



Report on baseline study of the existing policy frameworks for IPLCs on recognition of land rights and indigenous and local knowledge in the context of biodiversity conservation in Kenya

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Executive Summary

The baseline study of the current policy framework for IPLCs on recognition of land rights and indigenous and local knowledge in the context of biodiversity conservation in Kenya is a project of the Forest Peoples Programme (FPP).

The objectives of the consultancy assignment were to provide detailed information on the current status of relevant regional, national and local policies, laws and regulations concerning the IPLCs from Mt. Elgon, Narok, Trans Nzoia, Bungoma and West Pokot. In addition, it was expected to establish to what extent county or local policies and legislations as well as state agencies (such as KFS and KWS) have addressed the IPLCs land rights issue and biodiversity knowledge and conservation.

This was a 2 month consultancy (22nd March to 22nd May 2023) and the expected report of to be submitted through email.

The report is comprised of five (5) chapters, where Chapter 1 is on introduction to the issue, Chapter 2 is on the fundamental theories and principles on which land rights and biodiversity conservation would be based on. This was deemed necessary in order to draw the baseline from which the sincerity and adequacy of regulations would be assessed. Theories on Access, Property, Regime, Conflict and Development were reviewed and their short but precise linkages to the objectives of the consultancy were given. The principles include Principle of Common but differentiated responsibilities; principles of the common good; Principle of access to genetic resources and the sharing of benefits.

Chapter 3 is a review of the guiding international frameworks which address land and land rights and biodiversity conservation with emphasis on those touching on the IPLCs. These include the multilateral environmental agreements on biodiversity, climate change, drought and desertification and wetlands. Others are the intellectual property and indigenous and traditional knowledge systems as well as the United Nations Declaration on the Rights of Indigenous People (UNDRIP) and the Convention on the Elimination of all Forms of Discrimination against Women. How these international instruments have been domesticated in the target areas has been reviewed. Finally, the relationship of this domestication of international instruments and the Kenya National Vision 2030 on biodiversity and especially whether the areas in question are on course to the Global Biodiversity Vision 2050 of humanity living in harmony with nature is analyzed.

Chapter 4 is a detailed analysis of the National Policy and Regulatory Frameworks as at present. The relevant laws have been reviewed in depth and presented as a matrix.

Chapter 5 is a discussion and conclusion. It is concluded that the areas in question have had their land rights addressed in paper, but actual implementation on the ground still remains a big challenge. This project is seeking to contribute not only to the policy review but also to its implementation.

Chapter 1: Introduction and objectives of the consultancy, statement of the problem.

(i) Introduction

A baseline study of the recognition of indigenous people typically involved gathering information and data to establish a starting point or reference for understanding the status, rights and needs of indigenous communities. In this assignment the focus was on:

The need for a baseline study often implies that the available knowledge or information on the issue is inadequate or incomplete to serve as a reliable starting point or reference. Baseline studies are conducted when there is a recognition that there is a lack of comprehensive data or understanding about a specific topic or population.

In the context of recognition of indigenous people, many indigenous communities have historically faced marginalization, discrimination and limited documentation of their rights and needs. A key reason for this study is that the existing information might be fragmented, outdated or insufficient in capturing the complexities and nuances of the situation. Therefore, conducting a baseline study becomes crucial to gather accurate and current data, fill knowledge gaps, and establish a solid foundation for further research, policy development and interventions.

The targeted region, namely that occupied by IPLCs of Mt. Elgon, Narok, Trans Nzoia, Bungoma and West Pokot has been faced with conflicts between the government on the one hand and the indigenous communities on the other. In some cases, the government security forces have invaded and displaced communities from their ancestral homes after setting fire to their dwellings. This has resulted in prolonged court battles with the IPLCs appearing to be disadvantaged. Sometimes, the IPLCs have won the court cases but the government has been slow or reluctant to honor the courts decisions. This has given the impression that the existing legal frameworks are either inadequate or it is largely a strategy to keep the land open for grabbing in the future. In this review it is intended to trace the issue of IPLCs land rights and biodiversity conservation from their root causes and establish precisely where the disconnect comes from.

The Transformative Pathways project aims to improve the recognition of the contribution of indigenous peoples and local communities (IPLCs) to biodiversity conservation and consequently lead to a formal improvement of relevant enabling conditions. Its overall objective is to contribute to improved protection and sustainable use of biodiversity and to a greater recognition of the IPLCs' rights to their lands, territories and resources.

In Kenya, out of 47 communities at least 21 are considered indigenous. In fact, two of these, the Degere of Kilifi and Kwale and the Engulia of Makueni County are classified as “lost” tribes. The others include (in alphabetical order (1) Aweer, (2) Boni-Bajuni, (3) Boran, (4) Endorois, (5) El-molo, (6) Gabra, (7) Lichamus, (8) Maasai, (9) Malakote, (10) Ogiek, (11) Pokot, (12) Rendile, (13) Samburu, (14) Sanye, (15) Sengwer, (16) Somali, (17) Turukana, (18) Yaaku-Waate and (19) Wagochi. The Transformative Pathways project identified 6 specific areas for the Kenya component of the project to focus on. These are Mount Elgon region, Narok, Trans-Nzoia, Bungoma, Samburu and West Pokot counties. The indigenous communities represented in these areas are the Ogiek, Maasai, Samburu and the Pokot.

Worldwide, the indigenous people and local communities are faced with the triple challenges of (i) being unrecognized by their own governments, (ii) living on lands with weak tenural rights and (iii) Facing poverty and underdevelopment in all dimensions. Despite these challenges, these communities have persistently refused to surrender to the whims of their governments or to the socio-economic pressures exerted on them by those who have adopted the western civilization. Governments have used all manner of trickery, manipulations and brute force to ‘persuade’ the IPLCs to abandon their lifestyles (despite the 2007 (Decision 61/295) UN Declaration on the rights of indigenous people), and subsequently move out of their habitats, usually forests or jungles. The governments though insincere in their intentions, have failed to understand why people would refuse to abandon a “primitive” lifestyle even when the living conditions are considered hard, when viewed through the lens of the western civilization model. The governments, likewise refuse to acknowledge the simple reality that a people are emotionally attached to their ancestral land and psychologically conditioned to living a particular lifestyle without which their happiness and wellbeing cannot be realized. The IPLCs have no other place they can call home and are intricately linked to their ancestral lands and lifestyles. And for thousands of years, the IPLCs have survived to this day having evolved strategies to cope with the ecological conditions of their environment. These coping mechanisms include living on the environmental resources especially biodiversity. Having recognized that their biodiversity was their life, IPLCs have over the years devised strategies to conserve and sustainably utilize these resources and in the process have become completely intertwined with them to the extent that one could not possibly exist without the other. This state of affairs is probably what the biodiversity vision 2050 of ‘humanity living in harmony with nature’ advocates. It is perhaps in light of this that the Transformative Pathways project seeks to build up data for use to improve the IPLCs recognition of their contribution to biodiversity conservation. The data will inform the improvement of relevant enabling conditions such as the guidelines for advocacy in public policies, regulations, laws and financial mechanisms. The data should therefore be solid enough to touch the hearts of policy makers and law enforcement agencies.

(ii) Objectives of the Consultancy

The broad objective was to carry out a baseline study of the current policy and legal frameworks for indigenous peoples and local communities on recognition of land rights and indigenous and local knowledge in the context of biodiversity conservation in Kenya.

Specific Goals

- Provide detailed information on the current status of relevant regional policies, laws and regulations which concern the Kenyan IPLCs and especially those from the selected areas.
- To examine in detail the national policies, laws and legislations which bear relevance to the IPLCs, their ancestral land and biodiversity.
- To establish to what extent County or Local policies and legislations have addressed the 'PLC's land right issue as well as that of biodiversity knowledge and conservation.

(iii) Statement of the Problem

The IPLCs have occupied their ancestral lands since the dawn of human history, except in those cases where they were evicted either by use of brute force, coercion or trickery. Some of the reasons used for their evictions include the governments' policy to create nature conservancies, the need to set up development programs including mining and irrigation, and even to pave way for a wealthy investor to establish an elite tourist venture. Whether these new land use projects generate money or end up as failed initiatives is not the question. The issue is that the IPLCs displaced from their ancestral homes end up miserable, resource poor and generally homeless. Moreover, the ecology of their ancestral lands is permanently altered for the worse, resulting in land degradation, biodiversity loss and as carbon debtors. This is double tragedy where the people and the lands they once called home suffer irreparable damage, which spreads out to impact on the whole world, contributing to the third tragedy of a global nature and immeasurable magnitude. It is now getting clearer that for humanity to solve the complex problems created by climate change, the issue of the IPLCs will have to be solved simultaneously. Denying local people land rights has global consequences. This is more so with respect to the continuing biodiversity loss. The IPLCs biodiversity knowledge is intertwined with their languages and culture to the extent that the extinction of people will automatically mean loss of biodiversity. The purpose of this project is therefore to contribute to the aggregation of spatial information on the indigenous people and the creation of a database in the understanding of how these people may be empowered to exercise their traditional rights over their lands and hence play a significant role in biodiversity conservation.

There is definitely a conflict between human development seen from the western civilization lens and the lifestyles of the IPLCs. Government usually adopts the western civilization model and tend to view the IPLCs as a pullback force in its science-technology guided development agenda. On the other hand, the IPLCs want to live the way they have always lived. The IPLCs are Kenyan citizens and they pay their taxes as other Kenyans do. They are therefore entitled to benefits the government gives to other communities. But, although the IPLCs suffer similar challenges, they lack a unified factual argumentation to advance their cases.

Amidst all these unfortunate experiences by the IPLCs, the government has been involved in developing policies and regulations aimed at creating an enabling environment for all Kenyan people to live, work and support the government in building a strong nation. There is an uncomfortable feeling that the IPLCs and especially the indigenous people living in forested areas have been denied the full benefits of the government policies and regulations. Instead, they have been subjected to laws enacted during the colonial era related to the Crown Lands Ordinance of 1901. This archaic law empowered the Commissioner for Lands to treat any “unoccupied” land as ownerless and wasted or *terra nullius*. Thus ‘grazing areas’ left free for vegetation to recover as a pastoralist strategy for effective and ecological land use management risked being considered idle and ownerless wasteland. This was how the Maasai grazing land, north of Nakuru was taken away from them by use of the defective 1904 Maasai Treaty. Likewise, the occupants of an area could be permanently relocated to other areas without consultations or compensation. It is emotionally painful to notice that after Kenya gained her political independence, the government has continued to employ the inhuman community land use management practices with regard to the IPLCs. This project is based on the concept of thinking globally but acting locally. It has reviewed in depth the national and local policy frameworks and regulations on land ownership and use rights with special references to the forest dwelling communities.

Chapter 2: Fundamental theories and principles

The land question in Kenya from 1800, through the colonial era to the 5 governments after independence.

General Trends:

(a) Land

Land has always been taken away from the weak by the strong and mighty and in every case, there has been a 'sound' explanation or basis for example,

- i. *Pre-colonial era:* The European invaders hatched the concept that the Africans were an inferior race who had neither the need nor the capacity to utilize their land and its resources. The extreme case of this flawed philosophy was that by Leopold of Belgium¹. To the colonialists, African land was ownerless and has to be exploited for the benefit of Europeans. Cecil Rhodes² was a bit mild. He believed that Europeans should use African resources to develop and civilize Africans.

But in general, since African land had no title, then it was ownerless and the concept of community land was meaningless.

- ii. The Colonial Era - In order for the colonial government to justify 'owning' Kenyan land, the following steps were:
 - 1884 - Europeans held the Berlin Conference and partitioned Africa. There was no African representative.
 - 1895 - Kenya was made a British protectorate.
 - 1920 - Kenya was made a British colony (*All Kenyans were British subjects*).
 - The Kenya-Uganda railway land. 1896 - 1901: The railway land dispute to date is not resolved.
 - Indian land law imported to Kenya³.
 - Started titling Kenya land pieces

1 Thomas Pakenham (1991) The scramble for Africa: White man's conquest of the Dark Continent from 1876 to 1912.

2 Cecil Rhodes. 'From Cape to Cairo' The concept was advocated in early 1880s.

3 The Law was adapted from the Indian Transfer of Property Act of 1882 in 1902. Using this law, Kenyan Land was divided into three categories.....

(b) The Access Theory

Access, “the ability to derive benefits from things”. This is the classic definition.

Access Theory is a theoretical framework that examines how social and economic structures shape access to resources, opportunities, and power in society. It can be applied to the issue of land ownership in Kenya during the colonial period to understand how colonial policies and institutions affected access to land.

During the colonial period in Kenya, land was a major source of wealth and power, and access to land was tightly controlled by the colonial authorities. The colonial government introduced policies and laws that aimed to dispossess Kenyans of their land and transfer ownership to European settlers.

