

18. *Id.* at 192.

19. RUTTEN, *supra* note 5, at 177. The total of Maasai land in the pre-colonial era covered 55,000 square kilometers, which reduced to 24,000 square kilometers after the agreement. *See* MUNGEAM, *supra* note 14, at 328. Under the agreement, the newly created reserves were vested to Maasai in perpetuity and further alienation was prohibited.

20. MUNGEAM, *supra* note 14, at 328.

21. G. R. SANDFORD, AN ADMINISTRATIVE AND POLITICAL HISTORY OF THE MAASAI RESERVE, 186-228 (Waterlow & Sons Limited, 1919).

22. Kenneth King, *The Kenya Maasai and Protest Phenomenon, 1900 to 1960*, 12 J. AFR. HIST. 121 (1971).

23. SANDFORD, *supra* note 21, at 199.

24. SORRENSON, *supra* note 17, at 208.

agreements were treaties and not contracts.

The court held that Maasai living in the protectorate could, as a sovereign entity, legally enter into a treaty with the governor acting on behalf of the Crown even though they could not be governed by international law. The court also found that acts of government officers to implement the 1911 agreement were state action and therefore not cognizable by the court. The case was dismissed with cost. The Maasai appealed to the Privy Council. It dismissed their appeal on technical grounds.[25] Consequently, having lost the legal battle, the Maasai relocated to the Southern Reserve.[26]

The government then enacted a series of laws to facilitate and protect the European settlement. Although legislation remained unfavorable to the Maasai, its pastoral economy nevertheless continued to thrive. By the 1910's, the Maasai were considered the wealthiest indigenous people in the protectorate because of the size of their herds and holdings. They remained distrustful of the British, however, and consequently resisted modernization.[27]

The colonial government's efforts to induce development and transform Maasai society met resistance. For example, the Maasai rebelled against the recruitment of their children for school and against the construction of a road system within their territory.[28] They continued to maintain their traditional ways of life until two major developments occurred before independence. First, the agriculturist Kikuyu tribe infiltrated and occupied the best Maasai land after the loss of Kikuyu land to European settlement. Second, the progressive Maasai started to form individual ranches, which the government feared might lead to landlessness.

Although the Maasai survived and recovered from the initial British disruption, the violation of the 1904 agreement would have a long-lasting adverse effect. The Kikuyu infiltration of Maasai land and the newly enacted land laws continued to undermine the Maasai society.

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25. MUNGEAM, *supra* note 14, at 339. *See* SORRENSON, *supra* note 17, at 209.

26. Aman W. Kabourou, *The Maasai Land Case of 1912: A Reappraisal*, 17, TRANSAFRICAN J. HIST. 10 (1988). The author asserts that given the circumstances under which the agreements were signed, the adverse ruling against the Maasai in the case was inevitable. For instance the Maasai representatives were coerced to sign and both sides failed to meet some of their respective contractual obligations. Instead of challenging the colonial land policies, the plaintiffs' lawyers made tactical error of focusing on the legality of the agreements, which was peripheral and a narrow issue. In KING, *supra* note 22, at 121, Sfauffacher an American missionary stationed on Maasailand hand unsuccessfully warned the Maasai to keep out of reservation to avoid the fate the American Indian suffered in the United States of American.

27. Robert L Tignor, *The Maasai: Pattern Maintenance and Violence in Colonial Kenya* 13 J. AFR. HIST. 271 (1972).

28. *Id.* at 281.

C. *Post-Colonial Period*

The independent Kenyan government vigorously continued the land privatization that the colonial government had initiated in the early 1950's. Initially, it restricted this process to areas next to European settlements. Extending land privatization to Maasai settlements posed several challenges to the new government. First, the area was dry with poor soil and bad landscape. Second, because the Maasai land tenure was based on customary law, it was impractical to formalize land rights.[29] Third, international forces exogenously pressured the government to induce development by increasing livestock productivity while protecting Maasai communal ownership rights.

The Kenyan government introduced the concept of the group ranch as a compromise between conflicting communal and private ownership interests. The group ranch concept is a hybrid of Maasai customary land tenure and private land tenure.[30] It involves setting aside a piece of land, communally owned by a group of people who are recorded and registered as the legal owners of that land in a ranch.[31] Although the Maasai had previously resisted various forms of development that would change their way of life, the concept of group ranches was attractive to educated Maasai. It offered them security of title and protected them from land loss to other tribes. The Lawrence Report, which expressed the government's case for privatization,[32] also influenced the educated Maasai.

A group ranch consists of members who hold title in common. Elected group representatives coordinate and implement ranch development projects including management of resources and community organization.[33] The conventional view is that group ranches have failed to meet their intended objectives. Instead, most group ranches have been subjected to ongoing rapid subdivision, driven in part by their members. The management inefficiency of group representatives, together with government pressure to privatize the ranches, has increased demand for subdivision.[34] Group management

29. Simon Coldham, *Land-Tenure Reform in Kenya: The Limits of Law*, 17 J. AFR. MOD. STUD. 620 (1979).

30. John G. Galaty, *Ha(l)ving Land in Common: The Subdivision of Maasai Group Ranches in Kenya,* 34 NOMADIC PEOPLES 110 (1994).

31. RUTTEN, *supra* note 5, at 269.

32. Lawrence, et al., REPORT OF THE MISSION ON LAND CONSOLIDATION AND REGISTRATION IN KENYA, 30 (Government Printer, 1966).

33. Galaty, *supra* note 30, at 110.

34. Ester Mwangi, *The Transformation of Property Rights in Kenya's Maasailand: Triggers and Motivations* (September 14, 2004) *available at* http://www.isnie.org/ISNIE03/paper03/mwangi.pdf.

inefficiencies are rooted in the original establishment of the group ranches, which disregarded Maasai customary laws. For instance, the territorial boundaries of these ranches were arbitrarily created and did not correspond with each group's previous territories.

III. Evolution of Kenyan Land Laws

A. Protectorate Status

Following the Anglo-German Agreement of 1886, Kenya became a British territory. Two years later IBEAC was granted a Royal Charter of Incorporation to administer the territory on behalf of the British government. Before it was chartered, IBEAC established itself in the region through a concession offered by the Sultan of Zanzibar to run his customs services.[35] The company enjoyed monopolistic power on trade and other privileges in the interior. Eventually IBEAC relinquished its administrative power to the British, due to its failure to attract foreign investment.[36]

In 1895 Britain declared Kenya a protectorate. Because it governed Kenya as a colony, however, the British government acquired unlimited jurisdictional powers without bearing legal and financial responsibilities for the protectorate.[37] During this time, Europeans were gradually settling in Kenya through grants issued by IBEAC and through treaties with local chiefs. Because Kenya was a protectorate, the British government had no jurisdiction to deal with land, except for the land it received from the concession agreement between IBEAC and the Sultan.[38]

Constitutionally, a protectorate had no power to alienate land; unless such power was granted to it through agreements.[39] The British government enacted the Foreign Jurisdiction Act of 1890 to circumvent the constitutional restriction to alienate land and statutorily vest jurisdictional power in a Commissioner on behalf of the Crown. This

35. GHAI, *supra* note 12, at 6.

36. SORRENSON, *supra* note 17, at 12. The main failure of the company was commercial: failure to discover minerals, ivory trade was monopolized by Swahilis, most African in the interior engaged on pastoralism and produced non exportable goods.

37. J. B. OJWANG, Government and Constitutional Development in Kenya 1895-1995, 126, in KENYA: THE MAKING OF NATION: A HUNDRED YEARS OF KENYA'S HISTORY 1895-1995 (Bethwell A. Ogot and W. R. Ochieng eds., Institute of Research and Postgraduate Studies 2000).

38. H. R.O. OKOTH-OGENDO, TENANTS OF THE CROWN: EVOLUTION OF AGRARIAN LAW AND INSTITUTIONS IN KENYA 10 (ACTS Legal Studies Series, Act Press 1991).

39. Tim O A Mweseli, *The Centrality of Land in Kenya: Historical Background and Legal Perspective,* in ESSAYS ON LAND LAW: THE REFORM DEBATE IN KENYA 3 (Smokin Wanjala ed., Faculty of Law, University of Nairobi, 2000).

law gave Britain jurisdictional power over the wastelands and unoccupied lands in the protectorate,[40] which consisted of areas without a settled form of government and which local sovereigns or individuals had not appropriated.

B. Land Policy

1. Policy for Land Occupied by Europeans

The British colonial government adopted a land policy that promoted and protected European settlement in the protectorate. Because the protectorate did not confer land title on the Crown, a series of laws were enacted to enable the government to alienate the land to the settlers.[41]

The East Africa Protectorate Land Regulation of 1897 (Land Regulation of 1897) was enacted to empower the Commissioner to grant 99-year certificates of occupancy to willing settlers. The issuance of the occupancy interests was tied to several stringent conditions, against which settlers complained and demanded better terms.[42] To satisfy settlers' demands, the colonial government issued the East Africa (Lands) Order in Council, which vested Crown lands in the Commissioner and the Consul-General. The order defined the Crown lands and gave the Commissioner discretionary power to grant lease of them.[43]

Following the order, the colonial government promulgated the Crown Land Ordinance of 1902 to empower the Commissioner to alienate any land in the protectorate to settlers through sale of freehold or leasehold. The ordinance granted interests to occupy the land to non-Europeans, including the Africans, and it restricted each interest to five acres.[44] The settlers were dissatisfied with the 1902 ordinance on two grounds.[45] First, they argued that its control of speculation was

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40. KENNETH ROBERTS-WRAY, THE COMMONWEALTH AND COLONIAL LAW 73-74 (F A Praeger 1966). ARTHUR BERRIEDALE KEITH, THE GOVERNMENT OF THE BRITISH EMPIRE 497-507 (Macmillan and Co. 1935). WILLIAM IVOR JENNINGS, CONSTITUTIONAL LAW OF THE COMMONWEALTH 14-18 (The Monarchies, 1977) (1957).

