

**FACILITATING PARTICIPATION IN NATURAL RESOURCE GOVERNANCE  
IN KENYA: A CRITICAL REVIEW OF THE EXTENT TO WHICH KENYA'S  
CONTEMPORARY LEGAL FRAMEWORK ENABLES INDIGENOUS  
COMMUNITY CONSERVED AREAS**

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## **DECLARATION**

I do hereby declare that I have read and understood the regulations governing submission of a Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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**Rose J Birgen**

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## ABSTRACT

The goals of conserving nature have changed over the last decades, but setting aside areas for nature protection is still a major part of environmental efforts globally. Protected areas often include indigenous and local communities' territories, and although indigenous rights have been strengthened through international policies and laws, conflicts over land entitlement are still common. A couple of notable events internationally in the context of Human Rights and nature conservation discourses have marked a significant shift in the attitudes and approaches to the role of indigenous people and local communities in natural resource governance. Contemporary approaches enable them to define themselves and to own and manage land and natural resources. Domestic policy makers are faced with the challenge of creating national laws and policies to implement this contemporary approach. This thesis looks at the concept of ICCAs as a tool for facilitating participation of indigenous and local communities in natural resource management. It begins with an analysis of the form, nature, origins and value of ICCA's- and specifically key legal elements which should ideally be included in a legal framework to give domestic effect to them. This analysis indicates that in order to recognise and protect the indigenous people and local communities and for ICCAs to be a success, their land tenures and resource rights have to be legally secured, they have to be deliberately involved in management of natural resources and they have to enjoy the benefits that arise as a result of their input and use their traditional knowledge to protect and conserve natural resources. The dissertation then turns to consider whether these elements are present in Kenya's legal framework. 2010 is used as a benchmark because of the significant reform introduced giving an edge in the way indigenous people and local communities and their contribution to natural resource management were recognised. A new Constitution was promulgated which paved way for significant land reforms and natural resource management reforms to be made. As a result, some of the legislations including the Land Act, Land Registration Act and the Kenya Wildlife Conservation and Management Act were passed with the Communal Land Bill and the Natural Resources

(Benefit Sharing) Bill still pending in parliament. The pre-2010 analysis shows a narrow recognition of indigenous people's role as a result of clear influence from colonial concepts. It also demonstrates a lack of secure land tenure and resources right and minimal engagement of indigenous people and local communities in the management of natural resources. The analysis post-2010 shows a move in line with contemporary approaches characterised by significant land reforms in an attempt to secure land tenure and resources right, increase in level of participation of the indigenous people and local communities in management of natural resources. However, although the trend is positive, the paper suggests that more legislative reviews need to be undertaken.

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**LIST OF ABBREVIATIONS**

ABS	Access and Benefit Sharing
ACL	African Customary Law
BMUs	Beach Management Units
CBD	Convention on Biological Diversity
CFA	Community Forest Association
COP	Conference of Parties
ICCAs	Indigenous and Communities' Conserved Areas
IPR	Intellectual Property Rights
IUCN	International Union for Conservation of Nature
KFA	Kenya Forest Act
KFS	Kenya Forest Service
KWS	Kenya Wildlife Service
KWCMA	Kenya Wildlife Conservation and Management Act
LAA	Land Adjudication Act
MDGs	Millennium Development Goals
MTA	Material Transfer Agreement
NGOs	Non-Governmental Organisations
NLC	National Land Commission
NLP	National Land Policy
PIC	Prior Informed Consent

PoWPA

Programme of Works on Protected Areas

TK

Traditional Knowledge

## CHAPTER ONE

### INTRODUCTION

“Land is the foundation of the lives and cultures of indigenous peoples all over the world... Without access to and respect for their rights over their lands, territories and natural resources, the survival of indigenous people’s particular distinct cultures is threatened.”

Permanent Forum on Indigenous Issues  
Report on the Sixth Session, 25 May 2007.