Under the Crown Lands Ordinance of 1902, the colonial government claimed all land not already owned by Europeans as Crown Land, and then proceeded to grant large tracts of this land to European settlers. This effectively excluded Kenyans from owning land, as they were denied the right to purchase or even occupy Crown Land without the permission of the colonial authorities. Kenyans became squatters on their own land.

The Access Theory can help us understand how these policies created a system of unequal access to land, with Europeans having preferential access to the most fertile and productive land, while Kenyans were relegated to marginal and less productive areas. This had far-reaching consequences for Kenyan society, as access to land was linked to economic power, social status, and political influence.

The theory can also help us understand how land ownership became a source of conflict and resistance during the colonial period, as Kenyans fought to reclaim their land and challenge the colonial government’s authority. The Mau Mau rebellion, for example, was sparked by land grievances, with Kenyans demanding the return of their ancestral lands that had been taken away by the colonial authorities.

It is interesting to note that even after Kenya became politically independent, the government has continued to treat some of its citizens in the same way colonial power treated them. The case for the indigenous people is a classic example of this socially, politically and economically uncomfortable state of affairs.

(c) The Property Theory

The Property Theory is a theoretical framework that examines how individuals and societies establish and enforce property rights. It can be applied to land ownership in Kenya during and after the colonial era to understand how the concept of property rights has evolved over time.

During the colonial era in Kenya, land ownership was highly contested, with European settlers claiming ownership over large tracts of land that were traditionally occupied by Kenyan communities. The colonial authorities established a system of land tenure that denied Kenyans the right to own land, and instead granted them access to land through customary tenure systems.

After Kenya gained independence in 1963, the government embarked on a program of land reform aimed at addressing the historical injustices of the colonial era. The program sought to redistribute land to landless Kenyans, abolish discriminatory tenure systems, and promote equitable access to land.

After independence, the government recognized the property rights of all Kenyans regardless of their ethnicity or social status. The government also established a legal framework for land ownership that guaranteed the right to own, use, and dispose of property, and created institutions to protect these rights.

However, the implementation of land reform in Kenya has been uneven, with some Kenyans still struggling to access land, and others facing challenges in securing their property rights.

(d) The Regime Theory

Regime Theory is a theoretical framework that examines how political regimes affect policy-making and implementation. It can be applied to the issue of land ownership and use rights in Kenya to understand why these issues have remained unresolved despite changes in government regimes.

Kenya has undergone five government regimes since independence in 1963, but the issue of land ownership and use rights has remained contentious and unresolved. Some of its politicians have allocated themselves excess land and resources and sometimes even forcefully acquired land from marginalized and vulnerable communities. The government has implemented several land reform programs, but these have often been slow, ineffective, and prone to corruption.

The Regime Theory can help us understand why this is the case. According to the theory, political regimes are defined by their institutions, norms, and actors, and these factors shape the policy-making process and the implementation of policies.

In the case of land ownership and use rights in Kenya, the Regime Theory can help us understand how the institutional context and actors involved have influenced policy outcomes. For example:

- i. *Institutional context*: The institutional context in Kenya has been marked by uncoordinated and weak institutions, corruption, and political instability. This has made it difficult for the government to implement effective land reform programs, as policies are often undermined by vested interests and rent-seeking behavior.
 - ii. *Actors*: The actors involved in the policy-making process have also had a significant impact on policy outcomes. Political elites, for example, have often used land as a tool for political patronage, distributing land to their supporters and using it as a means of consolidating power. This has undermined efforts to implement equitable land reform programs.
 - iii. *Norms*: Norms and values also play a role in shaping policy outcomes. In Kenya, there is a culture of impunity that has also gained supporters who perpetrate and defend it, where powerful individuals are able to flout the law with impunity. It is also good to note that forces of resistance to this impunity exist. These forces led to the drafting and enactment of the Kenya Constitution 2010. This has made it much easier to hold individuals accountable for land-related crimes, and has enhanced the trust in the institutions responsible for implementing land reform.
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(e) The Conflict Theory

The Conflict Theory can be applied to the issue of land ownership and use in Kenya, particularly as it concerns the Indigenous Peoples and Local Communities (IPLCs).

Conflict Theory suggests that conflicts arise due to a struggle for power, resources, and status between different groups in society. In the context of land ownership and use in Kenya, IPLCs have been marginalized and dispossessed of their land by more powerful groups such as the government, private investors, and multinational corporations. This has led to conflicts between these groups over access to and control of land resources.

The IPLCs in Kenya, including the Ogiek, Maasai, Samburu, Pokot and other pastoralist communities, have experienced significant land loss and displacement due to government policies and commercial interests. The government has often allocated IPLCs' ancestral lands to private investors, their supporters and themselves for commercial agriculture and other large-scale development projects without their consent or adequate compensation. This has led to conflicts between the IPLCs and the government, as well as between the IPLCs and private investors.

Additionally, multinational corporations involved in natural resource extraction, such as mining and commercial forestry and export crops farming as well as international bodies focused on appropriating (or funding the appropriation of) indigenous land in theory to conserve it, in a way that IPs see as being about those bodies securing conservation funding for themselves, have also been implicated in land grabbing and human rights abuses against IPLCs in Kenya. This has further fueled conflicts between these communities and external actors who seek to exploit their land resources.

IPLCs have also complained about the availability of development funding that has impacted them negatively when it is availed to Government to implement conservation projects such as use of fortress conservation to keep IPLCs out of their lands. In some cases, international bodies have focused on appropriating or funding the appropriation of land belonging to IPLCs with a view to secure funding for themselves with the pretext of achieving conservation. Sometimes some NGOs have been responsible for human rights abuses in the process of implementation of their conservation projects which has also included fortress conservation. A model which has since been deemed more injurious than it is beneficial.

To address these conflicts, Conflict Theory suggests that it is necessary to redistribute power and resources to the marginalized groups. In the context of land ownership and use in Kenya, this would require recognizing the "collective property rights" of IPLCs and empowering them to undertake inclusive and collective decision-making processes decide on land use and management while ensuring that the outcome of such engagement will lead to ecologically sustainable and community sustaining land use and management. It would also require addressing the root causes of the conflict, such as historical injustices and unequal power relations, and promoting equitable and sustainable land use practices that benefit all stakeholders.

(f) The Development Theory

Development Theory is a set of ideas and perspectives that seek to explain the processes and conditions of economic, social, and political development in countries like Kenya. The theory is based on the premise that all societies pass through stages of development and that the key to promoting development is to overcome the obstacles that prevent countries from progressing to higher stages of development.

Kenya has undergone significant economic, social, and political changes since gaining independence in 1963. Over the past few decades, the country has made significant progress in reducing poverty, improving access to education and healthcare, and promoting economic growth. However, despite these gains, Kenya still faces significant development challenges, including high levels of inequality, political instability, and environmental degradation.

Development Theory can be applied to Kenya in a number of ways:

- i. Modernization Theory:* This theory suggests that countries like Kenya can achieve economic development by following the path of industrialization and modernization. According to this theory, development requires the adoption of Western-style institutions and values, including democracy, free markets, and individualism. Proponents of this theory argue that Kenya needs to focus on attracting foreign investment, improving infrastructure, and promoting education and training in order to achieve sustainable economic growth.
- ii. Dependency Theory:* This theory suggests that the development of countries like Kenya is hindered by their reliance on the global capitalist system. According to this theory, developed countries exploit developing countries like Kenya by controlling access to markets, resources, and technology. Dependency theorists argue that Kenya needs to reduce its dependence on foreign aid and promote local self-sufficiency through import substitution and the development of local industries.
- iii. Human Development Theory:* This theory suggests that development should focus on improving the quality of life for all individuals, not just economic growth. According to this theory, development requires improving access to education, healthcare, and other basic needs. Human development theorists argue that Kenya needs to focus on improving social services, promoting gender equality, and reducing poverty and inequality in order to achieve sustainable development.

(g) The Occupational Theory

The Occupational Theory, also known as the Labor Theory of Property, suggests that the right to own property is based on an individual's labor and investment in that property. In the context of land rights in Kenya, the Occupational Theory can be applied to the claims of IPLCs to their ancestral lands.

IPLCs in Kenya have occupied and used their ancestral lands for generations, investing their labor and resources in farming, grazing, and other livelihood activities. According to the Occupational Theory, this labor and investment should confer property rights to IPLCs, as they have effectively created value and improved the land through their activities.

However, the legal recognition of IPLCs' property rights in Kenya has been limited, with the government and other external actors often claiming ownership of these lands. IPLCs have faced eviction, displacement, and land loss due to policies aimed at promoting commercial agriculture, conservation, and infrastructure development. These policies have often ignored the historical and cultural ties of IPLCs to their lands and have failed to recognize their investments and labor in these areas.

In this sense, the Occupational Theory provides a framework for understanding the property rights claims of IPLCs in Kenya, and suggests that these claims should be recognized based on their longstanding occupation and investment in their ancestral lands. The theory also highlights the importance of recognizing the contributions of IPLCs to the development and management of these lands, and the need for equitable and sustainable land use practices that promote their rights and interests.

(h) The Principle of the Common Good

The principle of common good is a concept in ethics and philosophy that refers to the promotion of the well-being of all members of society, particularly the most vulnerable and marginalized. In the context of land rights in Kenya, the principle of common good can be applied to the claims of Indigenous Peoples and Local Communities (IPLCs) to their ancestral lands, where securing their land rights can enable them to secure the biodiversity of their land for the benefits of all.

The principle of common good suggests that land use and management practices should be guided by the interests of all members of society, rather than solely by the interests of a few powerful actors or groups. This means that IPLCs should inclusively and collectively decide on the management and use of their ancestral lands, and that their rights and interests should be protected and promoted.

Recognizing the property rights of IPLCs and promoting their access to and control over their ancestral lands is not only a matter of justice and human rights, but also of promoting the common good. IPLCs have a deep cultural, spiritual, and economic connection to their lands, and their traditional knowledge and practices have often contributed to the conservation and sustainable use of natural resources.

Furthermore, IPLCs often live in some of the most ecologically important and biodiverse areas in Kenya, and their lands have significant ecological value for the wider society. Protecting and promoting the land rights of IPLCs can contribute to the common good by promoting sustainable land use practices, conserving natural resources, and reducing poverty and inequality.

In this sense, the principle of common good provides a framework for understanding the importance of recognizing and protecting the land rights of IPLCs in Kenya, and for promoting equitable and sustainable land use practices that benefit all members of society.

(i) Principle of common but differentiated responsibilities in relation to the role of IPLCs in biodiversity conservation

The principle of common but differentiated responsibilities (CBDR) recognizes that all countries share a common responsibility to protect the environment, but acknowledges that developed countries have a greater responsibility due to their historical contribution to environmental degradation and their greater capacity to address these issues. The principle is a key element of international environmental law and is reflected in various international treaties and agreements, including the Convention on Biological Diversity (CBD).

Indigenous peoples and local communities (IPLCs) play an important role in biodiversity conservation as they have developed unique knowledge, practices, and beliefs that have enabled them to sustainably manage their lands and resources for generations. However, IPLCs often face significant challenges in maintaining their traditional practices and protecting their rights to land and resources, particularly in the face of increasing development pressures and the impacts of climate change.

The CBDR principle recognizes that developed countries have a greater responsibility to provide support and resources to enable IPLCs to participate fully in biodiversity conservation efforts. This includes providing financial and technical assistance to support community-led conservation initiatives, recognizing and respecting traditional knowledge and practices, and ensuring that IPLCs have a meaningful role in decision-making processes that affect their lands and resources.

In practice, this means that governments and other stakeholders need to engage with IPLCs as equal partners in biodiversity conservation efforts, taking into account their unique perspectives and knowledge systems, and providing them with the resources and support needed to effectively participate in conservation activities. By recognizing and respecting the role of IPLCs in biodiversity conservation, and providing them with the support they need, we can help to ensure that conservation efforts are more effective, equitable, and sustainable.

(j) The principle of access to genetic resources and benefit sharing in relation to IPLCs

The principle of access to genetic resources and benefit sharing (ABS) is an important concept in international environmental law, particularly in relation to biodiversity conservation. It refers to the fair and equitable sharing of the benefits derived from the use of genetic resources, with the goal of ensuring that the benefits are shared in a way that is both equitable and sustainable.

Indigenous peoples and local communities (IPLCs) often hold traditional knowledge and use genetic resources in their traditional practices, such as in traditional medicine, agriculture, and forestry. The ABS principle recognizes the importance of respecting and protecting the rights of IPLCs over their genetic resources and traditional knowledge, and ensuring that they receive a fair share of the benefits that may arise from the commercial use of these resources.

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol) is an international agreement that sets out the framework for ABS. It provides guidelines on how to ensure that access to genetic resources is obtained in a fair and equitable manner, and how benefits derived from the use of these resources are shared with the providers of these resources, including IPLCs.

Under the Nagoya Protocol, IPLCs are recognized as stakeholders and are encouraged to participate in the decision-making processes related to the use and management of their genetic resources. They are also entitled to a fair and equitable share of the benefits derived from the use of their genetic resources and traditional knowledge.