41. GHAI, *supra* note 12, at 25.

42. MUNGEAM, *supra* note 14, at 316. GHAI *supra* note 12, at 26.

43. *Id.* at 321. According to Mungeam, Crown land was defined as "all public land within East Africa Protectorate, which for the time being the subject to the control of his Majesty by virtue of any Treaty, Convention, or Agreement, or of His Majesty's Protectorate, and all lands which have been or may hereafter be acquired by His Majesty under the Lands Acquisition Act of 1894 or otherwise howsoever."

44. *Id.* at 325.

45. OKOTH-OGENDO, *supra* note 38, at 27.

undesirable because it impeded land conveyance. Second, the settlers contended that the ordinance gave the Commissioner broad power skewed in favor of Africans.[46] The settlers requested jurisdictional security and legal protection in the form of legal segregation from all non-Europeans.[47]

In response to the pressure by settlers, the colonial government promulgated the Crown Land Ordinance of 1915, the most important and far-reaching legislation passed by the colonial government. The 1915 ordinance profoundly affected subsequent land transactions, because it contained both substantive and registration provisions.[48] Although the 1915 ordinance did not impose segregation as the settlers requested, it was nevertheless a victory for them. It repealed the 1902 ordinance. It also empowered the Governor to alienate the Crown lands and broadly defined them to include all land in the protectorate.[49] The 1915 ordinance also established African reserves, nullified land rights held under African customary law, and banned land conveyances between Europeans and Africans that lacked the consent of the Governor. In effect, the 1915 ordinance reduced the rights and interests of Africans in their land to tenancies at the will of the Crown.[50]

In 1920 Kenya became a British colony, and the government facilitated easier terms of credit for financing post-World War I development.[51] The settlers welcomed the policy change; because it enabled them to consolidate their position by increasing the security and sizes of their holdings. They demanded permanent boundaries for their settlements and pressured the colonial government to ban Africans from growing cash crops.

2. Policy for Land of Africans

To address the Africans' discontent triggered by gradual loss of their lands, the colonial government appointed a commission to inquire into the land interests. Upon the recommendations of the commission, lands of the Africans were put under the trusteeship of the colonial

46. *Id.* at 14.

47. Simon Coldham, *Colonial Policy and the Highlands of Kenya, 1934-1944,* 23 J. AFR. L. 65 (1979).

48. Smokin Wanjala, *Problems of Land Registration and Titling in Kenya: Administration and Political Pitfalls and Their Possible Solutions, in* ESSAYS ON LAND LAW: THE REFORM DEBATE IN KENYA 86 (Smokin Wanjala ed., Faculty of Law, University of Nairobi, 2000).

49. OKOTH-OGENDO, *supra* note, 38, at 41.

50. *Id.*

51. R. M. Mason, *The Colonial and Foreign Offices Policy and Control,* in KENYA: THE MAKING OF A NATION 1895-1995 (Bethwell Ogot and W R Ochieng eds., Institute of Research and Postgraduate Studies, 2000).

government. A dual policy based on segregation was adopted.[52] These recommendations were incorporated in the Native Lands Trust Ordinance of 1930, which established the governing legal framework in the African reserves. This ordinance empowered the Governor to add more land to the African reserves, based on need. The Land Trust Board was established to manage the African reserves. They were expressly reserved for Africans forever.[53]

The 1930 ordinance indirectly provided legal protection to the land rights of Africans, but it was silent on two key issues. It failed to address either the overcrowding in the reserves or the legal status of African squatters on the farms of the settlers.[54] The colonial government thus appointed another commission with a broad mandate to address the weakness of the 1930 ordinance and to seek a general solution to all land problems of Kenya.[55] The report of the commission was implemented piecemeal and given effect through several legal procedures. The Native Lands Trust (Amendment) Ordinance of 1934 allowed the colonial government to take African lands for mining and public purposes, as long as Africans were compensated.[56]

By the 1940's the African reserves, particularly in agricultural communities, had become crowded and insecure.[57] Land became scarce because of population pressure and traditional inheritance practices that encouraged fragmentation. Coupled with overstocking and soil erosion, these developments led to rapid land deterioration. The colonial government blamed African customary laws as the fundamental cause of the problems. It sought to replace these laws with an English-style system, based on individual property rights. Implementation of this remedy became an explicit part of the land policy of the colonial government land policy in 1933. A report by the Kenya Land Commission recommended gradual replacement of African "native" land tenure with private ownership of property. Implementation was slow, however, until the Mau Mau revolt of the early 1950's demonstrated the urgency of land reform. In the wake of the revolt a Royal Commission was appointed in 1952. It produced the East Africa Royal Commission Report of 1953-1955, which became the blueprint for subsequent land reform policy. At the same time the Kenya colonial government produced its own report in 1954, the so-called Swynnerton Plan. Both reports called for the replacement of customary land tenure with private,

52. GHAI, *supra* note 12 at 26.
53. COLDHAM, *supra* note 29, at 68.
54. *Id.*
55. NWESELLI, *supra* note 39, at 11. *See* COLDHAM, *supra* note 29, at 69.
56. *Id.*
57. *Id.*

titled property as a means for increasing agricultural productivity and redistributing land to efficient farmers.[58]

Following the publication of Swynnerton Plan, the colonial government established a commission to consider specific legislation to implement the recommendations of the plan. As a result of the report of the commission, the Native Land Tenure Rules was enacted in 1956. Three years later, two more comprehensive statutes, the Native Land Registration Ordinance and the Land Control Ordinances were passed. These three pieces of legislation established, among other things, a system of title registrations based on the English model. Once a process of consolidation and adjudication of disputes was completed, title would be registered and the land would cease to be governed by customary law.[59]

The independent Kenya government continued vigorously to pursue land reform. All aspects of land tenure were brought under the Registered Land Act (RLA) of 1963, enacted by the new parliament. The statute was modeled after the English Land Registration Act of 1925, which instituted land registration in England as part of wholesale land reform. The desired effect of land ownership was to give title the quality of "indefeasibility"—i.e., the land register would become the "final and only proof of title."[60] Since 1963, the government has continued to pursue this land reform project, especially in settled agricultural areas.[61] The RLA of 1963 remains the most important legislation for privatization of land in Kenya.[62]

Registration of group ownership posed a legal challenge. The RLA provided neither for the registration nor for the legal basis of land owned by more than five individuals.[63] Therefore, the Land Group Representatives Act (LGRA) was enacted to allow legal registration of land owned by a large group of people, such as a group ranch. Group ranches exist only in Maasai land. An adjudication process determines their ownership rights. A group constitution is adopted to enable the incorporation of elected group representatives.[64] As a corporate body the

58. Makau Kiamba, *Introducing and Evolution of Private Landed Property in Kenya*, 20 DEV. & CHANGE 123 (1989).

59. *Id.* at 126. *See* COLDHAM, *supra* note 29, *see also* WANJALA, *supra* note 8, at 10.

60. S. ROWTON SIMPSON, LAND LAW AND REGISTRATION 494 (Cambridge University Press 1976).

61. Coldham, *supra* note 29, at 615.

62. Kiamba, *supra* note 58, at 127.

63. D. N. Kagagi, The Law and Practice of the Registered Land Act 1963: A Comparative Study (1992) (Unpublished Ph.D. Dissertation, University of Leeds in United Kingdom) (on file with the University of Leeds).

64. SIMPSON, *supra* note 60, at 497.

group representatives acquire the legal title to the land. They can sue or be sued in their corporate name. The group representatives have the power to acquire, hold, charge and dispose of property of any kind and to borrow money with or without collateral.[65]

The colonial formalization of the land rights of Africans was adopted to achieve both political and economical goals. The African's struggle for land, which became violent in the Mau Mau revolt forced the colonial government to embark on privatization of land in Africans reserves. The privatization policy was premised on the assumption that "land consolidation would create a class of landowners who would refuse to have any truck with nationalist politics."[66] Anticipating economic benefits, the colonial government assumed that issuing land title to African farmers would induce them to invest, which would in turn increase agricultural productivity.

IV. Legal Analysis of Protection of Maasai Land Rights

This section evaluates the legal status of the Maasai land rights. First, it analyzes the Kenyan constitutional law on trust land. Second, it analyzes and evaluates the statutory law that governs the Maasai land rights in the trust land. Third, the section presents legal analyses of three cases: the 1912 Maasai case; the Ogiek case; and the Loita Maasai case. Fourth, it applies the aboriginal title doctrine,[67] within the international legal framework to the Loita Maasai case.