#### 1. The Context

##### 1.1 Background to Kenya

Kenya lies just south of the equator in Eastern Central Africa with a total size of 58,036,700 hectares.<sup>1</sup> It is endowed with an enormous diversity of ecosystems and wildlife species which live in the terrestrial, aquatic and aerial environment.<sup>2</sup> This has been attributed to a number of factors, including its historical evolution, physical features, pleasant climatic conditions, and diverse habitat types and ecosystems.<sup>3</sup> Most of its biodiversity is found in forests and wilderness areas.<sup>4</sup>

About ten to 12 per cent of Kenya’s land area falls within designated protected areas.<sup>5</sup> The Kenya Wildlife Service (KWS) manages about eight per cent of this area.<sup>6</sup> 20 per cent of the land area is under cultivation, which supports most of the human population.<sup>7</sup> The remaining 70 per cent of the land

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<sup>1</sup> Nelson F “Recognition and Support of ICCAs in Kenya” in Kothari A, Corrigan C, Jonas H, Neumann A & Shrumm H (eds) *Recognising and Supporting Territories and Areas Conserved by Indigenous Peoples and Local Communities Global Overview and National Case Studies* (2012) CBD Secretariat, ICCA Consortium, Kalpavriksh, & Natural Justice, Montreal, Canada 6.

<sup>2</sup> Ali A & Businge M “Biodiversity” in GoK Kenya *State of the Environment and Outlook 2010: Supporting the Delivery of Vision 2030* NEMA 62.

<sup>3</sup> Mwendwa A & Kibutu T “Implications of the New Constitution on Environmental Management in Kenya” 2012 (8)1 *The Law Environment and Development Journal* 78.

<sup>4</sup> Lusweti A *Biodiversity Conservation in Kenya* (2011) Issue 32 Institute of Economic Affairs 3.

<sup>5</sup> Lusweti *Biodiversity Conservation in Kenya* 3.

<sup>6</sup> Kenya Wildlife Service “Overview- Parks and Reserves” <http://www.kws.org/parks/> (accessed on 12.11.2014 ).

<sup>7</sup> United Nations *Report on the Sustainable Development in Kenya: Stocktaking in the run up to Rio+20* (2012) 12.

area is mostly rangeland.<sup>8</sup> The country's forest cover, on the other hand, is less than three per cent, significantly lower than the internationally accepted threshold of ten per cent.<sup>9</sup> The forest ecosystem continues to face immeasurable pressure from other land uses as well as rapid climatic changes.<sup>10</sup>

In 2009, it was estimated that agricultural biodiversity had depleted by 90 per cent. Under specific reference were crop varieties that had been lost in the past century.<sup>11</sup> Livestock breeds were estimated to have disappeared at the rate of five per cent per year and aquatic life similarly threatened.<sup>12</sup> This situation is precarious for a country that relies heavily on the agricultural sector to sustain its growing population. According to the national census conducted in 2009, the current population stands at 38.6 million people.<sup>13</sup> This represents a 35 per cent growth rate over a ten year period,<sup>14</sup> and which growth rate may rightly be considered as fairly high for Kenya's size and socio-economic development.<sup>15</sup>

In summary, the situation in Kenya is precarious. The biological resources have been declining at an alarming rate,<sup>16</sup> yet a huge proportion of the population relies on them for their livelihood.<sup>17</sup> Few of these resources are conserved in designated protected areas, while a large percentage is not only

<sup>8</sup> Lusweti *Biodiversity Conservation in Kenya* 3.

<sup>9</sup> GoK *State of the Environment Report* (2009) NEMA 44.

<sup>10</sup> Ministry of Environment, Water & Natural Resources *National Environmental Policy* (2013) 11.

<sup>11</sup> Nakhauka B "Agricultural Biodiversity for Food and Nutrient Security: The Kenyan Perspective" 2009 (1)7 *International Journal of Biodiversity and Conservation* 209.

<sup>12</sup> Nakhauka 2009 (1)7 *International Journal of Biodiversity and Conservation* 209.

<sup>13</sup> Kenya National Bureau of Statistics *The 2009 Population and Housing Census Report: Counting Our People for the Implementation of Vision 2030* (2010) 18.

<sup>14</sup> A report prepared by the Centre Bureau of Statistics in conjunction with the ministry of finance and planning in 1999 enumerated the population as at 1999 to be 28,686,607 people also see KNBS *The 2009 Population and Housing Census Report* 18.

<sup>15</sup> Kenya Institute of Public Policy *Kenya Economic Report 2013: Creating an Enabling Environment for Stimulating Investment for Competitive and Sustainable Countries* (2013) 19. This document demonstrates the socio-economic development in Kenya in that while Kenya is a low middle income economy country, the majority of the population is living in poverty and the rate of unemployment is at its highest.