In practice, this means that companies and researchers who wish to access genetic resources held by IPLCs must first obtain prior informed consents (PIC) and negotiate mutually agreed terms (MAT) for the use and sharing of benefits. This ensures that IPLCs have a say in how their resources are used and that they receive a fair and equitable share of any benefits that may arise.

It is in light of the above theories and principles that the regional, national and local policies, laws and regulations were examined in relation to their impacts on the IPLCs land rights and the conservation and sustainable use of biodiversity. It should be pointed out here that the Kenya Constitution (2010) Article 2(5) states that “the general rules of International Law shall form part of the law of Kenya”. This means that all international agreements signed and ratified by Kenya shall form part of Kenya’s law and shall be obeyed in good faith. This Principle is entrenched in the Vienna Convention on the law of Treaties of 1969.

Chapter 3: Guiding international frameworks and their domestication in Kenya

(a) Some key international instruments

While progress has been made in the application of international instruments to address land rights issues with respect to indigenous people and local communities, there is still much work to be done. Here are some examples of successes and challenges:

The Convention on Biological Biodiversity (CBD) and its Nagoya Protocol have been successful in recognizing the important role of indigenous peoples and local communities in biodiversity conservation and providing a legal framework for access and benefit sharing of genetic resources. However, implementation has been slow in many countries, and there have been challenges in ensuring that the rights of indigenous peoples and local communities are respected and protected.

The United Nations Declaration on the Rights of Indigenous People (UNDRIP) and ILO Convention No. 169 have been successful in raising awareness of the rights of indigenous peoples and local communities to their lands, territories, and resources, and in establishing standards for consultation and participation in decision-making processes. However, ratification and implementation of these instruments has been uneven across countries, and there have been challenges in ensuring that the rights of indigenous peoples and local communities are fully respected and protected.

World Intellectual Property Organization Indigenous and Traditional Knowledge (WIPO ITK) Program has been successful in providing technical assistance to countries and indigenous peoples to protect and manage their traditional knowledge and genetic resources. However, there have been challenges in ensuring that the rights of indigenous peoples and local communities are fully respected and protected, particularly with respect to issues of ownership and control over traditional knowledge.

Ramsar Convention (also known as the Wetlands Convention) has been successful in raising awareness of the importance of wetlands as habitats for biodiversity and the role of indigenous peoples and local communities in their conservation. However, implementation has been slow in many countries, and there have been challenges in ensuring that the rights of indigenous peoples and local communities are fully respected and protected.

United Nations Framework Convention on Climate Change (UNFCCC) has been successful in recognizing the important role of indigenous peoples and local communities in climate change mitigation and adaptation and encouraging their participation in decision-making processes. However, implementation has been uneven across countries, and there have been challenges in ensuring that the rights of indigenous peoples and local communities are fully respected and protected in climate change initiatives.

The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) has been successful in recognizing the importance of ensuring women's equal access to and control over land and other natural resources, and the role of indigenous women in the conservation and management of these resources. However, implementation has been uneven across countries, and there have been challenges in ensuring that the rights of women, particularly indigenous women, are fully respected and protected.

UNDP Equator Principles have been successful in establishing environmental and social guidelines for project finance and including provisions for the protection of indigenous peoples' and local communities' rights and interests. However, implementation has been uneven across financial institutions, and there have been challenges in ensuring that these principles are fully respected and protected in project development and implementation.

Overall, while there have been successes in the application of these international instruments to address land rights issues with respect to indigenous peoples and local communities, there are still challenges and much work to be done to ensure that their rights are fully respected and protected. This requires continued efforts to raise awareness, improve implementation, and address challenges and obstacles to effective application of these instruments.

(b) Domestication of some international frameworks

- i. Kenya has developed The Kenya National Climate Change Strategy (2010) which has provisions on indigenous peoples and local communities. The policy recognizes the important role that indigenous knowledge and traditional practices play in climate change adaptation and mitigation, and it emphasizes the need to engage with and support local communities in addressing the impacts of climate change.

Here are some of the key provisions in the policy related to indigenous peoples and local communities:

- *Recognition of the role of indigenous knowledge:* The policy recognizes the importance of indigenous knowledge in climate change adaptation and mitigation, and it emphasizes the need to integrate this knowledge into climate change policies and programs.
 - *Support for community-based adaptation:* The policy emphasizes the importance of community-based adaptation to climate change, and it calls for the development of programs and initiatives that are tailored to the needs of local communities.
 - *Protection of natural resources:* The policy recognizes that indigenous peoples and local communities depend on natural resources for their livelihoods and calls for the protection and sustainable management of these resources in the context of climate change.
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- *Participation of local communities:* The policy emphasizes the importance of engaging with and involving local communities in the development and implementation of climate change policies and programs.
 - *Capacity building and awareness-raising:* The policy calls for the development of capacity-building and awareness-raising initiatives aimed at enhancing the ability of indigenous peoples and local communities to adapt to and mitigate the impacts of climate change.
- ii. The United Nations Convention to Combat Desertification (UNCCD) is being implemented in Kenya through various programs and initiatives aimed at addressing desertification, land degradation, and drought. The implementation of the UNCCD in Kenya involves several stakeholders, including the government, civil society organizations, and indigenous peoples and local communities (IPLCs).

Here are some ways in which the UNCCD is being implemented in Kenya and the role of IPLCs:

- *National Action Program:* Kenya has developed a National Action Program (NAP) for implementing the UNCCD, which outlines the country's strategies for combating desertification, land degradation, and drought. The NAP emphasizes the importance of involving IPLCs in the implementation process and recognizes their traditional knowledge and practices as valuable resources for sustainable land management.
 - *Community-based projects:* The implementation of the UNCCD in Kenya involves several community-based projects (outlined below) aimed at promoting sustainable land management practices. These projects often involve IPLCs and are designed to support their livelihoods while also addressing land degradation and desertification. Unfortunately, some of these projects have had irreversible consequences with very negative and sometimes positive impacts. The case of *Prosopis Juliflora* introduced by UNFAO to reverse the impacts of desertification in the Rift Valley Region is one such case/ The tree was introduced to deal with the consequences of desertification only for it to become invasive and poisonous to goats within pastoralists community lands that depends on livestock for food and livelihood. Further, in the process of trying to eliminate it, it has since been used for firewood or other crafts hence mixed reactions about whether to
 - *Capacity building and awareness-raising:* The implementation of the UNCCD in Kenya also involves capacity building and awareness-raising initiatives aimed at enhancing the ability of IPLCs to address land degradation and desertification. These initiatives often involve training IPLCs in sustainable land management practices and engaging them in advocacy efforts aimed at promoting sustainable land management.
 - *Participation in decision-making:* The UNCCD implementation in Kenya also emphasizes the importance of involving IPLCs in decision-making related to land management. IPLCs are often involved in the development of policies and programs aimed at addressing land degradation and desertification, and their perspectives and traditional knowledge are taken into account in the decision-making process.
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Overall, the implementation of the UNCCD in Kenya involves various initiatives and programs aimed at addressing desertification, land degradation, and drought. IPLCs play a critical role in this process, as they possess valuable traditional knowledge and practices that can contribute to sustainable land management. The involvement of IPLCs in decision-making, capacity building, and awareness-raising efforts is essential to the successful implementation of the UNCCD in Kenya.

- iii. The Ramsar Convention on Wetlands (1971), is an international treaty aimed at promoting the conservation and wise use of wetlands. Kenya is a signatory to the convention and has designated several wetlands as Ramsar sites. Some of these like Lakes Bogoria and Baringo are within IPLCs lands. The implementation of the convention in Kenya involves several programs and initiatives aimed at protecting and managing these wetlands, as well as promoting their sustainable use.

Indigenous peoples and local communities (IPLCs) in Kenya are participating in the implementation of the Ramsar Convention through various initiatives and programs aimed at protecting and conserving the country's wetlands. Here are some ways in which IPLCs are participating in the implementation of the Ramsar Convention in Kenya:

- *Community-based wetlands management:* IPLCs in Kenya are often involved in community-based wetlands management programs aimed at protecting and conserving the country's Ramsar sites. These programs often involve collaboration between IPLCs, the government, and civil society organizations and are designed to promote sustainable wetlands management practices that balance conservation and protection with the needs of local communities.
 - *Traditional ecological knowledge:* IPLCs possess valuable traditional ecological knowledge (TEK) that can contribute to the conservation and management of wetlands. The implementation of the Ramsar Convention in Kenya recognizes the importance of TEK and encourages its incorporation into wetlands management programs. IPLCs are often involved in the development of wetlands management plans and are consulted on the use of TEK in these plans.
 - *Wetlands restoration and rehabilitation:* IPLCs in Kenya are often involved in wetlands restoration and rehabilitation initiatives aimed at restoring degraded wetlands to their natural state. These initiatives often involve the participation of local communities in activities such as tree planting and erosion control, which contribute to the conservation and management of wetlands.
 - *Education and awareness-raising:* IPLCs in Kenya are often involved in education and awareness-raising initiatives aimed at promoting the conservation and wise use of wetlands. These initiatives often involve the participation of IPLCs in activities such as community meetings and workshops, which are designed to increase knowledge and understanding of wetlands management.
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iv. CITES (1973), (the Convention on International Trade in Endangered Species of Wild Fauna and Flora), is an international treaty aimed at regulating international trade in wild animals and plants to ensure their survival. Kenya is a party to CITES and has implemented the Convention through various measures aimed at protecting and conserving its wildlife resources. Here are some ways in which CITES is implemented in Kenya:

- *Wildlife protection and conservation:* CITES is implemented in Kenya through various wildlife protection and conservation initiatives aimed at protecting endangered species from illegal trade and poaching. These initiatives involve collaboration between the government, civil society organizations, and local communities.
- *Enforcement of trade regulations:* CITES is implemented in Kenya through the enforcement of regulations governing the international trade in endangered species. This involves monitoring the movement of wildlife and wildlife products across borders and confiscating any illegal trade.
- *Education and awareness-raising:* CITES is implemented in Kenya through education and awareness-raising initiatives aimed at increasing knowledge and understanding of the importance of wildlife conservation and the negative impact of illegal trade.
- *Community-based conservation:* CITES is also implemented in Kenya through community-based conservation initiatives aimed at involving local communities in the conservation and protection of wildlife. These initiatives often involve the participation of local communities in activities such as wildlife monitoring and habitat restoration.

Overall, CITES is implemented in Kenya through various measures aimed at protecting and conserving the country's wildlife resources. The involvement of local communities in these efforts is essential to promoting sustainable wildlife management practices that balance conservation and protection with the needs of local communities.

v. *The Sustainable Land Management Program* in Kenya is a joint initiative between the government of Kenya, the United Nations Development Programme (UNDP), and other partners aimed at promoting sustainable land management practices to combat land degradation, promote ecosystem services, and improve rural livelihoods.

In relation to Indigenous Peoples and Local Communities (IPLCs), the Sustainable Land Management program in Kenya recognizes the important role that IPLCs play in sustainable land management. The program recognizes that IPLCs have a deep understanding of their local ecosystems and possess valuable traditional ecological knowledge (TEK) that can contribute to the sustainable management of land and natural resources.

To this end, the Sustainable Land Management program in Kenya involves IPLCs in various initiatives aimed at promoting sustainable land management practices. These initiatives often involve the participation of IPLCs in the development and implementation of land management plans, the use of TK in land management practices, and the promotion of community-based land management approaches.

The involvement of IPLCs in the Sustainable Land Management program in Kenya is essential to promoting sustainable land management practices that balance conservation and protection with the needs of local communities. By recognizing and incorporating IPLCs' traditional knowledge and practices into land management practices, the program promotes a more holistic and sustainable approach to land management that is beneficial for both people and the environment.