Some background information about Kenya land tenure system is helpful to understanding these analyses. The colonial legacy land laws in Kenya, like other institutions, arise predominately from English law. These laws are a hybrid of African customary laws, constitutional law, and two substantive statutes, i.e., the Indian Transfer Act (ITA) and the Registered Land Act (RLA).[68] The ITA contains substantive law that governs land ownership in areas formerly occupied by the Europeans. The RLA governs lands that have been converted from communal to private ownership. There are two systems of land registration, which are embodied in five different registration laws.[69]

The Kenya land tenure system encompasses three legal categories of land: private land, government land and trust land. Private land tenure can be legally created from either the government land or trust land. It confers exclusive rights on individuals or corporations through the

65. The Land (Group Representatives) Act [LGRA] (1968) (Kenya).
66. Sorrenson, *supra* note 17, at 250.
67. *See* KENT MCNEIL, COMMON LAW ABORIGINAL TITLE, (Clarendon Press Oxford, 1989).
68. Registered Land Act [RLA] (1963) Cap. 300 § 27 (Kenya).
69. Wanjala, *supra* note 8, at 85.

registration process, which is preceded by an adjudication process and consolidation. Registered private land that has been acquired through registration of either government or trust land is governed by the RLA, which contains both substantive and registration law. The RLA vests absolute ownership in a landowner, subject to overriding interests.[70] The ITA provides substantive law regarding private land in areas formerly occupied by Europeans.

Government land is the land that is constitutionally and statutorily vested in the Kenya government; it comprises both un-alienated and alienated government land.[71] The Government Land Act (GLA), whose intent is "to make further and better provision for regulating the leasing and other disposal of government lands, and for other purposes," regulates the government landing Kenya.[72] Un-alienated government land is defined as land that the government has not given away to another person or entity through leasehold or freehold.[73] The GLA vests the President with special powers to make grants or dispositions of any estates of un-alienated government land.[74] Alienated government land is land under government lease or reserved for future government public use.[75]

Trust land tenure is the main focus of this paper because most of the land of indigenous peoples is regarded as trust land. Section 114 of the Kenya Constitution defines trust land as[76] the constitution, African customary laws and the Trust Land Act (TLA) together govern trust land.[77] All trust land is constitutionally vested in local governments on behalf of their local residents. African customary laws within a specific jurisdiction govern the access to and control of the un-adjudicated and unregistered trust land within that jurisdiction. Access rights are granted to community members, depending on the performance of their reciprocal obligations in the community.[78] The political authority in a

70. RLA, *supra* note 68, section 30.

71. PAUL N NDUNGU ET AL, REPORT OF THE COMMISSION OF INQUIRY INTO THE ILLEGAL/IRREGULAR ALLOCATION OF PUBLIC LAND 44 (Government printer, Nairobi, 2004). Section 204 and 205 of Kenya constitution; and sections 21, and 22 of Kenya Independence Order in Council 1963; section 25 and 26 of the constitution of Kenya (amendment) act 1964 define government land.

72. Government Land Act [GLA] (1984) (Kenya).

73. *Id.*

74. *Id.*

75. NDUNGU, *supra* note 71 at 44.

76. Constitution, chapter IX § 114 (Kenya).

77. Trust Land Act [TLA] (1962) (Kenya).

78. CHARLES NJONJO ET AL., REPORT OF THE COMMISSION ON INQUIRY IN THE LAND LAW SYSTEM OF KENYA ON PRINCIPLES OF A NATIONAL LAND POLICY FRAMEWORK CONSTITUTIONAL POSITION OF LAND AND NEW INSTITUTIONAL FRAMEWORK FOR LAND ADMINISTRATION (Kenya Government Printer, Nairobi, 2002).

given jurisdiction controls land usage, but individuals may be granted land usage rights that are analogous to private property rights and that are based on labor investment in a given resource.[79]

A. Constitutional Law

Section 115 of the Kenyan Constitution recognizes African customary law as the guiding legal principle by which the rights, interests or other benefits of local residents in trust land in a given county are held. Other provisions of the constitution, however, undermine these rights by imposing restrictions or extinguishment.

First, the Repugnancy Clause[80] provides that, "no right, interest or other benefit under African customary law shall have effect . . . so far as it is repugnant to any written law."[81] This subjects the land rights of indigenous people in trust land to the vagaries of national politics. Any arbitrary legislation could explicitly contradict the African customary law and thereby supersede it.

Second, Section 117 of the Kenya constitution, by an act of Parliament, grants to the county council the power of eminent domain to "set apart an area of Trust land" for public use.[82] A taking under this section extinguishes all the interests previously held under the African customary law. Anecdotal evidence indicates councilors have illegally allocated trust land set apart for public purposes to other individuals and to themselves.[83] Narok County Council (NCC) for example illegally allocated to individuals 2,400 acres of Maasai trust land, which had originally been set apart as holding ground and livestock routes for the use of local Maasai.[84]

Third, Section 118 of the constitution empowers the President to take trust land and convert it into government land, which in turn extinguishes "any right, interests or other benefits in respect of that land that were previously vested . . . under African customary law."[85] This taking, which is allowed for limited purposes,[86] may be done in consultation with the county council.

Finally, the constitution empowers the legislative branch of the

79. Bondi D Ogolla & John Murage, *Land Tenure Systems and Natural Resource Management, in* IN LAND WE TRUST: ENVIRONMENT, PRIVATE PROPERTY AND CONSTITUTIONAL CHANGE 97 (Calestous Juma and JB Ojwang eds., Initiatives Publishers, Nairobi 1996).

80. Constitution, chapter IX § 114 (Kenya).

81. *Id.*

82. *Id.* at § 117 cl 1.

83. NDUNGU, *supra* note 71, at 147.

84. *Id.* at 144.

85. Constitution, chapter IX § 118 cl 4 (Kenya).

86. *Id.* at § 118(2).

government to grant a person "a right or interest to prospect for minerals or mineral oils on any area of Trust land, or to extract minerals or mineral oils from any such area."[87] Similarly, the constitution grants the legislative branch administrative power over the trust land through the county council by an act of Parliament.[88] These constitutional powers granted to the legislative further undermine the rights of indigenous people in trust land. So although the Kenya constitution recognizes and protects the rights and interests that indigenous people hold in trust land under the African customary law, it also grants power over the trust land to the county council, the President, and the Parliament. Anecdotal evidence demonstrates that the exercise of this power seriously undermines the rights of the indigenous people.

B. Statutory Law

This subsection provides a brief description of relevant statutes that govern the trust lands. It also highlights the statutory provisions that have been violated to illegally extinguish the rights of indigenous people.

1. Trust Land Act

The TLA governs trust land and complements chapter XI of the Kenya Constitution. The TLA provides for establishment of divisional land boards to advise the county council on the "setting apart of land." This involves removing trust land from the community ownership to public ownership.

Consistent with Section 117 of the Kenya constitution, the TLA empowers the county council to take part of the trust land for "use and occupation (a) by any public body or authority for public purposes; or (b) for the purpose of the extraction of minerals or mineral oils; or (c) by any person or person for purposes . . . to benefit the persons ordinarily resident."[89] The TLA requires the county council to notify the divisional land board of its proposal for taking.[90] The divisional land board then sets a meeting at which the county council presents its proposal in front of local residents. After the meeting the board makes a recommendation, upon which the council votes. The TLA grants to the national Commissioner of Land[91] the same administrative powers it confers on the council, with qualifications. The Commissioner must act in accordance with the decisions of the county council.

87. *Id.* at § 115(3).
88. *Id.* at § 115(4).
89. Trust Land Act [TLA] at § 13(1) (1962) (Kenya).
90. *Id.* at § 13(2).
91. *Id.* at § 53.

Anecdotal evidence indicates county councils have allocated trust land, already reserved for public purposes, to politically favored individuals, companies, and councilors, contrary to the TLA.[92] The evidence further shows the Land Commissioner has illegally allocated land reserved for public purposes, such as schools and playgrounds.[93]

2. Land Adjudication Act of 1968

The Land Adjudication Act of 1968 (LAA)[94] governs the adjudication process by which the customarily held rights and interests of Africans in trust land are formalized into private rights and interests. The LAA authorizes an adjudication officer, appointed by the executive branch of government, to in charge of "general supervision and control over the adjudication."[95] Section 5 of the LAA empowers the officer to designates, the part of the trust land to be adjudicated, which is called an adjudication section. Every person who holds an interest in the land within the adjudication section must make his or her claim to a recording officer within a legally set period. Each piece of land is then demarcated and surveyed, according to procedures set forth in the LAA. Upon consideration of the claims presented, the recording officer prepares an adjudication record[96] for every parcel on the demarcation map. The record contains information about each parcel, including the names of its rightful owners under recognized customary law. Section 25 of the LAA authorizes the officer to certify the adjudication record and demarcation map and to give notice of sixty days for public inspection.

Procedural abuse of the LAA by government officials is widespread. Two adjudication sections in Maasai land, namely, Iloodo-Ariak and Masiro, illustrate this point.[97] The adjudication process for those two sections was found to be fraudulent. In 1979, Iloodo-Ariak, which was a trust land vested in the Olkajundo county council on behalf of 6,000 Maasai, was declared an adjudication section. Upon completion of the adjudication process, many rightful Maasai were disinherited from their ancestral land and 362 non-Maasai were fraudulently recorded as owners of the land. With respect to the Masiro section, the adjudication process omitted over 1,000 Maasai who were rightful owners of the land.[98]

Another reported procedural abuse involves a systematic delay by

92. NDUNGU, *supra* note 71, at 77.
93. *Id. See also* NJONJO, *supra* note 79, at 24.
94. Land Adjudication Act [LAA] (1968) (Kenya).
95. *Id.* at § 9.
96. *Id.* at § 19, 23.
97. NDUNGU, *supra* note 71, at 141.
98. *Id.* at 142.

the Minister of Land and Settlement in handling the appeals of the parties aggrieved by the adjudication process. The Kenya government created a commission to inquire into the land law system and catalogue a backlog of appeals that the Minister caused by delegating the power to hear appeals to the District Commissioners whose other administrative duties preclude them from prioritizing appeals.[99]

3. Land (Group Representatives) Act of 1968

The Land (Group Representatives) Act of 1968 (LGRA) provides for the registration of Maasai group ranches. It deems the group representatives of each registered ranch to be "absolute proprietors" of the ranch land.[100] The LGRA provides for appointment of a national Registrar, whose duties include maintaining a register of group representatives and supervising the administration of the group ranches.[101] The LGRA also provides for replacement, election and incorporation of group representatives with power "to sue and be sued in their corporate name, and to acquire, hold, charge and dispose of property of any kind, and to borrow money with or without giving security."[102] Part IV of the LGRA provides for administration of the groups. It requires them to hold meetings annually, to keep books of account, and to fulfill other responsibilities.