<sup>16</sup> The threat has been majorly attributed to high population pressure, poor land use practices, inadequate laws, policies and institutional framework, poor education and inadequate involvement of the communities amongst others. Also see NEMA *CBD Fourth National Report to the Conference of Parties to the Convention on Biological Diversity- Kenya* (2009) 18.

<sup>17</sup> *CBD Fourth National Report to the Conference of Parties to the Convention on Biological Diversity- Kenya* 18.

ironically conserved outside protected areas, but also thrives outside these protected areas.<sup>18</sup> While conserving biodiversity and securing sustainable development are part of the Millennium Development Goals (MDGs)<sup>19</sup> as well as sustainable development goals,<sup>20</sup> the current state of Kenya's environment suggests, at the least, that current conservation policies or measures are inadequate. Indeed, achieving these goals and in particular conserving biodiversity and securing rural livelihood, require Kenya to pursue a comprehensive approach to natural resource governance and extend its conservation practice outside the current protected areas.

## **1.2 Dominant Natural Resource Governance Paradigm in Kenya prior to Constitutional Reform in 2010**

Kenyan natural resource management history can be traced back to its pre-colonial period well-demonstrated by numerous traditional pastoralist conservation practices.<sup>21</sup> Land and associated natural resources were common property resources.<sup>22</sup> Access to these resources was open to all members of the socially defined group<sup>23</sup> and decision making regarding resource use was by reference to their ethics, norms and beliefs.<sup>24</sup>

These management practices were replaced by a colonial regime which revolved around one thing- the colonisation of land and natural resources by the

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<sup>18</sup> Lusweti *Biodiversity Conservation in Kenya* 3.

<sup>19</sup> See the United Nations Millennium Development Goals and particularly goal 1 & 7.

<sup>20</sup> *Report of the Open Working Group of the General Assembly Proposal for Sustainable Development Goals* 7.

<sup>21</sup> Nelson "Recognition and Support of ICCAs in Kenya" 8. The pastoralists communities like the Maasai used rotational grazing in order to create dry season grazing reserves which acted as a refuge area especially during drought seasons and to help in livestock development, the use of fire as a range management tool hence enhancing livestock productivity, and protection of forest catchment areas to secure water supply.

<sup>22</sup> Muma A "The Role of Local Communities in Environmental and Natural Resources Management: The case of Kenya" in Paddock L, Qun D, Kotze L & Markel D et al *Compliance and Enforcement in Environmental Law* (2011) The IUCN academy of Environmental Law Series, Edward Elgar, Cheltenham 623.

<sup>23</sup> A socially defined group comprises of individuals belonging to a certain tribe or community and relating to one another, living on traditional lands and territories and having a strong cultural, historical and emotional connection to these lands and territories.

<sup>24</sup> Njogu J *Community-based Conservation in an Entitlement Perspective: Wildlife and Forest Biodiversity Conservation in Taita, Kenya* (2004) African Studies Centre, Lieden 167.

British. Open access to land and resources was interpreted to mean lack of ownership,<sup>25</sup> and therefore, the communities whose tenure lacked formal title recognition were regarded as lacking legal capacity regarding their land.<sup>26</sup> It was on this basis that the colonialists sought to justify the expropriation and allocation of land and natural resource rights to colonial settlers.<sup>27</sup> This was achieved through policies and laws that created 'wildlife reserves' and 'forest reserves',<sup>28</sup> placing them under state management.<sup>29</sup> This did not bode well for the local communities that were displaced from the protected areas, and Benjamin JR puts it well that:

“When colonial authorities in Africa set aside large territories as game reserves and parks, they evicted the native inhabitants to make way for places that would primarily serve the recreational and scientific interests of the outsiders. Areas inhabited by subsistence hunters and farmers for thousands of years suddenly were labelled ‘wildernesses’.”<sup>30</sup>

The post-colonial state after independence continued with the colonial top-down approach to natural resource management.<sup>31</sup> Land policies reflected the colonial approaches.<sup>32</sup> Land not allocated was held by the state as trust land on behalf of the indigenous people and local communities.<sup>33</sup> It was not until recently, 1999-

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<sup>25</sup> Barume A *Land Rights of Indigenous Peoples in Africa* (2010) IWGIA, Copenhagen, Denmark 65.