(c) Some local examples

- i. *Mt. Elgon Forest Restoration Project*: This project is aimed at restoring degraded forests in Mt. Elgon and promoting sustainable forest management practices to improve ecosystem services, mitigate climate change, and enhance local livelihoods.
 - ii. *Mt. Elgon Climate Change Adaptation Project*: This project is aimed at promoting climate change adaptation measures among local communities in Mt. Elgon, including through the promotion of sustainable land management practices, the development of drought-resistant crops, and the establishment of community-based early warning systems.
 - iii. *Sustainable Land Management Project in Mt. Elgon*: This project is aimed at promoting sustainable land management practices among smallholder farmers in Mt. Elgon to improve soil health, reduce soil erosion, and enhance agricultural productivity.
 - iv. *Mt. Elgon Biodiversity Conservation Project*: This project is aimed at promoting the conservation of biodiversity in Mt. Elgon, including through the establishment of community-led conservation areas and the promotion of sustainable land use practices that are compatible with biodiversity conservation.
 - v. *Samburu Heartland Conservation Program*: This program is aimed at promoting conservation and sustainable use of biodiversity and natural resources in Samburu, including through the establishment of community-led conservation areas and the promotion of sustainable land management practices.
 - vi. *Samburu Ewaso Ng'iro River Basin Integrated Management Plan*: This plan is aimed at promoting integrated management of the Ewaso Ng'iro River Basin in Samburu, including through the conservation of wetlands and the promotion of sustainable land management practices.
 - vii. *Samburu Northern Rangelands Trust*: This trust is aimed at promoting conservation and sustainable use of natural resources in the Samburu region, including through the establishment of community conservancies, the promotion of sustainable livestock management practices, and the development of alternative livelihoods.
 - viii. *Samburu County Climate Change Action Plan*: This action plan is aimed at promoting climate change mitigation and adaptation measures in Samburu County, including through the promotion of sustainable land management practices, the development of renewable energy sources, and the establishment of climate-resilient infrastructure.
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- ix. *Mau Forest Conservation Project*: This project is aimed at conserving the Mau Forest Complex, which is a critical water catchment area and home to many endemic species. The project involves measures to restore degraded areas of the forest and promote sustainable land use practices among local communities.
- x. *Mau Forest Complex Conservation and Management Project*: This project is aimed at promoting sustainable forest management practices and improving the livelihoods of local communities living in and around the Mau Forest Complex, including through the establishment of community-led forest management committees and the promotion of sustainable agroforestry practices.
- xi. *Sustainable Land Management Project in Bungoma*: This project is aimed at promoting sustainable land management practices among smallholder farmers in Bungoma to improve soil health, reduce soil erosion, and enhance agricultural productivity.
- xii. *Bungoma County Climate Change Action Plan*: This action plan is aimed at promoting climate change mitigation and adaptation measures in Bungoma County, including through the promotion of sustainable land management practices, the development of renewable energy sources, and the establishment of climate-resilient infrastructure.
- xiii. *Conservation and Sustainable Management of Forests Project in Bungoma*: This project is aimed at promoting the conservation and sustainable management of forests in Bungoma, including through the establishment of community-led forest management committees and the promotion of sustainable agroforestry practices.
- xiv. *Pokot Integrated Conservation and Development Project*: This project is aimed at promoting the conservation of natural resources and the improvement of livelihoods among local communities in Pokot, including through the establishment of community-led conservation areas, the promotion of sustainable livestock management practices, and the development of alternative livelihoods.
- xv. *Sustainable Agriculture and Natural Resource Management Project in Pokot*: This project is aimed at promoting sustainable agriculture and natural resource management practices among smallholder farmers in Pokot to improve food security, reduce poverty, and enhance the resilience of local communities to climate change.

(d) Some benefits reaching the IPLCs

- i. *Increased income and livelihood opportunities*: Many of these projects aim to promote sustainable agriculture and natural resource management practices, which can help improve crop yields, reduce crop losses, and increase income and livelihood opportunities for IPLCs.
 - ii. *Improved food security*: By promoting sustainable agriculture practices and protecting natural resources, these projects can help improve food security among IPLCs, which is especially important in areas where food insecurity is a major issue.
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- iii. Access to new markets:* Some of these projects, such as the Sustainable Agriculture and Natural Resource Management Project in Pokot, aim to connect IPLCs with new markets for their agricultural products, which can help improve their economic opportunities and increase their incomes.
- iv. Increased participation in decision-making:* Many of these projects aim to promote community-led conservation and natural resource management, which can help give IPLCs a greater voice in decision-making processes that affect their lives and livelihoods.
- v. Improved access to infrastructure and services:* Some of these projects, such as the Bungoma County Climate Change Action Plan, aim to promote the development of climate-resilient infrastructure, which can help improve access to basic services such as water and energy for IPLCs.

(e) Some challenges facing the implementation of the projects

- i. Limited participation of IPLCs:* Some IPLCs may not be aware of these projects or may not have the capacity to participate fully in the planning and implementation processes, which can limit the effectiveness and sustainability of the projects.
 - ii. Land tenure issues:* Land rights are a major issue in many parts of Kenya, particularly for IPLCs. Lack of secure land tenure can make it difficult for IPLCs to invest in sustainable land management practices or to benefit fully from conservation and natural resource management initiatives.
 - iii. Limited resources and capacity:* Many IPLCs may lack the resources and capacity to participate fully in these projects, particularly in terms of accessing financing or technical support.
 - iv. Limited institutional capacity:* Implementation of these projects may require collaboration across different government agencies, NGOs, and other organizations, which can be challenging in areas where institutional capacity is limited.
 - v. Conflicts and competition over resources:* IPLCs in these areas may face competition or conflicts over access to natural resources, particularly with non-IPLC groups such as commercial farmers or mining companies. These conflicts can undermine the effectiveness and sustainability of conservation and natural resource management initiatives.
 - vi. Overall, addressing these challenges will require a concerted effort from a range of stakeholders, including IPLCs themselves, government agencies, NGOs, and other organizations.*
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(f) Towards biodiversity Vision 2050 of humanity living in harmony with nature

The IPLCs and especially the indigenous people are ecologically wise when it comes to the use of natural resources. It is widely acknowledged that indigenous people, including the Ogiek, Maasai, Samburu, Pokot and Sabaot, have a deep understanding and connection to their natural environment. They have developed sustainable practices and knowledge systems that enable them to use natural resources in a way that ensures their long-term viability, without causing harm to the ecosystem. <https://www.mdpi.com/2078-1547/11/2/29>

For example, the Ogiek people have lived in the Mau Forest Complex and Mount Elgon for centuries, and they have developed a unique way of life that is closely linked to the forest. They have traditional knowledge about the medicinal properties of plants, and they use the forest resources sustainably for food, shelter, and cultural practices.

Similarly, the Maasai, Samburu, Pokot, and Sabaot communities have developed sustainable practices for land management, livestock rearing, and natural resource use that have allowed them to live in harmony with their environment for generations.

For instance, the Maasai community practices rotational grazing, which involves moving their livestock from one grazing area to another, allowing the vegetation to recover and regenerate. This ensures that the pasture is never overgrazed, and it maintains its productivity over the long term.

Thus, the IPLCs, including the Ogiek, Maasai, Samburu, Pokot, and Sabaot, have a long history of living in harmony with nature, and their traditional knowledge and practices reflect this deep understanding and connection to their environment.

The Biodiversity Vision 2050 aims to transform human societies and economies to live in harmony with nature by 2050. This means that people should use natural resources sustainably, reduce pollution and waste, and respect the ecological limits of the planet.

While IPLCs have been practicing sustainable resource management for generations, they still face significant challenges, including land rights issues, climate change, and the erosion of traditional knowledge and practices. For example, hunting wildlife has been made illegal in Kenya effectively impacting negatively on the livelihoods of some communities. This cultural practice is bound to die within a few years and result into unknown ecological disruptions. Therefore, while IPLCs are well positioned to contribute to the Biodiversity Vision up to 2050, there is still work to be done to ensure that their rights are protected and their knowledge and practices are valued and integrated into conservation and development policies and practices.

The Kenya Vision 2030 is a long-term development blueprint that aims to transform Kenya into a newly industrializing, middle-income country by the year 2030. The year 2030 is the target time when the country should have put in place appropriate policies and programs to guide the country towards the Vision 2050. The Vision 2030 recognizes the importance of IPLCs and their contribution to the sustainable development of Kenya. Specifically, the Vision 2030 identifies the following priorities for IPLCs:

- i. Land and natural resources:* The Vision 2030 recognizes the importance of land and natural resources to IPLCs and emphasizes the need to secure land tenure and ensure equitable access to resources.
- ii. Participation in development:* The Vision 2030 emphasizes the importance of engaging IPLCs in development planning and decision-making processes to ensure that their interests and priorities are taken into account.
- iii. Cultural heritage:* The Vision 2030 recognizes the importance of preserving and promoting the cultural heritage of IPLCs as a vital component of Kenya's national identity.
- iv. Livelihoods and economic opportunities:* The Vision 2030 emphasizes the need to support IPLCs in developing sustainable livelihoods and economic opportunities, including through the development of community-based tourism and other income-generating activities.

Overall, the Vision 2030 recognizes the importance of IPLCs and their role in sustainable development in Kenya, and emphasizes the need to support and empower IPLCs to ensure their full participation and benefit from the country's development.

(g) Some cases of exploitation of the IPLCs

There have been documented cases of exploitation of IPLCs in Kenya by both the government and outsiders. For example, in the case of the Ogiek community, the government has been accused of evicting them from their ancestral land in the Mau Forest Complex to pave the way for conservation efforts without proper consultation

Efforts have been made to address these challenges and promote equitable access to biodiversity resources for IPLCs. These include the development of or compensation. Similarly, the Samburu, Ogiek, Endorois and Maasai communities have reported incidents of forced evictions from their land to make way for wildlife conservation and tourism. <https://www.mdpi.com/2078-1547/11/2/29>

<https://ogiekpeoples.org/index.php/download/ogiek-community-bio-cultural-protocol>

Furthermore, there have been reports of external actors exploiting IPLCs in Kenya, such as companies engaging in land grabs and exploiting natural resources in areas inhabited by IPLCs without their consent or adequate compensation. These activities often lead to environmental degradation and negatively impact the livelihoods of IPLCs who depend on the natural resources for their survival.

Access to biodiversity is also a concern for IPLCs in Kenya. There have been cases where outsiders have exploited the natural resources in areas inhabited by IPLCs without their consent or adequate compensation. This has had negative impacts on the biodiversity of these areas and has threatened the livelihoods of IPLCs who rely on these resources for their survival. Endorois Peoples BCP, 2019. See <https://www.abs-biotrade.info/fileadmin/Downloads/2.%20PARTNER%20COUNTRIES/KENYA/3.%20ACTIVITIES%20AND%20ACHIEVEMENTS/2.%20Endorois%20BCP%20Kenya/Report-Endorois-Peoples-Biocultural-Protocol-Kenya-2019.pdf>

In addition, IPLCs may also face challenges in accessing and utilizing the biodiversity resources in their areas due to limited resources, lack of legal recognition of their rights to these resources, and inadequate representation in decision-making processes.

Efforts have been made to address these challenges and promote equitable access to biodiversity resources for IPLCs. These include the development of community-led conservation initiatives and the recognition of community land rights, which can help to ensure that IPLCs have greater control over their natural resources and are able to sustainably manage them for the benefit of both their communities and the environment.

Exploitation of the cultural assets of IPLCs is also a concern in Kenya. These assets include traditional knowledge, cultural practices, and artifacts that are of great value to IPLCs and can contribute to the preservation of their cultures and heritage.

There have been cases where outsiders have appropriated or misused the cultural assets of IPLCs without their consent or adequate compensation. This can lead to cultural erosion and the loss of cultural identity for IPLCs.

Efforts have been made to address these challenges and promote the protection of the cultural assets of IPLCs. These include the recognition of the intellectual property rights of IPLCs and the promotion of cultural tourism that is respectful of the cultures and traditions of these communities. The Kenya Cultural Expressions Act of 2016 is an example of a legal framework that seeks to protect the cultural assets of IPLCs by recognizing and promoting their cultural expressions. (Details of this Act are presented in Chapter 3 of this report).

The marginalization, non-recognition, and mistreatment of indigenous peoples by their own governments can be attributed to several factors, including historical injustices, political marginalization, and economic exploitation. Here are some examples of this phenomenon:

- i. Historical injustices:* Many indigenous peoples have suffered historical injustices such as forced displacement, land dispossession, and cultural suppression at the hands of colonial powers and their post-colonial governments. These injustices have often left indigenous peoples with a deep mistrust of their governments and a sense of grievance that has been passed down from generation to generation.
 - ii. Political marginalization:* In many countries, indigenous peoples are politically marginalized and excluded from decision-making processes that affect their lives. They are often not adequately represented in national and local governments, and their voices are not heard
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in policy-making processes. This can lead to policies that do not reflect their needs and interests and exacerbate their marginalization.

iii. Economic exploitation: Indigenous peoples are often economically marginalized and exploited by their own governments and outside actors. They may be forced to give up their land and resources for mining, logging, or other extractive industries, which can have negative impacts on their health, environment, and livelihoods. In addition, they may not receive fair compensation for the use of their resources.