Anecdotal evidence demonstrates that the Registrar and group representatives have abused and disregarded the LGRA, while discharging their respective responsibilities. In some cases, the Registrar has granted dissolution of groups before their liabilities were settled and before all assets were shared among the members.[103] Group representatives reportedly have allowed illegal allocation of shares and mortgaging of group land without consent of the members, contrary to the LGRA.[104]

4. Evaluation of the Statutes

In summary, the foregoing discussion has covered the problem of enforcement under the three statutes discussed (TLA, LAA and LGRA).

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99. NJONJO, *supra* note 79, at 35.

100. Kagagi, *supra* note 63, at 498. *See* LAA *supra* note. Group means "a tribe, clan, section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner under the proviso to § 23(2)(a) of this Act."

101. Land (Group Representatives) Act [LGRA] § 3, 4 (1968) (Kenya).

102. *Id.* § 8.

103. NJONJO, *supra* note 78, at 21.

104. *Id.*

Although they recognize the rights held under the African customary law, as the preceding evidence demonstrates, the statutes are not adequately enforced to protect these rights. The enforcement problem involves failure of the executive branch of the government to protect the land rights of its most venerable citizens. Moreover, in some cases, county councils have acted in total breach of trust as custodians of land for the local residents. The high cost of access to the legal system exacerbates the enforcement problem and undermines the intent of these statutes. Indigenous people such as the Maasai lack the knowledge of their legal rights and the financial resources to enforce them. The Kenyan courts, furthermore, have narrowly defined the legal standing of individuals to bring actions on behalf of an aggrieved community.[105]

Section 13 of the TLA requires county council to seek the divisional land board's recommendation before a taking occurs. This procedure has two flaws that likely will adversely affect the rights or interests of the local residents. First, although the TLA provides for the establishment of the land boards, the power to appoint[106] the board members resides with the county council, instead of the local residents whose rights the board has a duty to protect. Second, under the TLA the county council retains the power to approve[107] any proposal to take land. The board only makes a recommendation. Since the county council appoints the board members, the board will likely recommend any taking by the county council, regardless of the impact upon the rights or interests of local residents.

The adjudication procedure authorized by the LAA also has flaws that could undermine the customarily held right of Africans in the trust lands. First, the LAA vests the adjudication power exclusively in government administrators and appointed committees of lay people. The LAA does not state qualification requirements for the administrators and appointed committee members. Consequently, ill-equipped administrators and committee members aggravate the adjudication process. Second, as civil servants the administrators are poorly paid and the appointed committee members receive no remuneration. Lack of adequate compensation exposes administrators and committee members to attempts of bribery. It could also weaken any incentives for committee members to act responsibly. Anecdotal evidence also shows that the failure of the committees to convene in some instances delays the

105. Isaac Lenaola et al., *Land Tenure in Pastoral Lands, in* LAND WE TRUST: ENVIRONMENT, PRIVATE PROPERTY AND CONSTITUTIONAL CHANGE 249 (Calestous Juma and JB Ojwang eds., Initiative Publishers, 1996).

106. Trust Land Act [TLA] (1962) § 5 (Kenya).

107. *Id.* at § 13 (2).

process.[108] Third, as a government policy the LAA was designed to exclude courts and lawyers from the land adjudication process in order to expedite the process in the African reserves. The benefit of speedy adjudication, however, could be outweighed by the cost of inadequate identification and protection of subordinate interests in the land. The adjudication register is final, and first registration is unimpeachable under section 143(1) of the RLA.

The LGRA, which governs Maasai group ranches, requires the group constitution to stipulate that "every member shall be deemed to share in the ownership of the group land in undivided shares."[109] But since the LGRA does not recognize the group representatives as trustees, the individual members lack status as beneficiaries in equity.[110] The rights of members, furthermore, to deal their shares are restricted; because they cannot unilaterally sever their shares or individually dispose of the shares *inter vivos* or by will.[111]

C. Case Law

This subsection analyzes three cases brought against the British and Kenyan governments by the Maasai and the Ogiek: the 1912 Maasai case, the Ogiek case, and the currently pending Loita Maasai case. The 1912 Maasai case is an anomaly. It addresses only the narrow issue of the legality of the 1904 and the 1911 agreements. It does not address the legal basis for the taking of Maasai land by the colonial government. An analysis of the case is important, however, for its historical significance. The Court of Appeals for Eastern Africa held that both the 1904 and the 1911 agreements were treaties and thus not recognizable by the court.

The Ogiek case addresses the conflict over the ownership of the Tinet Forest. The Ogiek claim the aboriginal title to the forest based on historical use and occupancy. The Kenya government claims ownership of the Tinet Forest on the premise that the forest was gazetted by colonial government in 1934 and upon the authority of the Forest Act of 1959. The Ogiek case arose from the decision by the government to evict the Ogiek after halting its proposal to degazette the Tinet Forest. The High Court held that the Ogiek do not have ownership rights over the Tinet Forest and that the eviction was thus constitutional and non-discriminatory. The appeal of this case by the Ogiek to the Court of Appeals remains pending.

The Loita Maasai case arose from the NCC's proposal to take the

108. Kagagi, *supra* note 63.
109. Land (Group Representatives) Act [LGRA] § 17 (1968) (Kenya).
110. Kagagi, *supra* note 63, at 498.
111. *Id.* at 499.

Naimina Enkiyio Forest. This would have extinguished all the rights, interests, and benefits that the Loita Maasai hold in the forest under the African customary law. After unsuccessful attempts to settle the dispute with the NCC, the Loita Maasai brought a legal action against the NCC to prevent the taking. Since the hearing of the case began, it has been slowed by several adjournments, caused by lack of a complete constitutional bench of three High Court judges as required by law.[112] The case has been indefinitely adjourned.

1. The 1912 Maasai Case: Ol le Njogo and 7 Others v. the Attorney General and 20 Others

The key facts of the Maassai case involve two agreements between the Maasai and the colonial government hereinabove mentioned. Under the terms of the 1904 agreement, the Maasai agreed to relocate from the Rift Valley to two reserves, the Laikipia Reserve to the north of the railway and the Southern Reserve in the south. In return, the government was to provide a road easement between the two settlements and establish an administrative unit in Laikipia, staffed with appointed officers known and trusted by the Maasai. The agreement stipulated that Maasai land rights over the new territories "shall be enduring so long as the Maasai as a race shall exist, and the European or other settlers shall not be allowed to take up land in the settlements."[113] The 1911 agreement, nevertheless, called for the eviction of the Maasai from Laikipia to the Southern Reserve, considered the inferior of the two reserves.[114]

The plaintiffs premised their appeal upon an alleged breach of the1904 agreement and a tort claim. Appealing the judgment of Municipal, the plaintiffs requested the High Court to declare that they and certain other Maasai residents in Laikipia were entitled to Laikipia as equitable tenants in common. The plaintiffs also asked the High Court to declare that they were entitled to an easement in the form of a road joining the Laikipia and Southern reserves. They further sought a finding that they were not bound by the 1911 agreement because they were not signatories to it. The plaintiffs sought relief against the government for failure to provide the road as the 1904 agreement stipulated and for the tortious acts of the government agents in illegally removing their livestock from Laikipia. They also moved the court to

112. Francis Karanja et al., *Equity in the Loita/Purko Naimina Enkiyio Forest in Kenya: Securing Maasai Rights to and Responsibilities for the Forest* (August 31, 2004) *available at* http://www.iucn.org/places/earo/pubs/forest/loita.pdf.

113. *Id.* at 327.

114. Kabourou, *supra* note 26.

enjoin the government agents from impeding the return of the displaced Maasai to Laikipia.[115]

Affirming the lower court, the High Court dismissed the lawsuit. The High Court held that the Maasai were not British subjects because the protectorate was a British dominion under the Foreign Jurisdiction Acts. The court argued that the agreements were treaties "between the Crown and the representatives of Maasai, a foreign tribe living under its protection."[116] The court, consequently, did not address the challenge by plaintiffs to the legality of the 1911 agreement. The court denied the tort claim, moreover, because the acts of government agents to enforce the 1911 agreement were acts of state. According to the then existing law tortious acts committed by British agents on behalf of the Crown against foreigners were not actionable.[117] Since the acts of government agents to confiscate the Maasai's property were authorized by the Crown and the Maasai were considered foreigners, the acts were not actionable.

In their appeal to the Court of Appeals for Eastern Africa the plaintiffs argued that the 1904 and 1911 agreements were civil contracts rather than treaties, because the Maasai tribe was not a sovereign state. They pointed out that the declaration of Kenya as a protectorate brought the Maasai tribe under complete administrative control of the British Crown. The plaintiffs further claimed that the protectorate was a British dominion and thus the "Maasai were not foreigners in the Courts and a British subject has no privilege over them."[118] They re-alleged the tort claim against the government agents for committing wrongful acts while enforcing the 1911 agreement.