<sup>26</sup> Muma “The Role of Communitites” 623.

<sup>27</sup> Muma “The Role of Communitites” 623-624.

<sup>28</sup> Okoth-Ogendo H *Tenants of the Crown: Evolution of the Agrarian Law and Institutions in Kenya* (1991) Africa Centre for Technology Studies, Kenya 53.

<sup>29</sup> Chongwa M “The History and Evolution of National Parks in Kenya” 2012 (29)1 *The George Wright Forum* 40.

<sup>30</sup> Richardson B “The Ties that Bind: Indigenous People and Environmental Governance” in Richardson B, Imai S & McNeil K (eds) *Indigenous people and the Law: Comparative and Critical Perspective* (2009) Oxford & Portland, Oregon 337-338 footnote omitted.

<sup>31</sup> Kabiri N “Historic and Contemporary Struggles for a Local Wildlife Governance Regime in Kenya” in Nelson F *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa* (2010) 127.

<sup>32</sup> The initial land policies were characterised by the state being the ultimate authority in matters of control and management of land, general contempt of customary land tenure through systematic adjudication of rights and registration of title, and its replacement with a system similar to the English freehold with the result of private ownership of land becoming deeply entrenched into the law, and administration of land through an unconsolidated body of land laws.

<sup>33</sup> Okoth-Ogendo *Land Policy Development in East Africa: A Survey of Recent Trends A Regional Overview Paper for the DFID Workshop on Land Rights and Sustainable Development*

2005, that participation of the indigenous people and local communities in natural resource governance began to be accommodated in the form of shared governance.<sup>34</sup> This has to some extent secured their rights of access to natural resources, with the state retaining formal ownership of the land and resources.

### **1.3 An Emerging new Approach to Natural Resource Governance in Kenya post-Constitutional Reform in 2010**

In stark contrast to the colonial approach, Kenyan policy-makers have begun to accommodate and integrate international norms and contemporary thinking about natural resource governance, aimed at promoting participation in natural resource governance by the indigenous people and local communities, into its laws and policies.<sup>35</sup> These laws and policies include the Constitution of Kenya 2010, which provides a platform for enacting specific domestic legislation to give domestic effect to the broad content reflected in several relevant international treaties to which Kenya is a party to. Others include the National Land Policy, Land Act, Land Registration Act and the new Kenya Wildlife Conservation and Management Act. These laws and policies reflect positive legislative reforms as they attempt to secure land tenure and resource rights as well as reintegrate the indigenous people and local communities in natural resource management.

### **1.4 ICCAs as a Tool to Promote Participatory Natural Resource Governance**

Indigenous Communities Conserved Areas (ICCAs) have gained prominence in the last decade on what seems to be a move from, and an expansion of, the classic state-owned and state-controlled protected areas.<sup>36</sup> This has been a

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*in Sub-Saharan Africa* hosted at Sunningdale Park Conference Centre, Berkshire, England, 16 - 19 February, 1999 3.

<sup>34</sup> Several laws made during this period signify a shift towards a human-centered approach to natural resource governance. For instance, the Forest Act 2005 recognises the forest-adjacent communities as stakeholders in forest management and has enabled the Government of Kenya to involve communities in forest management. This has been made possible by participation through the formation of Community Forest Associations (CFAs), thus entering into management collaboration with the semi- autonomous state body- the Kenya Forest Service (KFS).

<sup>35</sup> Benjamin "The Ties that Bind" 4-5.

<sup>36</sup> Lausche B *Guidelines for Protected Areas Legislation* (2011) IUCN, Gland 1.

result of efforts internationally to recognise and support indigenous people and local communities and their need to govern and strengthen their ICCAs.<sup>37</sup> These contributions are attributed to agreements like the *Convention on Biological Diversity* (CBD),<sup>38</sup> a couple of events including the Vth International Union for Conservation of Nature World Parks Congress (IUCN- WPC) held in Durban in 2003; the CBD COP 7 meeting where the CBD *Programme of Work on Protected Areas* (PoWPA) was approved;<sup>39</sup> the IUCN World Conservation Congress held in Barcelona in 2008 and subsequently the CBD COP 10 where the parties to the CBD re-affirmed their desire to monitor progress towards the goals of PoWPA with the aim of improving coverage of areas under conservation;<sup>40</sup> institutions like the IUCN through publications, workshops, and public platforms related to ICCAs, and advocacy in intergovernmental forums. In particular, the IUCN has published the *IUCN Protected Areas Governance Guidelines*<sup>41</sup> which has specifically accorded recognition to the diverse forms of protected areas governance, the *IUCN Protected Areas Management Guidelines*<sup>42</sup> which recognise that protected areas have a wide range of management objectives<sup>43</sup> and the *IUCN Protected Areas Law Guidelines*<sup>44</sup> all of which are discussed further in chapter two.