(h) Some policies harmful to the IPLCs

i. Conservation policies: Kenya has a number of national parks, game reserves, and other protected areas that are intended to conserve wildlife and their habitats. However, these policies often restrict the use of natural resources by indigenous peoples and local communities who live adjacent to or within these protected areas. This has led to conflicts between conservation authorities and local communities over access to resources such as water, grazing lands, and firewood. Kenya also has a number of forest reserves where forest dwelling indigenous peoples are evicted from their ancestral lands, on the basis that these are protected areas, while at the same time these areas are often exploited for commercial profit through the misapplication of the PELIS ('shamba') system. This has led to conflicts between forest conservation authorities and forest dwelling indigenous peoples over their ability to live on their lands, and their ability to be sustained by their lands.

ii. Mining and extractive industries: Kenya has a growing mining sector that is attracting foreign investors to explore and extract minerals such as gold, titanium, and coal. However, many of these mining operations are located on or near lands that are traditionally owned or used by indigenous peoples and local communities. They often lead to displacement, loss of livelihoods, and environmental degradation, which have negative impacts on the communities' social, cultural, and economic well-being.

iii. Settlement policies: The Kenyan government has a history of forcibly evicting indigenous peoples and local communities from their ancestral lands in the name of development or conservation. In some cases, these communities are relocated to new settlements that are far from their traditional lands and resources, disrupting their social and cultural fabric.

iv. Education policies: Indigenous peoples and local communities in Kenya have long struggled to access quality education that is relevant to their cultures and livelihoods. Many education policies and programs do not take into account the diversity of indigenous cultures and languages, and the curriculum often fails to reflect the values and traditions of these communities.

The Case for Mount Elgon Region

The Mount Elgon region in Kenya, which straddles the border with Uganda, is home to the closely related Ogiek indigenous peoples (in Kenya) and the Mosopisyek of Benet indigenous peoples (in Uganda). These communities have distinct cultural identities, languages, and traditional livelihoods, and they have been living in the region for generations.

However, the Mount Elgon region has been marked by conflict and displacement in recent years, particularly in the wake of the post-election violence that occurred in Kenya in 2007-2008. The violence was orchestrated by powerful political players fueling ethnic tensions, which led to the displacement of thousands of people from their homes and lands, including many indigenous communities.

The Ogiek community, in particular, has been affected by violence and displacement, as well as by the government's efforts to evict them from the forest reserves that they have traditionally relied on for their livelihoods. The government claims that the Ogiek are illegal settlers in the forest and that their activities are causing environmental degradation, but the community disputes these claims and argues that they have a right to access and use the forest resources.

Similarly, the Ogiek and Mosopisyek communities have also faced challenges in accessing their traditional lands and resources, as well as in asserting their rights to their cultural identities and practices. The Ogiek community, in particular, has been fighting for recognition as an indigenous group by the Kenyan government and for the protection of their rights to their ancestral lands and resources.

Despite these challenges, indigenous communities in the Mount Elgon region have been organizing themselves to assert their rights and demand recognition and respect from the government and other actors. They have formed a community based advocacy group, such as the Chepkitale Indigenous Peoples Development Project and have been engaging with the government and other stakeholders to push for policies and programs that are responsive to their needs and interests. In particular, they have been pushing for recognition of their community land tenure rights at Mt. Elgon.

(j) The Kenya Forest Service (KFS) in Mount Elgon

The Kenya Forest Service (KFS) program in Mount Elgon aims to address deforestation and biodiversity loss in the area through a range of conservation measures, including reforestation, community-based conservation initiatives, and the relocation of communities living within the park boundaries. However, the program has been criticized for its impact on the Ogiek, an indigenous community that has traditionally lived in the forest and relied on its resources for their livelihoods.

The Ogiek have argued that the relocation was carried out without their full and informed consent, and that it has had significant negative impacts on their health, livelihoods, and well-being.

The Case for Mau forest and Samburu

The Mau Forest Complex and the Samburu region in Kenya are both areas where indigenous peoples and local communities have been facing significant challenges in accessing their traditional lands and resources, as well as in asserting their cultural identities and practices.

The Mau Forest Complex is a critical watershed area that provides water to millions of people in Kenya. The forest is also home to several indigenous communities, including the Ogiek, who have been living in the area for generations and have traditionally relied on the forest for their livelihoods. However, in recent years, the Kenyan government has been carrying out a program to evict settlers from the forest in the name of conservation. This has led to the displacement of thousands of people, including many indigenous communities, who have been denied access to their traditional lands and resources.

Similarly, the Samburu region in northern Kenya has been marked by conflict and displacement, particularly in relation to the issue of land rights. The region is home to several indigenous communities, including the Samburu and Turkana, who have been clashing with each other and with government authorities over access to grazing lands and water sources. The government has also been carrying out a program to create game reserves and wildlife conservancies in the area, which has led to the eviction of many pastoralist communities who have traditionally relied on the land for their livestock.

In both the Mau Forest Complex and the Samburu region, indigenous communities have been organizing themselves to assert their rights and demand recognition and respect from the government and other actors. They have been forming advocacy groups, engaging in dialogue with the government and other stakeholders, and using legal and advocacy strategies to push for policies and programs that are more responsive to their needs and interests.

(k) Biodiversity under Threat

Biodiversity knowledge held by indigenous peoples and local communities is under threat from a variety of factors, including both their lifestyles and government policies and practices given for example the way in which forest peoples are so often forbidden from accessing and using their resources, and are forbidden from subsistence hunting.

On the one hand, the lifestyles of many indigenous peoples and local communities are based on traditional knowledge systems that have been developed over generations and have allowed them to sustainably manage their lands and resources. However, these lifestyles are increasingly under pressure from a range of external factors, including government policies and practice which restrict their ability to care of their lands, and lead to eviction from their lands, urbanization, land use changes and climate change. As a result, many indigenous peoples and local communities are facing challenges in maintaining their traditional practices and knowledge systems, which can lead to a loss of biodiversity knowledge.

Government policies and practices can be a threat to the biodiversity knowledge held by indigenous peoples and local communities. In some cases, governments have implemented policies that prioritize conservation over the rights and needs of indigenous peoples and local communities, leading to the displacement or marginalization of these communities and the loss of their traditional knowledge systems. Additionally, government policies that promote resource extraction or large-scale infrastructure development can also lead to the destruction of biodiversity and the loss of traditional knowledge.

To address these threats, it is important to recognize the value of traditional knowledge held by indigenous peoples and local communities, and to support their efforts to maintain and transmit this knowledge to future generations. This includes respecting their land rights and supporting their participation in decision-making processes that affect their lands and resources, as well as promoting the integration of traditional knowledge into biodiversity conservation and management practices.

IPLCs and Food Security

Forest resources, such as wild game, fish, fruits, and vegetables, have traditionally been a major source of food and nutrition for many forest-dwelling communities around the world. In some cases, these communities have developed intricate systems for managing and sustaining these resources over many generations.

In addition to food and nutrition, forest resources provide many other important benefits to forest-dwelling communities, including medicinal plants, construction materials, and cultural and spiritual values. These resources are often closely linked to the cultural identity and way of life of forest-dwelling communities, and their loss or degradation can have significant impacts on their well-being.

However, it is also true that many forest-dwelling communities have diversified their livelihoods and income sources over time, and may not rely exclusively on forest resources for their nutritional or economic needs. This is often due to a variety of factors, including changes in market dynamics, government policies, and socio-economic conditions.

Therefore, while it is true that forest-dwelling communities may have diverse sources of food and livelihoods, it is important to recognize the central role that forest resources have historically played in supporting their livelihoods, culture, and well-being, and to work towards sustainable management of these resources that benefits both local communities and the environment.

Population Dynamics

Forest-dwelling communities face social and economic marginalization, discrimination, and limited access to education and other opportunities. These factors can contribute to lower population growth rates and overall lower population levels among forest-dwelling communities.

Supporting forest peoples can involve building infrastructure such as roads, schools, healthcare facilities, and other basic services. These types of investments can improve access to education, healthcare, and economic opportunities, and can help to reduce poverty and promote social and economic development.

However, it is important to note that the construction of infrastructure in forest areas can also have negative impacts on the environment and on forest-dwelling communities themselves unless the construction of such infrastructure in forest areas is guided by forest peoples themselves as well as by ecological science. Infrastructure development can lead to deforestation, soil erosion, and other forms of environmental degradation, which can in turn harm local ecosystems and undermine the livelihoods and well-being of forest dwelling communities

Therefore, it is important to take a balanced and sustainable approach to infrastructure development in forest areas, one that takes into account the needs and perspectives of local communities and that seeks to minimize negative environmental impacts. This may involve engaging in participatory planning processes that are guided by forest-dwelling communities themselves, and that take into account their cultural values and livelihood strategies. It may also involve investing in alternative forms of infrastructure such as renewable energy or community-based eco-tourism, that are compatible with sustainable forest management practices and that can generate benefits for local communities.

Chapter 4: National policy and regulations frameworks

Kenya forest peoples rights at national level.

Law	Provisions	Relevance for IPLCs	Current situation/Remarks/ Comments	Recommendations	Proposed Action
	Art 1	<p>CoK Art (1) (1) states that, all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with it.</p> <p>CoK Art (1) (2) It also states that the people may exercise their sovereign power either directly or through their democratically elected representatives.</p> <p>CoK Art (1) (3) Sovereign power is delegated and exercised through state organs such as parliaments and legislative assemblies in counties, national and executive structures and the judiciary and independent bodies.</p> <p>CoK Art (1) (4) In Kenya Sovereign power of the people is exercised both at national and county level.</p>	There might not be enough indigenous peoples in State organs	Advocacy for more inclusive governance that includes marginalized communities in existing state positions is needed.	Communities to be engaged in governance and decision making structures more
CoK	Art 2 (1)	<p>Supremacy of the CoK is reinforced with the CoK as the supreme law of the republic of Kenya.</p> <p>Art 2 (4) also provides that any law that is inconsistent with the CoK (including Customary law) is void to the extent of the inconsistency, and any act or omission in contravention of this CoK is invalid.</p>	All rights flow from the CoK in the first instance and are operationalized by other statutory. As such the way this assignment is arranged is by ensuring that the provision of the CoK is cited first after which the other provisions that operationalize the statute are listed and critiqued.	Some provisions of the CoK are already operationalized and have been realized to some extent but some still have gaps.	Advocacy for realization of the communities' rights under the CoK should be a continuous effort.
	Art 2 (5) and Art 2 (6)	<p>Art 2(5) provides that the general rules on international law form part of international law of Kenya.</p> <p>Art 2 (6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the CoK</p>	International that has been ratified by Kenya is part of the law of Kenya and reference to these international laws will be made.	Some provisions of international laws are already operationalized and have been realized to some extent but some still have gaps.	<p>Advocacy for realization of the communities' rights under the CoK should be a continuous effort.</p> <p>There should be targeted litigation to push back against breach of international law. .</p>
CoK	Art 3	Defence of the CoK is every person's obligation	Persons to defend the CoK include the legislature, the Judiciary, the administrators, state office and public officers along with their citizen whenever any of them have to apply or interpret the CoK.	Whenever there is a breach of the CoK, those rights should be enforced	There should be continuous advocacy and targeted litigation to push back against breach of the CoK.

Law	Provisions	Relevance for IPLCs	Current situation/Remarks/ Comments	Recommendations	Proposed Action
CoK	Article 10	National values and principles of governance include the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non- discrimination and protection of the marginalized, good governance, integrity, transparency and accountability and sustainable development.	These provisions are great and provide an avenue through which the communities can start agitating for their rights.	Some of the national values and principles have been realized while some have not.	Advocacy on each and every aspect in this provision to get for example, human rights of IPLCs respected, that there be equity in allocation resources, positions in government offices, e.t.c
CoK	Article 11	<p>The state undertook to:</p> <ul style="list-style-type: none"> -promote all forms of national cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; - recognize the role of science and indigenous technologies in the development of the nation; -promote the intellectual property rights of the people of Kenya; <p>In this regard, the state was to enact legislation to;</p> <ul style="list-style-type: none"> a. ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and b. recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristic and their use by the communities of Kenya. 	<p>- There is work in progress but the provision has not been fully implemented. Kenya has</p> <p>There Copyright Act that is useful for protection of culture and cultural expressions.</p>	Not enough attention is paid to the right to culture in policies, plans programmes and decisions that are being made and this needs to change urgently to ensure that the nation protects its identity.	Full advantage should be taken of this provision and it should be anchored in every strategy and every plan and programme for advocacy, conservation or whatever that requires community engagement.
		Protection of Traditional Knowledge and Cultural Expressions Act,	<p>Under the Protection of Traditional Knowledge and Cultural Expressions Act, there is a national registration of indigenous knowledge project that is ongoing but has not been completed.</p> <p>There is a taskforce that was charged with the development and operationalization of PTKCE Act, 2026 (Rev. 2018)</p>	<p>The registration of traditional knowledge should be preceded by putting in place the digital national repository that was recommended in the PTKCE Act.</p> <p>Taskforce on regulations has no IPLCs. It should be looked into to ensure that it includes IPLCs.</p>	<p>Appropriate safeguards for protection of marginalized and indigenous communities of Kenya need to be put in place.</p> <p>Lobby for and respect for culture.</p> <p>Lobby for inclusion of IPLCs in matters involving their resources and their rights.</p> <p>Challenge with the documentation is that it risks putting information about to free access and use without the possibility of sharing of benefits.</p>
		Environmental Management and Coordination Act, 1999 and regulations on access and benefit sharing, the environmental management and coordination (conservation of biological diversity and resources, access to genetic resources and benefit sharing) Regulations, 2003.	Kenya has an Environmental Management and Coordination Act, 1999 and regulations on access and benefit sharing, the environmental management and coordination (conservation of biological diversity and resources, access to genetic resources and benefit sharing) Regulations, 2003.	The EMCA and its ABS regulations have not been able to support implementation of the Nagoya Protocol.	<p>The laws on implementation of ABS should be amended to support ABS and sharing of benefits with the communities.</p> <p>Reference is also made to Article 69 of the CoK on benefit sharing.</p>