In three separate opinions the Court of Appeals affirmed the High Court and held that the 1912 Maasai case was not cognizable by the courts of the East Africa Protectorate. Chief Justice Morris Carter asserted, first, that was still a foreign country, although it had become part of the British dominion. He cited a Court of Appeals case, *Rex v. Crewe*, in which the court had held that Bechuanaland Protectorate "was a foreign country in which His majesty had jurisdiction within the meaning of the Foreign Jurisdiction Act, 1890."[119] Although the East Africa Protectorate and the Bechuanaland Protectorate were administered differently, both were acquired under the Foreign Jurisdiction Act rather than by a formal annexation. Second, the Chief Justice argued that the Maasai were not British subjects. Rather they were "subjects of a chief or their local government, whatever the form that government may in

115. *Id.* at 343.
116. *Id.*
117. GHAI, *supra* note 12, at 21.
118. SANDFORD, *supra* note 21, at 199.
119. *Id.* at 204.

fact take."[120] Contrary to contention of plaintiffs, the Chief Justice stated that the Maasai could make a treaty, because they retained some elements of sovereignty after the protectorate declaration.[121] Third, the Chief Justice contended that neither agreement was a civil land contract; because neither was signed within the framework of the 1902 Crown Land Ordinance.[122] In addition, the Chief Justice was "unaware of any provision of law which would authorize certain members of a tribe to enter into a civil contract which would bind all the members, unless such members form a central authority in the nature of government in which it may be presumed some elements of sovereignty would exist."[123] The agreements lacked the appearance of land contracts because they contained other provisions not related to land.[124] Finally, citing *Buron v. Denman,*[125] the Chief Justice asserted that the injurious acts the government ordered against the Maasai were not actionable because they were acts of the state.

Justice Farlow held that "the East Africa Protectorate was a foreign country under His Majesty's protection and part of His Majesty dominions and that Maasai, as native inhabitants thereof were not British subjects, or subjects of the East Africa Protectorate Government, as had been suggested, but foreigners under the protection of the British Crown."[126] Justice Farlow noted that the Maasai were administratively and judicially controlled by the British, but capable of making treaties; because some rights of sovereignty remained in the "absence of annexation and irrevocable constitution."[127] Justice Farlow also concurred with the Chief Justice that both agreements were treaties, the enforcement of which was outside the jurisdiction of the court. He argued that the agreements could not be denied treaty status; because they were "entered into with a tribe or community, which by reason of their being uncivilized, may not be recognized as coming strictly within the rules of international law."[128] As to the tort claim against the government, Justice Farlow held, "Inasmuch as it is settled law that the King can neither do nor authorize a wrong . . . the claim against the government in tort cannot be sustained."[129] Therefore, the appeal was dismissed. Conditional leave to appeal to the Privy Council was granted;

120. *Id.* at 205.
121. *Id.* at 207.
122. MUNGEAM, *supra* note 14, at 323.
123. SANDFORD, *supra* note 21, at 208.
124. *Id.* at 208.
125. *Id.* at 209.
126. *Id.* at 218.
127. *Id.* at 219.
128. *Id.* at 221.
129. *Id.* at 221.

but it lapsed for failure of the plaintiffs to give security for costs.

In his analysis of the case, Professor Kabourou asserted that the adverse outcome against the Maasai was inevitable. As British citizens, the lawyers, administrators and the judges in the case were concerned less with protecting the land rights of Maasai than with perpetuating and protecting white supremacy.[130] Kabourou inferred that the plaintiffs' lawyers had deliberately sought to uphold the 1904 agreement, rather than to challenge the legality of the power of colonial government to acquire land. According to Kabourou, the legal basis of the 1904 agreement was weak because of its structural flaws. First, it did not provide a mechanism for enforcement. Both parties could easily violate it.[131] Second, the 1904 agreement failed to anticipate future political and social changes within and outside the protectorate. Although the court did not address the legality of the 1911 agreement, Kabourou provides evidence that suggests the government would probably have prevailed had that issue been addressed.[132] Kabourou further asserted that the judges manipulated the legal system in favor of the government. The court held for instance that the Maasai retained a residual sovereignty after establishment of the protectorate. But the court failed to explain the nature of this sovereignty.

2. The Ogiek Case: Francis Kemai and Others v. Attorney General

People identified as Ogiek lived in the Mau Forest long before the arrival of the Europeans.[133] The Mau Forest contains the largest remaining block of indigenous forest in East Africa.[134] It is rich in bio-diversity and is home to nationally endangered species like the potto, the spotted necked Otter and the striped hyena. Its mean annual rainfall is between 1,000 to 1,800 mm, and it forms an important water catchment in Kenya.[135] The Mau Forest has distinct ecological zones. This enabled the Ogiek to find different foods in different zones throughout the year.

130. Kabourou, *supra* note 26, at 10.

131. *Id.* at 7.

132. *Id.* at 8.

133. K. R. Dundas, *Notes on Origin and History of Kikuyu and Dorobo Tribes*, 8 MAN 136 (1908), available at http://links.jstor.org/sici?sici=0025-1496%281908%291%3a8%3c136%3a7notoa%3e2.0.co%3b2-r&size=large. Roberic H. Blackburn, *The Ogiek and Their History*, IX AZANIA 139 (1974).

134. Lynette Obare and J.B. Wangwe, *Underlying Causes of Deforestation and Forest Degradation in Kenya,* (April 15, 2002) available *at* http://www.wrm.org.uy/deforestation/Africa/Kenya.html. (last visited Feb. 14, 2007).

135. Francis M Nkako, Christian Lambrechts, Michael Gachanja and Bongo Woodley, *Maasai Mau Forest Status Report*, available *at* http://www.unep.org/dewa/assessments/ecosystems/land/mountain/maasaimau/index.asp (visited on June 6, 2007).

Because the forest supported their livelihood as hunters and honey-gatherers, the Ogiek managed the forest efficiently. Blocks of forest marked by rivers or hills were allocated to a clan, who then divided the block according to a family tree. Tree species used for medicinal purposes were communally owned, and community members were prohibited from cutting them.

Early in the twentieth century the British colonial administration unsuccessfully evicted the Ogiek from the forest to arid lands. In the 1930s, the Mau forest was gazetted. A settlement for the Ogiek was created upon the recommendation of the Kenya Land Commission. It denied the Ogiek the status of a tribe and thus denied their claim to their ancestral lands.[136] Some of the Ogiek, nevertheless, returned in defiance of the colonial government.

In 1991 the Kenya government proposed to degazette the Tinet Forest, one of seven blocks that form the Mau Forest, and to settle landless Kenyans, including the Ogiek in the Tinet. The government identified potential recipients, issued them allotment letters, and allowed some of them to temporarily settle. Later the government withdrew its proposal to degazette the forest, after discovering the potential environmental degradation from settling people in the forest.

In 1992 ten members from a group of 5,000 Ogiek brought an action against the government for wrongful eviction from the Tinet Forest. They sought two declarations and two orders. First, the Ogiek requested the High Court to declare that their eviction contravened their right to the protection of law, their right to be protected against discrimination, and their right to reside in any part of Kenya. Second, they sought a judicial declaration that their right to life had been contravened by the forceful eviction from the forest. They also moved the court to order the government to pay compensation for the eviction and court costs.[137]

The legal theory of the case was that the government eviction violated sections 71 and 82 of the Kenya Constitution.[138] The plaintiffs contended that the eviction was unconstitutional; because it would contravene their right to their ancestral home and deprive them of their right to livelihood. They also claimed ownership of the forest and contended that the eviction was discriminatory; because non-Ogiek residents of the forest were not evicted.

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136. SIR MORRIS CARTER, R. HEMSTEAD AND F WILSON, REPORT OF THE KENYA LAND COMMISSION SEPTEMBER 1933 259-261 (His Majesty's Stationery Office 1934).

137. Francis Kemai et al. v. The Attorney General et al., (1999) High Court of Kenya at Nairobi, Civil Case no. 238, http://www.ogiek.org/indepth/case-no-238-1999.htm.

138. TUDOR JACKSON, THE LAW OF KENYA: AN INTRODUCTION CASES AND STATUTES, 77-79, 92-93 (Kenya Literature Bureau, 1986) (1992) (1997).

In defense the government contended that the plaintiffs were non-Ogiek and non-residents of the forest; because the legitimate Ogiek had been relocated, as the archival administrative record indicated. The government denied the discrimination claims, since all residents who had lawfully settled in the forest were advised to vacate. The also government claimed that the plaintiffs were not deprived of their livelihood; because they had adopted modernity and become less dependent on the forest.

The High Court held that the government eviction was neither discriminatory nor unconstitutional. In a joint opinion the court held that the rights of the plaintiffs to their livelihood were not violated, because they were not the rightful owners of the forest. The court challenged the ownership claim of the plaintiffs on evidentiary grounds by noting, "Nothing was placed before us by way of early history to give them an ancestry in this particular place, to confer them with any land rights."[139] The court ruled that, using the government-issued allotment letters as proof of ownership, the plaintiffs "thereby recognized the government as the owner of the land in question, and the right authority and the legal power of the government to allocate a part of its land to the applicants."[140]

According to the High Court, the eviction did not deprive the plaintiffs of their right to their livelihood; because it did not preclude them from accessing the forest by seeking licenses and permits. The court justified the eviction by noting that "the eviction is for the purposes of saving the whole Kenya from a possible, environment disaster; it is being carried out for common good within statutory powers."[141] The modern socio-economic pursuits of the plaintiffs, moreover, were no longer consistent with forest conservation. Finally the court rejected the discrimination claim for insufficient evidence.