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	Seeds and Plant Varieties Act, CAP 26 (SPVA).	<p>Seeds and Plant Varieties Act, CAP 26 (SPVA) is also in place but is considered as one that interferes with culture.</p> <p>Is this applicable to forest communities? Are any of them considered farmers? To ascertain from interviews.</p>	Unfortunately the SPVA does not allow farmers to trade with their seeds before stringent measures for certification are observed and this is not in line with the culture of most communities who were already used to sharing their seeds. The provisions of the Act also give the companies, multinationals and other private sector players undue advantage over communities.	The law is contra to the spirit of the CoK and should be amended to support farmers.	Advocacy to amend the law should be pursued.
CoK	Art 21	<p>Art 21 (1) provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.</p> <p>The State is required to legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.</p> <p>All state organs and all public offices have the duty to address the needs of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious and cultural communities.</p> <p>The courts are then required to uphold and enforce the bill of rights under article 23.</p>	This provision of the CoK is useful for protection of the fundamental rights and freedoms and the rights of indigenous communities across all spheres of their engagement.	This fundamental obligation of the state has yet to be fully realized considering that Kenya has continued to experience violent conflicts with indigenous peoples and minority and marginalized communities.	<p>There should be a lot of advocacy on behalf of the communities based on this provision.</p> <p>Affirmative action programmes should also be put in place to realize the rights of communities in Kenya.</p>
CoK	Art 56 – Minorities and marginalized groups	<p>The state is required to put in place affirmative action programmes designed to ensure that minorities and marginalized groups:</p> <ul style="list-style-type: none"> a. participate and are represented in governance and other spheres of life; b. are provided special opportunities in educational and economic fields; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure. 	This provision of the CoK is useful for protection of the fundamental rights and freedoms and the rights of indigenous communities across all spheres of their engagement.	This fundamental obligation of the state has yet to be fully realized.	There should be a lot of advocacy on behalf of the communities based on this provision.

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CoK	Art 260 – meaning of minorities and marginalized groups	Meaning of marginalized community under Article 260 of the CoK.	<p>Marginalized means:</p> <ul style="list-style-type: none"> a. a community that because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; b. a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole. c. An indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or d. Pastoral persons and communities, whether they are: nomadic or a settled community that because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya's a whole. e. Marginalized group also means a group of people who, because of laws or practices before, on or after the effective date, were or are disadvantages by discrimination on one or more of the grounds in Article 27 (4). 	Recognition under the CoK comes with many other rights such as rights to vote, to get an identity card, to free basic education, to public Hospital, social amenities and infrastructure, land rights, to access to justice among others.	Forest communities have a great chance to pursue their rights to the fullest in view of recognition under the CoK either as marginalized, minority or indigenous community.
CoK	Art 53 of the CoK - Right of education.	The CoK provides the right of every child to education.	Right not completely fulfilled due to limited infrastructure within communities.	There are not enough schools within community lands. This is partly due to the extensive jurisdictions that they have to cover to reach their schools.	Advocacy for increment of schools within communities should be increased subject to consultations with the communities to ensure that they drive the process of achieving their needs within their cultural set up.
CoK	Transparency – Disclosure of information Art 35, 69, 201, 232;	Article 35 (1) (a) and (b) gives IPLCs the right to request and obtain information from the State or any other person to enable them exercise or protect any right or fundamental freedom.	<p>This provision activates the right to access information towards access to justice.</p> <p>It provides for the right to access information, the procedure to exercise this right and information that is exempted from application of this right.</p>	N/A	Demand to access information and for information to be publicized
CoK		Art. 35 obligates the state to publish any publicize any important information affecting the nation.	This provision avails information to all citizens which can then be used to access justice.	There should be continuous availability of information including information on the outcome of court and tribunal cases.	Demand to access information and for information is publicized

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		Access to information Act, 2015. Access to information. Citizens of Kenya are also availed the right to access information which is the necessary to protects any of their rights.	To support this right to information, Kenya has in place the Access to information Act, 2015 And mechanism for grievance redress in the event of failure to be able to access any information from public bodies.		Communities should be educated about their rights to access s to information and should demand information to defend their rights whenever they feel like their rights have been interfered with or whenever they are apprehensive of interference with their rights. Where access is denied, action should be pursued with possible litigation and criminal sanctions following misconduct of any kind.
CoK	Principles and values of governance: Sustainable development	Art 10 (2) d enshrines the principle of Sustainable development as a principle and value of the CoK.	Communities already contribute to Sustainable Development. This is a strength that should be used to bargain for fulfilment of other rights.	What is Sustainable Development is dependent on community customs, way of life, ideals and aspirations.	Sustainable Development is subject to the communities' customs, way of life, ideals and aspirations and any advocacy should be subject to prior approval of the communities through their community structure.
CoK	Principles and values of governance Transparency	Art 10 (2) c of the CoK provides transparency as a principle of governance	Under this head we have the Access to Information Act, 2015 and various grievance redress mechanisms under it.	Marginalized communities and indigenous peoples are overlooked in decisions relating to them and this should be discouraged.	Communities ought to be capacity built on these rights and should then pursue their rights to access that information in order for them to understand where there is no transparency. Where there is no transparency, action should be pursued with possible litigation and criminal sanctions following misconduct of any kind.
		Art 232 (1) also requires public service to exercise it as part of the principles of public service		Marginalized communities are also supposed to be considered in appointments to public offices but they might be left behind in some cases due to lack of adequate qualifications in which case, affirmative action programmes should be put in place within public service to support appointment of marginalized and minority groups	Communities ought to be capacity built on these rights and should then pursue their rights to appointments to public offices and public service so that they can also support public service and public office decision making with perspectives on marginalized communities and the indigenous peoples and local communities. Where there is no transparency, action should be pursued with possible litigation and criminal sanctions following misconduct of any kind.

Law	Provisions	Relevance for IPLCs	Current situation/Remarks/ Comments	Recommendations	Proposed Action
CoK	Principles and values of governance Accountability Art 10 (2) (c) Art 73 2 (d) Art 174, 201,	Art 10 (2) (c) provides for accountability as a principle of governance Art 73 2 (d) includes accountability as a principle of leadership and integrity. Art 174 of the CoK provides for democratic and accountable exercise of power, recognition of diversity, gives powers of self-governance to the people and encourages participation exercise of the powers of the state and in decisions affecting them. It also recognizes the right of communities to manage their own affairs and to further their development. It also seeks to ensure socio-economic development and provision of proximate services It also seeks to ensure equitable sharing of resources.	These provisions apply to all citizens in application and interpretation of laws, policies and in all spheres of governance and are a useful pillar in the defence of the rights of marginalized and minority groups.	The inclusion of these values of principles in all spheres of governance is necessary as it will favor marginalized and minority groups	As before accountability should be the subject of advocacy and where there is none, it should be pursued with possible litigation and criminal sanctions following misconduct of any kind.
CoK	Principles and values of governance Participation – CoK Art 69, 174, 201, 232;	Art. 10 of the CoK- Public participation is a principle of governance in Art 10 of the CoK. Art. 174 of the CoK – As part of the objects of devolution: (c) gives the powers of self-governance to the people while enhancing the participation of the people in the exercise of the powers of the State in making decisions affecting them. 174(d) recognizes the rights of communities to manage their own affairs and to further their development. 174(e) protects and promotes the interest and rights of minorities and marginalized communities 174(f) Promotes social and economic development and provision of proximate easily accessible services throughout Kenya. 174(g) Ensures equitable sharing of national and local resources throughout Kenya.	Devolution was expected to bring powers, governance and services closer to communities	To-date, not all the aspirations of communities have been realized.	There is need for continuous advocacy and targeted litigation to enforce the rights of communities under this provision. However, the advocacy and or litigation should be in accordance with ascertainable wishes with the communities to avoid undue conflicts with the governments where other strategies could have worked and to also avoid realization of rights like those of infrastructure that would be contrary to the communities’ customs, way of life, ideals and aspirations. Any advocacy or Litigation should be subject to prior approval of the communities through their community structure.
County Government Act	Transparency 2012 Art 94, 95, 96,;	These just like the previous provisions under the CoK are rights that ought to be pursued on behalf of the Communities	The same position under the provisions under the CoK above refer	The same position under the provisions under the CoK above refer	Continuous capacity building, advocacy and litigation should be considered after attempts at alternative dispute resolution have failed.
County Government Act	Accountability CGA 89	These just like the previous provisions under the CoK are rights that ought to be pursued on behalf of the Communities	The same position under the provisions under the CoK above refer	The same position under the provisions under the CoK above refer	Continuous capacity building, advocacy and litigation should be considered after attempts at alternative dispute resolution have failed.

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County Government Act	Participation 47, 91, 99-100;	These just like the previous provisions under the CoK are rights that ought to be pursued on behalf of the Communities	The same position under the provisions under the CoK above refer	The same position under the provisions under the CoK above refer	Continuous capacity building, advocacy and litigation should be considered after attempts at alternative dispute resolution have failed.
CoK	Art. 40 of the CoK - Right to Property	Art 260 describes property as including any vested of contingent right to, or interest in or arising from: land, or permanent fixtures on, improvements to land; goods or personal property; intellectual property; or money, choses in action or negotiable instruments. Art 40 protects the right to property by providing that every person has the right, either individually or in association with others, to acquire and own property: or any description; and in any part of Kenya. Parliament was also prohibited from enacting a law that permits the state or any person to arbitrarily deprive a person of property or to limit or in any way restrict the enjoyment of any property rights.	Property of communities is safeguarded under the community land Act in the case of community land and under the protection of traditional knowledge and cultural expressions act, in the case of traditional knowledge and cultural expressions belonging to the community. The community's rights over genetic resources, genetic material, biodiversity and information arising from these resources is also protected under EMCA and the ABS regulations.	The rights and value of community's property is usually not very well considered in decision making. Communities are not considered.	The rights of communities over property (community land, intellectual property and other resources that they have) should be protected as part of the fundamental rights and freedoms under the CoK.
CoK	Art 43 - Right to social and economic rights	Art 43 of the CoK provides that every person has the right to: a. the highest attainable standards of health, which includes the right to health care services, including reproductive health care. b. accessible and adequate housing, and to reasonable standards of sanitation; c. to be free from hunger, and to have adequate food of acceptable quality; d. to clean and safe water in adequate quantities; e. to social security; and f. to education.	All communities' are entitled to all these rights	Not all these rights have been realized as far as communities are concerned and even where there have been measures and structures in an attempt to fulfil these provisions, there has not been adequate realization of this right.	There is need for continuous advocacy and targeted litigation to support realization of these constitutional rights. However, the advocacy and or litigation should be in accordance with ascertainable wishes with the communities to avoid undue conflicts with the governments where other strategies could have worked and to also avoid realization of rights like those of infrastructure that would be contrary to the communities' customs, way of life, ideals and aspirations. Any advocacy or Litigation should be subject to prior approval of the communities through their community structure.
CoK	Right to environment under article 69: -	<u>The article spells out the duties of the state as including: to ensure that the environment is protected by ensuring a 10% tree cover is maintained, the equitable sharing of benefits from the exploitation and use of the environment and natural resources;</u> protect, and enhance, the intellectual property and indigenous knowledge of communities; to ensure the processes of impact assessment and audit for projects; to ensure public participation among others. It also spells out the responsibility of every citizen to the environment.	The provisions of the CoK were operational even before the CoK was passed because the country already had the Environmental Management and Coordination Act, 1999.	Communities are often overlooked when dealing with the environment yet their contribution is immense	These rights need continuous capacity building because environmental issues will always be there and they keep evolving. This is one of the easiest rights to enforce because one does not need locus standi to enforce them and litigation is actually an option after alternative dispute resolution has failed.