For two reasons, the opinion of the court is not persuasive. First, the argument that the livelihood rights of the plaintiffs were not violated, because they retained access to the forest, rest upon a questionable assumption. The court assumed the equivalence of ownership rights and statutorily created rights to access the forest through licenses or permits. It assumed the transaction costs of complying with the governing statutes are zero. The assumption is erroneous; because the cost of obtaining licenses or permits, including the bureaucratic cost of dealing with government agencies, could be exorbitant.

Second, without supporting evidence, the court concluded that the

139. KEMAI, *supra* note 138.
140. *Id.*
141. *Id.*

purpose of the eviction was to prevent environmental disaster. The court ". . . found that to go ahead with [settling the plaintiffs in the forest] would necessarily result in environmental degradation which would adversely affect the role of the forest as a natural forest reserve and a water catchment area, with dire consequences for rivers springing from there which presumably sustain human life, fauna and the flora there and downstream and their environs."[142] But the court premised this finding upon the mere conjecture by the government as to the impact of its proposed settlement plans. The government presented no evidence that the plaintiffs would have degraded the forest.

3. The Loita Maasai Case: Loita Conservation: Trust v. Narok County Council

The Loita Maasai have refused to register their land and have vehemently rejected any government proposal to individualize their land titles.[143] Consequently, all land in Loita is still communally owned. Decisions concerning land matters are communally made, and community members have equal rights to use resources consistent with their customary law.

The Loita Maasai population is about 17,000. They are semi-nomadic and live in isolated scattered communities on hillsides of the Loita Forest. Their land tenure is based on communal ownership and governed by their customary law.[144] Community members retain equal access and use for all land resources. Customary law prohibits individual private ownership. A council of elders is responsible for dispute resolution including punishments in the form of fines. Most ceremonies of the Loita Maasai's are presided over or sanctioned by Laibon, who are considered spiritual and religious leaders.

The forest at issue is Naimina Enkiyio, situated in the Loita hills, 320 kilometers southwest of Nairobi. It is classified as dryland afro-montane and covers 33,000 hectares at an altitude of 2,300 feet above sea level. This dense forest is one of the last remaining closed-canopy, truly indigenous forests in Kenya. Its fauna and flora earn it a high biodiversity index.[145] It is home to globally threatened species like the

142. *Id.*

143. MARK K OLE KARBOLO, FACING MODERN LAND LOSS CHALLENGES: THE LOITA MAASAI PASTORALISTS AND THE RECENT CONTROVERSY OVER THE NAIMINA ENKIYIO INDIGENOUS FOREST IN NAROK DISTRICT PAPER PRESENTED TO THE KENYA COUNTRY GROUP OF ARID LANDS AND RESOURCE MANAGEMENT 7 (ALARM 1999).

144. LOITA NAIMINA ENKIYIO CONSERVATION TRUST COMPANY, FOREST OF THE LOST CHILD: A MAASAI CONSERVATION SUCCESS THREATENED BY GREED 1 (Narok, Kenya 1994).

145. *Id.* at 5.

red-throated tit, Jackson's widowbird and Hunter's cisticola.[146] The forest is the main water-catchment area in the region, receiving twice as much rainfall as the surrounding area, and it is a vital component of the ecosystem upon which Maasai livelihood depends. The value of its water-catchment protection services is estimated at 105 million Kenya Shillings.[147]

The Loita Maasai have reasonably maintained the forest, but it is at risk of being taken by the NCC, a local authority. Under the TLA, the Loita Maasai lands, including the forest, are classified as trust lands. The legal ownership of the Loita Maasai territory is vested in the NCC on behalf of the Loita Maasai. In 1993, the NCC proposed to take the forest and allocate it as part of Maasai Mara Game Reserve. Under the auspices of the Loita Naimina Enkiyio Conservation Trust, the Loita Maasai filed a lawsuit to enjoin the NCC from taking the forest.[148] In a preliminary proceeding,[149] the High Court upheld the Loita Maasai's entitlement to judicial review against the NCC. The case remains pending.

D. Application of the Aboriginal Title Doctrine to the Loita Maasai Case

The aboriginal title doctrine assumes that the imposition of colonial land laws did not extinguish the original land title of indigenous peoples. Some developed countries with common law tradition like the United States of America, Canada and Australia, have recognized the doctrine.[150] The land rights of indigenous peoples stem from prior physical occupation, based on pre-existing customary law. Like Canada and Australia, Kenya is a common law jurisdiction and a member of the British Commonwealth. As a sovereign nation, Kenya has the discretion to develop its own common law, based on its social frameworks and independently of other jurisdictions. However, it cannot ignore a common law legal doctrine recognized by other jurisdictions with which it shares historical legal roots.

Professor Anaya examines the relevant common law precedents to aboriginal land title through the perspectives of established and emerging international legal instruments in order to develop two threshold criteria

146. Parselelo Kanti, *Managing the Loita Naimina Enkiyio Forest*, http://www.monitorinternational.org/loita.htm (last visited Feb. 14, 2007).

147. *Id.*

148. *Id.*

149. David J. Stephenson, *The Importance of Convention on Biological Diversity to the Loita Maasai of Kenya*, (2002), http://www.ubcc.bc.ca/oocs/chapter11.pdf.

150. S James Anaya, *Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize*, 1 YALE HUM. RTS. & DEV. L.J. 17, 23 (1998).

for building *prima facie* case for aboriginal land title. The threshold criteria are "(1) existence of a culturally distinctive community or society with historical origins that predates the effective exercise of sovereignty by the state or its colonial precursor; and (2) customary or traditional land tenure or resources use that can be identified as a part of the cultural life of the community or society."[151]

Thus to establish a *prima facie* case for aboriginal land title to Naimina Enkiyio Forest, based on Anaya's analysis, the Loita Maasai must have originally owned the title to the Naimina Enkiyio Forest by these the above criteria. Second, the original title to the forest must not have been statutorily or constitutionally extinguished by the colonial government or the independent Kenya government.

The first criterion requires that the Loita Maasai society be a culturally distinctive community whose existence predated the declaration of Kenya as a British protectorate. The Loita Maasai, one of the smallest sections of the Maasai tribe, have their ancestral roots in the Loita area, including the forest in question.[152] They have retained their traditional life style, with pastoralism still the main source of their livelihood. Although the Loita Maasai have modified their diet, it is still largely livestock based and their attire remains the same.[153] Customary law still governs the land usage and sanctions private ownerships. The Loita Maasai have some characteristics distinct from the other Maasai. The Loita Maasai have reputation for bravery and notorious introversion. Unlike other Maasai, they have successfully excluded non-Maasai from their lands.[154]

The Loita Maasai trace their ancestral history from Hamites who intermarried with Nilotes of the Nile River basin north of East Africa.[155] These Nilo-Hamites migrated south along the Nile River into northern Kenya and moved farther south along the Great Rift Valley. As the Loita Maasai migrated, they pushed out other tribes and settled permanently[156] in the Loita Hills, including the Naimina Enkiyio Forest two hundred years before the arrival of the British. Their original area measured 10,200 square kilometers, six times its present size.[157] The above evidence satisfies the first criterion that the Loita Maasai are a culturally distinctive community and have held the Naimina Enkiyio Forest under

151. *Id.* at 30.
152. KARBOLO, *supra* note 144.
153. *Id.* at 3.
154. *Id.* at 4.
155. B. M. Lynch, and L. H. Robbins, *Cushitic and Nilotic Prehistory: New Archaeological Evidence from North-West Kenya*, 20 J. AFR. HIS. 319 (1979).
156. KARBOLO, *supra* note 144, at 4.
157. *Id.* at 5.

their customary law before Kenya became a British protectorate. The Loita Maasai had the original title to the Naimina Enkiyio Forest.

The following evidence satisfies the second criterion by showing that the use of the forest by the Loita Maasai was part of their cultural identity. The Loita Maasai used the forest for many cultural rites.[158] They included the rite of passage of young adults, marked by initiation ceremonies, and the cleansing of women to enhance their fertility.[159] The forest holds spiritual significance for the Loita Maasai and serves as a source of herbal and traditional medicines.[160]

The Loita Maasai customarily managed the forest through the institution of the chief, called a Laibon, and by unwritten rules and regulations. These rules and regulations are on uses of resources based. Most of them were exercised through the elders, while others were enforced by all group members.[161]

Their history clearly shows, therefore, that the Loita Maasai are an organized community with roots predating colonization and the post-colonial Kenyan state. This fact, combined with a recognized clear pattern of use of the Naimina Enkiyio forest as part of the Loita Maasai cultural identity, establishes a *prima facie* case of aboriginal title.

Thus the government carries the burden to show that the established aboriginal title of the Loita Maasai has been validly extinguished by some official act or series of acts.[162] For an act to successfully extinguish an aboriginal title, it must conform to legal norms that restrict official behavior.[163] The Kenya constitution provides protection against discrimination based on "tribe, place of origin or residence or other local connection, political opinions, color, creed or sex."[164] Therefore, the Kenya government would violate the constitution if it did not respect the common law property rights of Loita Maasai. International law provides additional legal protection, furthermore, against the extinguishment of Loita Maasai land rights.[165] As a contracting party of the Convention on Biological Diversity, for instance, the Kenya government is required to:

> Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices indigenous people and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote

158. Karanja, *supra* note 113.
159. *Id.* at 4.
160. *Id.*
161. *Id.*
162. ANAYA, *supra* note 151, at 39.
163. *Id.*
164. Constitution Art. 5 § 82 cl. 3 (1992) (Kenya).
165. ANAYA, *supra* note 151, at 40.