Law	Provisions	Relevance for IPLCs	Current situation/Remarks/ Comments	Recommendations	Proposed Action
	Article 175 of the CoK	Article 175 of the CoK ⁴ also support democracy and the separation of powers and require counties to have reliable resources of revenue to enable delivery of services. These objectives show that there is another level of governance, the County Governance structure that the community is supposed to rely on in addition to the governance structure at the National level. The County Governance structure is further defined by the County Governments Act of 2012 ⁵ .	These provisions are also repeated in the county government Act and the Intergovernmental Relations Act.	Counties are supposed to ensure service delivery and to be the representatives of the communities at the national level of governance and the relationship between the community and the county ought to be very cordial with various avenues for interaction and engagement in policy, law making and other decision making avenues.	Advocacy on the role of communities in governance at the county level should be undertaken continuously. Counties are also charged with the responsibility to ensure citizen participation and this is one of the avenues through which the engagement includes indigenous peoples and local communities.
CoK	Art. 197 of the CoK on gender and diversity	Art 197 Promotes inclusivity and non –discrimination. The country has in place the National Gender and Equality Commission (NGEC) under the National gender and Equality Act, 2011. The NGEC is mandated to promote gender equality and non-discrimination for all persons in Kenya as provided for in the Constitution of Kenya 2010 article 27 with a focus on Special Interest Groups (SIGs) who have been defined as children, youth, women; persons with disability; older members of society and minority and marginalized groups. Minority and marginalized groups also fall under Art 56 of the CoK.	Gender is supposed to be mainstreamed throughout all processes and structures and the special interest groups rights are supposed to be mainstreamed across all policies, decisions and activities.	Some communities have not fully realized this right but they are also subject to their own customary laws and are evolving at their own pace.	Rights under this provisions should be the subject to self-governance of communities. Any advocacy should be in accordance with ascertainable wishes with the communities especially the affected group to avoid undue conflicts within the community and where other strategies to the communities' customs, way of life, ideals and aspirations could have worked.
CoK	Art 61 Definition of community land	Community land recognized as a legal regime of land holding in Kenya	Community land has yet to be registered as such since the advent of the Community Land Act, 2016.	Value of community land is not properly taken into consideration in decision making	Community land should be given the same weight as private land and public land to avoid undue interference at will. The real value of community land needs to be taken into account. Any advocacy or Litigation should be subject to prior approval of the communities through their community structure.

⁴ Ibid.

⁵ County Governments Act No. 17 of 2012.

Law	Provisions	Relevance for IPLCs	Current situation/Remarks/ Comments	Recommendations	Proposed Action
Community Land Act		<p>The Community Land Act, was put into place to operationalize article 63 (5) of the CoK and to provide for among others, the protection and registration of community land rights; management and administration of community land; the role of County governments in relation to unregistered community land.</p> <p>Under Section 2 of the CLA - A Community has been described as a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes:</p> <ul style="list-style-type: none"> a. common ancestry; b. similar culture or unique mode of livelihood; c. socio-economic or other similar common interest; d. geographical space; e. ecological space; f. ethnicity; <p>Definition of customary land rights is also provided.</p> <p>Recognition, Protection and Registration of community land rights processes are also outlined.</p>	<p>Some communalities have never been issued with their community land title despite application as provided by the Act.</p> <p>Some communities had already started dividing their land from group ranches to private land.</p> <p>Some communities are still in conflict with the government arising from eviction and litigation of cases that are still pending and some have been concluded.</p>	<p>Community land should be protected from destruction because it also shields us from the impacts of climate change.</p> <p>because it hosts our minorities and marginalized communities including indigenous peoples who are the centre of our culture and our heritage</p>	<p>Value of community land needs to be established.</p> <p>Community land also needs to be treated the way communities interact with it in the sense of it being part of their very being and existence.</p> <p>Community land should also be protected from arbitrary change of user or grabbing or other misuse and to get remedy, there should be contingency funds set aside to support litigation on behalf of communities.</p>
	Sec 7 of CLA	<p>Community land management committee is proposed to be established.</p> <p>Community elects 7-15 members to be members of the community land management committee - they come up with a register of communal interest holders and register them.</p>	This is part of organization of community land	Some communities have these structures in place and many others do not	Support communities to form community land management committees.
	Sec 8	Community Assembly is described as a gathering of registered adult members of a community convened in accordance with the CLA (Sec. 2).	This is part of organization of community land	Some communities have these structures in place and many others do not	Advocacy and capacity development to support communities to form community assemblies should be increased
	Sec 9.	Registrar is expected to register community land.	Customary land rights are supposed to be recognized, documented and adjudicated for purposes of registration in accordance with the CLA and other relevant written law	Some of the processes commenced by communities have not been completed	Support communities to register their lands and for some, to finalize their processes.
	S. 39 -	Settlement of Disputes	The Act provides for the dispute resolution mechanisms available.	Not all disputes need to go to Court some can be resolved under ADR using community structures which have since been recognized under the CoK and various statutes.	Any advocacy or Litigation should be subject to prior approval of the communities through their community structure.

Law	Provisions	Relevance for IPLCs	Current situation/Remarks/ Comments	Recommendations	Proposed Action
Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (Rev 2018)	Section 14.	<p>This Act sought to operationalize Article 11 of the CoK.</p> <p>Sec. 14 of the PKTCE and several other provisions make reference to Community Protocols as a source of information about a community's knowledge and culture.</p> <p>All TK to be documented at the County level, National level.</p> <p>National Government, in consultation with Counties, maintain Traditional Knowledge Digital Repository.</p> <p>Counties and other institutions dealing in matters relating to TKCE to co-operate with National Government</p>	<p>This Act is very critical for communities and for protection of their culture and heritage as well as in protection of their traditional knowledge and sharing of benefits from their traditional knowledge.</p> <p>It also recognizes community protocols made within communities and that should be encouraged amongst communities</p>	Protection of culture and cultural heritage has not been prioritized in Kenya,	<p>Have more communities put in place their community protocols.</p> <p>These protocols ought to be recognized by law.</p> <p>Any advocacy or Litigation should be subject to prior approval of the communities through their community structure.</p>
	Community's self-governance and the instruments to support them in doing so, community protocols are therefore recognized	<p>This provision are in line with art. 174 (c) CoK giving the people powers of self-governance.</p> <p>Art 174 (d) also allows communities to manage their own affairs and to further their own development.</p>	<p>They are recognized under the PTKCE while the CoK only speaks to recognition of self-governance under Art 174 among the objects of devolution as:</p> <p>a. ...</p> <p>b. ...</p> <p>c. to give powers of self-governance to the peoples and enhance the participation of the people in the exercise of the State and in making decisions affecting them,</p> <p>d. to recognize the right of communities to manage their own affairs and to further their own development,</p> <p>e. ...e.t.c</p>	Communities should put in place their own BCPs and other forms of protocols to ensure they retain the mandate of self-governance.	<p>Support communities to develop their community protocols.</p> <p>Any advocacy or Litigation should be subject to prior approval of the communities through their community structure.</p>
	Section 4-5: Section 8:	<p>Responsibilities of County and National Governments.</p> <p>Counties establish and maintain register of TK and cultural expressions</p> <p>National government should establish a digital repository</p>	<p>These are well defined with respect to the protection of traditional knowledge and cultural Expressions Act</p> <p>The county registers for registration of community rights should be established and information shared with the public so that communities can participate in the processes. The national government should also establish and publicize the process for public participation and engagement.</p>		Advocacy subject to approval by the community
	Section 9:	<p>Rights of protection of TK vest with traditional owner or holders</p> <p>Community can make and adopt own rules of process to authorise exploitation of TK. To be filed with County during registration of TK.</p>	This provision gives individual and collective rights and responsibility to all members of the community over their resources	Communities should engage more deliberately and strategically towards protection of their individual and collective rights and not leave this duty to a few.	Any advocacy or Litigation should be subject to prior approval of the communities through their community structure.

Law	Provisions	Relevance for IPLCs	Current situation/Remarks/ Comments	Recommendations	Proposed Action
	Section 10	Every community (owner/holder) can authorize or prevent exploitation Rights/Remedies are also available and communities can institute legal action.	This is a very strategic right to have in a law since it allows all community members to be guardians of their resources.	Communities should take advantage of the availability of this rights to pursue legal action for breach of their rights.	Any advocacy or Litigation should be subject to prior approval of the communities through their community structure.
Access to justice: CoK	Article 59 (4) & 5 established independent commission named Kenya National Human Rights and Equality Commission (KNHREC) which was later split into three bodies:	Communities have an avenue though which they can pursue their human rights.	Have supported communities realization of their rights to some extent	Body could do more to support communities.	Should continue being utilized as avenue for access to justice.
Access to justice: National gender and Equality Commission	To promote gender equality and non-discrimination for all persons in Kenya as provided for in the Constitution of Kenya 2010 article 27 with a focus on the following Special Interest Groups (SIGs): Children; Youth; Women; Persons with disability; Older members of society and, Minority and marginalized groups.	Avenue to promote inclusivity, gender equality. The country has in place the National Gender and Equality Commission (NGEC) under the National gender and Equality Act, 2011. The NGEC is mandated to promote gender equality and non-discrimination for all persons in Kenya as provided for in the Constitution of Kenya 2010 article 27 with a focus on Special Interest Groups (SIGs) who have been defined as children, youth, women; persons with disability; older members of society and minority and marginalized groups. Minority and marginalized groups also fall under Art 56 of the CoK.	This Act has supported communities' realization of their rights to some extent. Gender is supposed to be mainstreamed throughout all processes and structures and the special interest groups rights are supposed to be mainstreamed across all policies, decisions and activities.	Body could do more to support communities. Some communities have not fully realized this right partly because they are also subject to their own customary laws and are evolving at their own pace.	Should continue being utilized as avenue for access to justice. Rights under this provisions should be the subject to self-governance of communities. Any advocacy should be in accordance with ascertainable wishes with the communities especially the affected group to avoid undue conflicts within the community and where other strategies to the communities' customs, way of life, ideals and aspirations could have worked.
Access to justice: National Commission on Human Rights	This is the Government watch dog on Human rights issues; It is also expected to investigate and provide redress for human rights violation, to research and monitor the compliance of human rights norms and standards, to conduct human rights education, to facilitate training, campaign and advocacy on human rights as well as collaborate with other stakeholders in Kenya.	Avenue to seek protection and promotion of human rights	Have supported communities realization of their rights to some extent	Body could do more to support communities.	Should continue being utilized as avenue for access to justice.

Law	Provisions	Relevance for IPLCs	Current situation/Remarks/ Comments	Recommendations	Proposed Action
Access to Justice: CoK, the ELC, the High Court and the subordinate Courts	Art 42, 69 and 70 of CoK	Avenues are provided and they recognize community mechanisms as alternative dispute resolution mechanisms	Have supported communities realization of their rights to some extent	The marginalized and minority groups also have rights to a clean and healthy environment in their own way that also needs to be championed	Should continue being utilized as avenue for access to environmental justice.
Access to Justice: EMCA and the National Environment Tribunal Regulations	Section 3 ad all provisions within EMCA including section 129 and 130	Avenues are provided and they recognize community mechanisms as alternative dispute resolution mechanisms	Have supported communities realization of their rights to some extent	These provisions are available for use when challenging decisions that are made by the National Environment Management Authority, the Kenya Wildlife Service, the Kenya Forestry Service and the Wildlife Research and Training Institute and ought to be utilized more often	Should continue being utilized as avenue for access to justice in the first instance after which parties can pursue further rights through the environment and land Court
Commission on Administrative Justice (CAJ)	Sec 8	<p>Avenue to seek protection and promotion of human rights violated by conduct of public officers or administration.</p> <p>Sec provides: provides its functions as including:</p> <p>Investigate any conduct of state affair, or any act or omission in public administration by any State organ or public office in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;</p> <p>Investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;</p> <p>Inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service;</p> <p>Complaints handling;</p> <p>Public reports on the state of administrative justice in Kenya;</p> <p>Promote and protect fundamental freedoms of the individual in public administration;</p> <p>among others</p>	This is a very strategic commission on enforcement of marginalized and minority groups rights.	More engagement should be had with the Commission	There should be an engagement mechanism with this Commission