> their wilder application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.[166]

As another example, the African Charter on Human and Peoples Right guarantees the right to own property.[167] The International Labor Organization Convention, moreover, provides for extinguishment of land rights of indigenous peoples only through their consent.[168]

As hereinabove noted, during the colonial era the Loita Maasai refused to comply with the 1904 agreement that required them to move from their ancestral lands to the Laikipia Reserve. The Loita Maasai also resisted invasion by other Maasai, who were forced to relocate from Laikipia Reserve to the Southern Reserve following the 1911 agreement.[169] With the enactment of the Crown Land Ordinance of 1915 and the declaration of Kenya as a British colony, the Crown land was broadly defined to include all occupied and unoccupied African lands. The policy would later be echoed in *Isaka Wainaina wa Gathomo and Kamau Gathomo v. Murito wa Indagara & Others*, in which the court held that African land rights in "reserved land, whatever they were . . . disappeared and natives in occupation of such Crown land become tenants at the will of the Crown."[170] The 1915 ordinance was amended in 1938, however, by Native Lands Trust Ordinance, which removed African lands from the Crown lands. Given the above-mentioned historical facts, one may infer that the Loita Maasai's aboriginal title to Naimina Enkiyio was never extinguished during the colonial era.

The post-independent Kenya government cannot establish that the Loita Maasai consented to relinquish their aboriginal title to the forest through an adjudication process under LAA. In fact, the evidence suggests the contrary. In 1969, the Kenya government declared the Loita area an adjudication area under the LAA to allow the creation of group ranches.[171] The Loita Maasai, however, have resisted adjudicating their land into group ranches to date. They have also vehemently continued to reject any government proposal that would alter the existing communal

166. Convention on Biological Diversity article 8(j), http://www.biodiv.org/convention/articles.asp (last visited Mar. 29, 2005).

167. The Protocol to African Charter on Human and Peoples Rights on Women's Rights in Africa article 14, (March 29, 2005), *at* http://www.africa-union.org/official_documents/treaties_conventions_Protocols/BanjulCharter.pdf.

168. Convention (No. 169), Concerning Indigenous and Tribal Peoples in Independent Countries, International Labor Organization (June 27, 1989) *at* http://www.unhchrch/html/menu3/b/62.htm [ILO Convention No. 169].

169. *Id.*

170. OKOTH-OGENDO, *supra* note 38, at 54.

171. KARANJA, *supra* note 112.

ownership of the forest. Unlike other Maasai groups, the Loita Maasai pride themselves on successfully keeping other agriculturist tribes from taking their lands.[172]

The Naimina Enkiyio is trust land forest and thus the Kenya constitution and TLA govern its ownership and use. The ownership of the forest, therefore, is vested in the trusteeship of the NCC on behalf of the Loita Maasai. The NCC has constitutional and statutory power to take any part of trust land under its trusteeship within set legal guidelines. The NCC, for instance, must inform its residents through the divisional board before the taking and must pay full compensation to the affected residents. The evidence shows that the NCC has not met the two legal requirements.[173] Thus, the NCC's taking of the Naimina Enkiyio Forest would be unconstitutional and in violation of the TLA.

In conclusion, the Loita Maasai have the aboriginal title to the forest; because their ancestral roots in the forest predate both colonialism and the modern Kenyan state. The Loita Maasai have also established clear patterns of forest use that form part of their cultural identity. During the colonial era the British did not legally extinguish the Loita Maasai's aboriginal title. The proposed taking by the NCC is unconstitutional therefore and inconsistent with international law.

V. Economic Analysis of the Ownership Rights of Naimina Enkiyio Forest

The proposed taking by the NCC that would make Naimina Enkiyio forest part of Maasai Mara Game Reserve raises two fundamental questions of economics. First, given that the forest ownership rights are not well defined,[174] who, among the stakeholders should be assigned the ownership rights to the forest? Second, what legal rules should the court enforce to protect the assigned ownership rights in order to promote economic efficiency?

Although there are multiple stakeholders in the forest, the primary stakeholders consist of individuals or organizations with a direct interest in it.[175] These are local communities like the Loita Maasai, whose livelihood depends on the forest, and the central government that would benefit from revenue generated by the forest. The major interest of the Loita Maasai is uncontrolled access to the forest for ceremonial rites and livestock refuge during the dry season. The government has an interest in maintaining and maximizing revenue collection that is generated from

172. *Id.*
173. KARBOLO *supra* note 143, at 21, 22.
174. KARANJA, *supra* note 112.
175. *Id.*

tourism and logging activities. Although its interest encompasses various levels of government, the analysis narrowly focuses on the local government as represented by the NCC. Under the Local Government Act, local authorities are governed by elected councilors, but administratively managed by appointed bureaucrats.[176] County councils are highly regulated and controlled through the decision-making power vested in the appointed bureaucrats of the central government. In light of this symbiotic relationship between the local government and the central government, the NCC functions as a proxy of the central government in the analysis.

A. Economic Model

This subsection develops a simple economic model based on tradeoff between the benefits and costs of making the Naimina Enkiyio Forest part of the Maasai Mara Game Reserve. The benefits are the revenue generated by tourist visitors and by logging activities. Tourists would perhaps impose an external cost on the local communities. Such cost would include interference with the sacred sites and dry season grazing lands of Loita Maasai.

The model represents the benefits by a profit function, $\pi(x)$ whereby x is the number of tourist visitors allowed. Assume that the profit function increases in x at a decreasing rate, reflecting a positive but diminishing marginal benefit of x. Suppose the damage of external costs imposed on the Loita Maasai amounts to $D(x)$, which is a function of x whose marginal cost with respect to x is positive and increasing.

Assume the social goal is to maximize the net profits, $\pi(x)$-$D(x)$. The solution to this problem is socially efficient; because it represents the optimal number of tourists, whereby additional revenue generated by one tourist is equal to the cost of the damage imposed by the same tourist. The difference between the marginal profit and marginal damage is precisely zero.

Figure 1 depicts the analysis graphically, using demand and supply curves. The vertical axis represents the dollars per unit fee paid by each tourist. The horizontal axis represents the number of tourists. It is reasonable to assume that the NCC and the Loita Maasai will be competing for tourists with other national parks and game reserves. This means that the fees charged to the tourists are market fees such that they are inversely related with number of tourists. If the fees are high, for example, the tourists would seek alternative choices with lower fees. In

176. PAUL J SMOKE, LOCAL GOVERNMENT FINANCE IN DEVELOPING COUNTRIES: THE CASE OF KENYA 76 (Oxford University Press 1994).

figure 1, the line for marginal profits is a downward sloping curve, which depicts the demand curve. The supply curve is represented by the marginal damage, which is upward sloping and positively related to the number of tourists. As the number of tourist increases, more damage will occur.

As shown in *figure 1*, x^* occurs at the equilibrium condition at which the demand equals the supply. It is the optimal number of tourists. It represents the maximum number of tourists who would create the least external cost. But the NCC's maximization problem also exists.

B. The NCC's Maximization Problem

If the NCC has property rights over the forest, it will likely maximize profit without internalizing the damage imposed upon the Loita Maasai. The NCC will maximize revenue, disregarding the cost of damages to the Loita Maasai. As shown in *figure 1*, x^p represents the maximum number of tourists that the NCC would allow. Given that x* is the socially optimal number of tourists, then x^p is inefficient; because it is greater than the socially optimal level. This means that, if NCC has property rights over the forest, it will likely allow more tourists than is socially desirable. This would impose more damage on the Loita Maasai.

The conjecture that the maximization problem of the NCC ignores the cost of damages invites explanation. First, like all other local governments, the NCC is controlled by the central government through the power of decision making vested in the Minister for Local Government. Although the NCC councilors are elected, for instance, their employment tenure depends upon the discretion of the Minister. Thus the councilors are less likely to be accountable to their constituents than to the central government, whose main goal is to maximize revenues from tourism. Second, in the short term the expected cost of damages to the forest would likely be restricted to local communities with little national consequence. Because the NCC governs sparsely a populated area, it lacks influence for the political decisions of the central government. The central government through the NCC, therefore, would likely disregard the concerns of Loita Maasai. Third, the Loita Maasai have limited influence within the NCC; because they control less than ten percent of the its voting members. Given this limited voting influence, the Loita Maasai through their councilors would find it difficult to veto any proposal by the NCC that would adversely affect them. A case in point is the decision by the NCC to annex the forest and

grant concessions for campsites without approval of residents.[177]

C. *The Loita Maasai's Maximization Problem*

Because the Loita Maasai directly bear the cost of damages, including possible loss of the use of the forest, they are likely to internalize the cost of the damages imposed.[178] If the Loita Maasai own the property rights over the forest, then their maximization problem, $\pi(x)-D(x)$, becomes identical to the social problem. This means that the Loita Maasai would be likely to behave efficiently and allow the socially optimal number of the tourists. The Loita Maasai would thus allow tourists to a point at which the marginal profits from one additional tourist would equal the marginal cost of damage imposed upon the tribe.

Mismanagement of Maasai Mara Game Reserve by the NCC anecdotally supports predictions of the model that the NCC would likely behave inefficiently. Although the NCC has limited sources of revenue, it is considered one of the richest local authorities in the country; based on the colossal amount of revenue it collects from tourist fees.[179] The NCC has nevertheless allowed tourism to develop with virtually no control to minimize the environmental degradation thus created. Too many lodges have been built to accommodate more tourists. There has been no limit placed on tourist vehicles.[180] Lack of transparency with respect to revenue collection and other irregularities have been reported.[181] The revenue-sharing arrangements, for example, provide that twenty-five per cent of fees collected are to be allocated to the local communities. In practice this number has been only five percent. Given the documented mismanagement of the Maasai Mara Game Reserve by NCC, the Naimina Enkiyio Forest will likely be equally mismanaged; if the taking occurs.

The model also predicts that, if the Loita Maasai retains their property rights in the forest, they will likely allow a socially optimal number of tourists because they directly bear the cost of damage generated by tourism. This probability is anecdotally supported by evidence of tourism conducted in the forest, which differs from tourism in the Maasai Mara Game Reserve. The Loita Maasai, for instance, have restricted the number of tourists allowed in the forest to 600 per year through permit activities like hiking, horse riding, donkey trails and cultural exchanges. Tour operators and educational institutions are

177. *Id.*
178. *Id.*
179. KARBOLO, *supra* note 143.
180. LOITA NAIMINA ENKIYIO CONSERVATION TRUST COMPANY, *supra* note 144, at 8.
181. *Id.*

restricted to conducting forty to fifty trips per year.[182]

Clearly the Loita Maasai should retain ownership rights over the forest; because, as the model demonstrates, they would likely behave more efficiently than the NCC. This leads to the question of whether the ownership rights to be retained by the Loita Maasai should be enforced by rules of property or of liability.[183] The corollary to the Coase Theorem calls for the use of property rules to when the transaction costs are low and for liability rules when they are high.[184] The transaction costs include bargaining and administrative costs.

Anecdotal evidence indicates that the transaction costs between the Loita Maasai and the NCC are high. First, the filing of the lawsuit by the Loita Maasai provides a case in point; because the NCC and the Loita Maasai could not settle the dispute. Second, Karanja documented the effort of the Loita Maasai in fighting against the taking of the forest.[185] They asked the NCC to rescind its decision to take. But their request was ignored. The Loita Maasai also unsuccessfully lobbied locally and internationally against the taking.[186] Third, the interest of secondary stakeholders increases the transaction costs. Secondary stakeholders are individuals or organizations having an indirect interest in or impact on the forest. This group includes international and local conservation organizations, donors and the private sector.[187]

Because the transaction costs between the Loita Maasai and the NCC are high, the Coase Theorem would suggest that their ownership rights over the forest should be protected with a liability rule. This means the NCC can take the forest or regulate the forest without the consent of Loita Maasai. The NCC must pay court-imposed compensation, however, reflecting the subjective value of the forest to the Loita Maasai.

VI. Conclusion

The foregoing case studies of the Maasai and the Ogiek demonstrate that although Kenyan national laws recognize the land rights held by indigenous people under the African customary law, they do not adequately protect these rights. Chapter IX of the Kenyan constitution

182. *Id.*

183. THOMAS J. MICELI, THE ECONOMICS APPROACH OF THE LAW 176 (Stanford University Press, 2004). According to Miceli, if an individual property right is protected with property rule, then his or her right cannot be acquired by anybody without his or her consent. On the other hand, if the property is protected with liability rule, the owner's consent is not required so long as acquiring party pays court-imposed compensation.

184. *Id.*

185. KARANJA, *supra* note 112.

186. *Id.*

187. *Id.*

recognizes and protects land rights held in the trust lands under African customary law. The constitution also erodes the protection of these rights, however, by granting broad taking powers over the trust land to the executive and legislative branches of government. With only limited participation by the indigenous peoples, the President has misapplied the constitution in his allocation of trust land.

Like the constitution, the statutory law recognizes the land rights of indigenous peoples in trust lands. Yet it grants to the executive branch, which includes the local authorities, broad taking power. The statutory law also provides the adjudicatory procedure for taking trust lands and converting rights held in them under African customary law into private rights. Anecdotal evidence confirms widespread failure of government administrators to enforce the law; because they are not accountable to the indigenous peoples. Inability of the indigenous peoples to enforce their land rights, due to lack of resources and other institutional barriers, exacerbates the enforcement problem. Case law leads to an inference that the law more adequately protects the rights of indigenous peoples when their land is located in the trust land than when it is located in the government lands.

An alternative common law legal theory exists based on the doctrine of aboriginal title. Although the doctrine has been successfully applied in other commonwealth[188] jurisdictions, whether the Kenyan courts will find it persuasive remains to be seen. The Kenya High Court refused to apply the Mabo case jurisprudence in the Ogiek case, but Judges Oguk and Kuloba left open that possibility.[189] The common law of aboriginal title, construed in light of relevant international law, applies to the Loita Maasai case. Based on Professor Anaya's analysis, the Loita Maasai case establishes a *prima facie* case for aboriginal title over the Naimina Enkiyio Forest. First, the Loita Maasai's ancestral roots in the forest predate both colonialism and the modern Kenya state. The Loita Maasai had established clear patterns of forest use that are part of their cultural identity. Second, during the colonial era the British did not legally extinguish aboriginal land title of the Loita Maasai to the Naimina Enkiyio Forest. The proposed taking by the NCC is unconstitutional and inconsistent with international law.

188. Gary D Meyers & Sally Raine, *Australian Aboriginal Land Rights in Transition (part II): The Legislative Response to the High Court's Native Title Decision in Mabo v Queensland and Wik v Queensland 9* TULSA J. COMP. & INT'L L. 95 (2001).

189. KEMAI, *supra* note 137. The High Court claimed that the Ogiek case was not well analyzed as Mabo case because "the various land statutes and customary law were not argued and case was presented within narrow limits of the forest legislation and the extracurial struggles and resistance of the people who had been removed from the place and relocated elsewhere."

The Kenya High Court has an alternative framework with which to resolve the Loita Maasai case based on economic efficiency. Supported by anecdotal evidence and consistent with the aboriginal title doctrine, an economic model predicts the Loita Maasai would be better custodians of the Naimina Enkiyio Forest than would the NCC. Thus the ownership rights of the forest should be assigned to the Loita Maasai. Because the Loita Maasai would directly bear the immediate external costs generated by tourism, they are likely to internalize these costs and allow the optimal number of tourists who would impose the least damage to the forest. Because high transaction cost precludes the NCC and the Loita Maasai from setting the case Court should protect their ownership rights over the forest with a liability rule; based on well established economic principles. This means the NCC could take or regulate the forest without seeking consent of the Loita Maasai but the NCC would have to pay compensation imposed by the court to cover the value of the forest, including its subjective value to the Loita Maasai.

A. Recommended Reforms

Several reforms would strengthen the existing legal protection of indigenous land rights. First, proper procedures must be adopted to check the constitutional and statutory taking power over trust lands granted to the executive branch of the government. Through their own elected representatives instead of through government representatives, the indigenous peoples must be empowered to participate in the taking as equal partners with government administrators. Government officials who abuse the public trust and illegally allocate the trust lands must be prosecuted in accordance with the penal code.

Second, the LGRA should be amended as follows: (i) to provide for the appointment of a qualified assistant Registrar to educate the members of group ranches about their legal rights; and (ii) to ensure compliance with the LGRA by group representatives. Section 13 of the LGRA should be amended to prohibit the Registrar from consenting to the dissolution of a registered group before all the liabilities have been settled and all the assets have been shared among the individual members of the group.

Third, the LAA should be amended to allow the courts and lawyers to participate in the adjudication process to ensure that subordinate interests and minority interests are well protected. To control corruption, the government should increase budget for the adjudication process, so as to raise the number of qualified administrators and to remunerate appointed officials for their services.

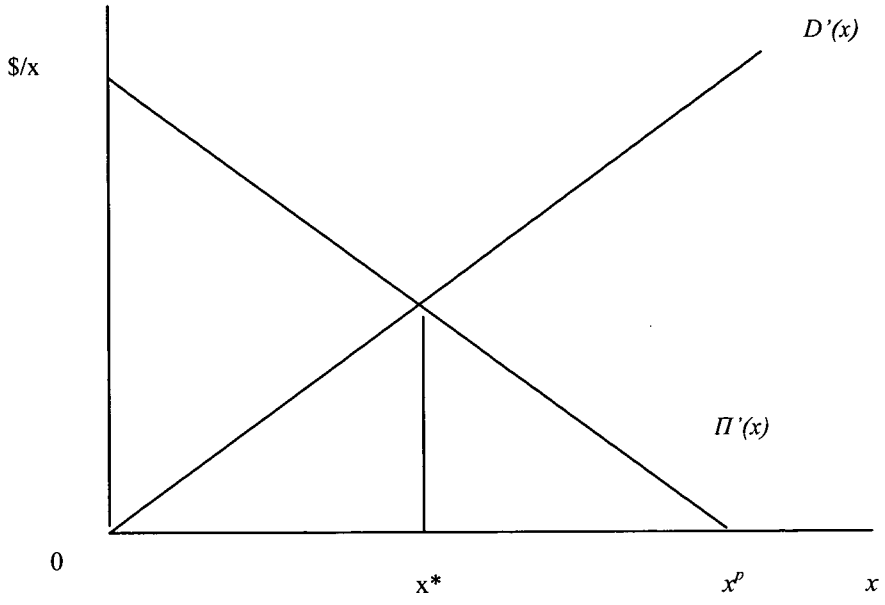

Figure 1