Law	Provisions	Relevance for IPLCs	Current situation/Remarks/ Comments	Recommendations	Proposed Action
National Environmental Management and Coordination Act, 1999	Provides for protection of the Environment, sustainable development, for enforcement of rights to a clean and healthy environment for all	Does not recognize the role of communities in environmental protection, conservation and management	Sometimes environmental legislation is in conflict with community interests	Gazettement of environmentally significant areas could have negative impact on community land.	There is need for continuous advocacy and targeted litigation to support realization of these constitutional rights. However, the advocacy and or litigation should be in accordance with ascertainable wishes with the communities to avoid undue conflicts with the governments where other strategies could have worked and to also avoid realization of rights like those of infrastructure that would be contrary to the communities' customs, way of life, ideals and aspirations. Any advocacy or Litigation should be subject to prior approval of the communities through their community structure.
Land Act, 2012	Provides for substantive law on land	The act makes provisions for the community land as one form of tenure in accordance with the provisions of the CoK.	Community land has equal legal force as other forms of land tenure and is in fact more attached to the communities on account of its cultural significance and hence more significantly important due to the need to preserve hun and cultural rights of communities.	More attention needs to be paid to the need to ring fence community land to protect the culture and identity of the nation when decisions involving land including compulsory acquisition have to be made.	Any advocacy or Litigation should be subject to prior approval of the communities through their community structure.
Land Registration Act, 2012	Provides for registration process of land and for registrable rights over land	This law provides for the process of registration of land in in the case of minorities and marginalized communities, the issues of transfer, conversion of land from one tenure system to the next , caution or caveats for protection of land from disposition can all be found in this law.	The officers dealing with registration of land within communities and conversion of land should exercise the principles and values espoused within the CoK more deliberately to protect the overall community land regime from undue interference.	There is need for more diligence before title documents are issued to individuals over land that qualifies as community land. More needs to be done to ensure that community land is surveyed and registered urgently to protect it from grabbing.	Any advocacy or litigation should be subject to prior approval of the communities through their community structure.
Forests Conservation and Management Act, 2013.	Provides for protection conservation and management of Forests in Kenya	Communities interact with wildlife and are the first line of defence of forests from an indigenous and traditional perspective and this should be taken into account in any laws that are being developed. The Act has structures that facilitate community engagement in forest management.	There are Community Forest Associations in place with whom the communities work. Forest peoples are also recognized as indigenous communities in Kenya under article 260 of the CoK.	Communities should explore more meaningful mechanisms for engagement with the KFS especially now that nature based solutions are being considered as a mechanism to pushback against the impacts of climate change and biodiversity loss.	Advocacy on the role of communities in forests should be increased and any advocacy or Litigation should be subject to prior approval of the communities through their community structure. The value of communities to the existing forests in Kenya should be valued and taken into account in national planning. Appropriate protection of forest communities should also be ensured.
Kenya Wildlife Conservation and Management Act, 2013	Provides for protection conservation and management of Wildlife in Kenya	Communities interact with wildlife and are the first line of defence of wildlife from an indigenous and traditional perspective and this should be taken into account in any laws that are being developed. The Act has structures that facilitate community engagement in forest management.	There are rangers with whom the communities work collaboratively in place with whom the communities work.	Communities should explore more meaningful mechanisms for engagement with the KWS especially now that nature based solutions are being considered as a mechanism to pushback against the impacts of climate change and biodiversity loss.	This Act gives KWS wide mandate over wildlife and constant engagement with communities on the role and mandate of KWS should be made possible since this is the institution that is responsible for approval of research licenses that also require interaction with communities.

Law	Provisions	Relevance for IPLCs	Current situation/Remarks/ Comments	Recommendations	Proposed Action
Mining Act, 2016	This Act provides for regulation of mining activities in Kenya and includes provisions for community participation and benefit sharing. It also recognizes that communities must be consulted	This sector has potential to bring such positive change to the economy but it should not be done at the expense of the human rights and other fundamental rights and freedoms of communities within the areas proposed for investments.	This Act has in place benefit sharing requirements and if handled well this sector could provide benefits to not only the surrounding communities but also the country at large. Kenya is rich but the mechanism for the sector need to be very protective of its citizenry particularly the communities where the investments are put up.	<p>This sector is very contentions with a lot of money and funds poured into such investments fueling evictions of communities and lack of prioritization of human rights over private sector and expected profit.</p> <p>Unfortunately also, the community is not as literate as the investors or government in terms of negotiation of benefits, monitoring, technology, and similar aspects and is therefore disadvantaged.</p> <p>Care should also be taken not to trade culture and disruption of whole society's livelihoods that are part of the nation's identity and culture for profits that are likely to run out on a future date.</p>	<p>This particular sector needs more engagement and awareness creation.</p> <p>There is need for governments to ensure proper social impact assessments where these projects have to be implemented but also ensure that human rights are observed as well as compensation for loss of land where the community agrees (gives PIC) to give up their land or parts of it. Local content should also be looked into to ensure that any investment is complies with local content requirements to ensure that the immediate community is the first one to benefit from any benefits that flow from such investments.</p>
Water Act, 2016	This Act provides for governance of, management, use and protection of water resources in Kenya. It also recognizes the rights of communities to access and use water for domestic, cultural and livelihood while ensuring sustainable management of water resources	This Act also provides the structure for community engagement	This is one of the areas where communities would be very strategic is supporting the government to manage its water resources has been seen with the water towers in Kenya where the communities have helped support a thriving ecosystem.	The government needs to understand that communities do not destroy the water sources or interfere with them – that is taboo to do so and that it is in fact community's culture that has helped sustain the water sources and resources.	There is evidence of protection by communities and it should be harnessed in communications to government where the communities can pursue their rights as partners with duties and responsibilities to support protection of water.
Land Value Index (amendment) Act, 2019.	Provides for compulsory acquisition of land in Kenya and the processes to be followed.	The mechanisms established under this law are oppressive	The mechanisms established under this law are oppressive	The mechanisms established under this law are oppressive and do not value the community land as far as its ecosystem services and its value to communities and the economy is concerned.	Repeal of this law should be pursued.

Chapter 5: Discussion and conclusion

The concept of the Tragedy of the Commons (Hardin, 1968) is that when property - such as land, forests or rivers - are held in common then they will inevitably be depleted because individuals act in their own self-interest and take more than their fair share of a common resource, which leads to the resource becoming depleted and negative consequences for everyone. However, Hardin himself is reported later to have acknowledged that he had confused commons regimes (in which the community has systems for regulating what resources individuals use) with open-access regimes (which are often the result of communities no longer being allowed to regulate resource use, often due to being overrun by more powerful outside forces).

In reality, whether in relation to a stretch of river or coast for fishing or to an area of forest or grazing land, the perseverance of an effective common property regime requires a very clear *demarcation* of who can and cannot use the resource, and on what terms. When communities have clear community-tenure rights, they can have intricate and flexible systems of rights and responsibilities, including mechanisms for *incorporating* new co-users of the common pool resource who are willing to abide by the *reciprocal rules* required to maintain it.

The self-organising nature of commons, and their consequent need for non-interference by external authorities, has often led states and other powerful actors to undermine them: sometimes purposefully, and sometimes through ignorance. Removal of such commons regimes serves several purposes. This denial of the existence of other ways of organising bolsters the ideological power of states and markets, and the appropriation of land for other (profit-generating) purposes – and the people on it as sources of cheap labour. This denial of common property regimes both boosts industrial systems and makes land and people more vulnerable to regulation, control and exploitation by the state and the market.

This phenomenon has marveled governments worldwide as it puts on table one critical questions i.e. should there be two different practices in the management of a national resource, namely, one for the IPLCs and another for the rest of the country? This is a big challenge given that the IPLCs and especially the indigenous people are a minority and marginalized, in some cases, less than 10% of the national population.

The governments have always answered this question in the affirmative until the issue of biodiversity conservation was brought to the table in 1992 when the CBD was adopted worldwide and Kenya became a party to it. The IPLCs issues have quickly and gradually taken to the central arena of biodiversity conservation and environmental management in general. For some people, the IPLCs especially those occupying mountainous areas are now being viewed as the environmental saviors of the country, particularly now that the impacts of climate change are glaringly threatening human livelihoods. The lifestyles of the minorities and marginalized communities and groups are now being examined in depth for other people to borrow some of their practices and survival strategies as well as technologies. But this can only be effectively

done if they are treated with dignity and accorded equal rights as citizens of the land. It was in this context that this baseline study was commissioned to establish the exact situation in a few selected but significant areas.

The fundamental theories and principles on which sound policy and legal frameworks would be developed were highlighted in the beginning of this report, their purposes being to establish an internationally accepted benchmark to measure sincerity and appropriateness of the enacted policy and laws. Likewise, the international frameworks, specifically the post 1992 multi-lateral agreements on environment, were reviewed and their domestication outlined. Within the target area, several initiatives have been started by the government with the long term aim of demonstrating the recognition of the IPLCs as well as building their capacity in line with the Multilateral Environment Agreements (MEAs). The relevant MEAs here are the Convention on Biological Diversity, the United Nations Convention on Climate Change, the United Nations Convention to Combat Drought and Desertification and their Protocols. In short, it can be authoritatively said that the government has taken strong measures to implement the MEAs and other relevant international instruments in as far as the IPLCs are concerned.

What is however disturbing, is the way sometimes the government turns round and initiates in the same areas other programs which negate the benefits of its compliance to the MEAs objectives and recommendations. It appears as if the conflict in the governance of natural resources mentioned earlier, regularly resurfaces. It is no doubt true that to put up modern infrastructure like tarmac roads, trading centers, residential estates, health centers and schools in a forest area to serve and improve the welfare of the IPLCs living there would inevitably open the area for influx of people from outside and eventually deplete the resources, interfere with culture and damage the environment.

But it is also true that if the IPLCs living in these areas are not provided with adequate modern infrastructure, their descendants especially the youth will eventually move out of the forest in search of modernity and this will leave the area exposed and the indigenous knowledge related to biodiversity and environmental management will disappear. The government's solution to this dilemma is not to leave the IPLCs alone but periodically raid and destroy their homesteads to discourage them from building more permanent homes, a practice which leaves the IPLC angry, poor, and disillusioned. The Kenya Constitution of 2010 recognizes and provides for the protection of community land rights. In addition, the Kenyan Traditional Knowledge and Cultural Expression Act of 2016 seeks to promote and protect the rich cultural heritage of Kenya and ensure that cultural expressions are preserved and passed down to future generations. A compromise strategy should urgently be found in order to conserve and benefit from the biodiversity held in IPLC lands.

It is also true that while some of the rights accruing to IPCLs have been realized, the achievement and realization of most of these rights is still wanting and more needs to be done to realize them. More advocacy, communication and litigation is needed to be able to change the overall response of the governance, administration, legal system and the access to justice landscape to be able to support more IPLCs to live according to their aspirations which in turn will support the rest of the Country.

While it is true that all these rights are provided under the CoK and the other statutory laws of Kenya, under Art 21 of the CoK, the state is obliged to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the bill of rights but also in a defeatist provision under Article 21 (2) goes on to state that it will take legislative, policy and other measures including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43. This means that if the state is not able to fulfill the rights under Article 43 for a reason such as lack of funding, and in some cases it lacks to prioritize the fulfillment of these rights, then there is nothing that the court can do except find, based on history, that there has been progress and that it is progressive. As long as there is progress and there is evidence of progress towards realization of these rights, then there will not be any action to be taken by the access to justice regime.

Kenya has however made strides towards realization of some of the minority and marginalized community rights and has even gone ahead to meet the Ogiek community to engage in discussions on how to make good the judgment of the of the Ogiek Community on reparations in a recent meeting when the African Commission on Human and People's Rights (ACHPR) met with the Ogiek of Mau Community and the other government agencies such as Treasury. However, the challenges they face come from various governance structures from sectors such as water, petroleum, mining, wildlife, forests and land. Other laws that are required to support the administration of justice also have challenges in implementation but at least they are available which again presents an opportunity for communities to engage the National, County and sector governance structures and to approach the grievance redress mechanisms available whenever they feel aggrieved.

From the analysis of the laws that apply to IPLCs in Kenya, it is clear that from the Constitution of Kenya (CoK) the rights are expected to be implemented in all levels of governance, the society, sectors and in policy, planning, and all forms of decision making. Despite a very elaborate and very progressive CoK and the entrenchment of the principles of public participation, access to information and other procedural rights through which IPLCs can find avenues to ventilate their issues, there are still evident cases of lack of adherence to these mandatory requirements of involvement of IPLCs in processes that affect them in one way or the other.

It would be useful if effort is also shifted towards holding all persons in governance, public offices and all citizens including private sector individually liable in addition to collective liability for breach of the fundamental rights and tenets necessary for protection of the IPCLs and realization of their rights and freedoms under the CoK including those of culture, our heritage. As earlier pointed out, care should also be taken not to trade culture and disruption of whole society's livelihoods that are part of the nation's identity and culture for profits that are likely to run out on a future date.

Since IPLCs are now being championed and addressed by many initiatives such as the focus of action towards dealing with the impacts of climate change and biodiversity loss in addition to other issues such as oceans, they are in a vantage position from where they can negotiate but they will need to be facilitated to make policy briefs and engagement in communication mechanism with the government not as disadvantaged communities but as partners who are available to support the government to achieve its targets. The Government has in recent years been engaging the communities in discussions and initiatives and more cordial relationships have been built over time and from which more advances towards a society that is more protective of its IPLCs can be modelled. By way of example, it was reported in the news and the local dailies that recently, the Cabinet Secretary, Ministry of Environment, Climate Change and Forestry has engaged a strategic approach to dealing with the impacts of climate change by inviting all partners, citizens and stakeholders across all sections of society including communities to join the movement towards planting 15 billion trees. There are other instances of the collaboration with IPLCs and it would be useful if the progress made can be mapped and coordinated so that coordinate effort can be utilized to achieve greater gains across all counties in the Country.

As Kenya's legal regime develops with the development of new laws and amendments of existing laws continues, IPLCs will have to keep updating themselves on the relevant requirements for engagement to ensure that they are always involved when decisions, laws, policies, plans and programs affecting them are being made and must always seek to ensure that actions towards fulfillment of their rights are monitored and enforced. In implementation of these rights, the low hanging fruits should be identified and pursued first before other more cost intensive and longer term actions can be rolled out.

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