## 2. Aim and Purpose

This dissertation seeks to critically consider whether or not Kenya's legal framework enables ICCAs to facilitate participatory natural resource governance

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<sup>37</sup> The efforts referred to here are the contributions from a range of international environmental resolutions, international human rights, agricultural and other instruments which shall be discussed in detail in chapter two.

<sup>38</sup> 31 *ILM* 818 (1992).

<sup>39</sup> COP 7 (Kuala Lumpur, 2004) Decision VII/28 (*Protected Areas (Articles 8 (a) to (e)*).

<sup>40</sup> Borrini-Feyerabend et al *Governance of Protected Areas: From understanding to action* (2013) Best Practice Protected Area Guidelines Series No. 20, IUCN, Gland 65.

<sup>41</sup> Borrini-Feyerabend G, Dudley N, Jaeger T, Lassen T, Broome N Phillips A & Sandwith T *Governance of Protected Areas: From understanding to action* (2013) Best Practice Protected Area Guidelines Series No. 20, IUCN, Gland.

<sup>42</sup> Dudley N (ed) *Guidelines for Applying Protected Areas Management Categories* (2008) with Stolton S *IUCN WCPA Best Practice Guidance on Recognising Protected Areas and Assigning Management Categories and Governance Types* (2013) Best Practice Protected Area Guidelines Series No. 21, IUCN, Gland.

<sup>43</sup> Dudley(ed) *Guidelines for Applying Protected Areas Management Categories* 10.

<sup>44</sup> Lausche B *Guidelines for Protected Areas Legislation* (2011) IUCN, Gland.

by reviewing the significant legal shifts which have taken place pre-and post-2010. In order to fulfil this purpose, I explore seven key questions. First, what are ICCAs? Secondly, why are ICCAs an important focus in natural resource management, particularly with a view to promoting participatory natural resource governance? Thirdly, what factors have led to the rise of ICCAs globally? Fourthly, what are the key legal prerequisites for successful ICCAs? Fifthly, to what extent does Kenya's legal framework enable ICCAs? Sixthly, what are the strengths and weaknesses of Kenya's legal framework relating to ICCAs? Finally, what reforms, if any, need to be made to Kenya's legal framework to provide for the effective and equitable regulation and promotion of ICCAs?

### **3. Methodology and Structure**

The research is doctrinal. Both the main question and the subsidiary questions are considered from a theoretical perspective. The desktop research involves a study of primary sources like conventions, international guidelines, policies and texts which have emerged as a result of the widespread need for greater understanding on how to recognise and support management and conservation in territories and areas inhabited by indigenous people and local communities. In addition, it involves scrutiny of national legislation and policies that govern natural resources as well as secondary sources such as books, journals, reports and other scholarly articles. Drawing from this, the dissertation is broken down into three main parts.

Chapter two canvasses the appropriate issues before addressing the primary research question of the dissertation. The first issue relates to what ICCAs are and how they differ from protected areas. The second issue is what their origins are and the factors that have led to their rise in prominence. Here the dissertation also canvasses the importance of ICCAs and the challenges they encounter. Lastly, are the key legal elements which would appear to inform their successful domestic implementation. ICCAs appear in various forms including the formal, statutory ICCAs and ICCAs recognised as part of protected areas, and informal ICCAs. This dissertation is however limited to the statutory

ICCAs. The international guidelines and policies are used to unravel this phenomenon and to point out and discuss the legal elements thematically. These legal elements include recognition and declaration of protected areas, land ownership or tenure and resource rights, management, and access, use and benefit sharing. The guidelines help to show how these legal elements can be achieved and how they should be reflected in domestic law to promote effective and equitable ICCAs.

Chapter three focuses on the analysis of Kenya's land and conservation policies and legislation. This is to consider whether Kenya's contemporary legislation is, in the quest of meeting its international obligations, enabling ICCAs as an important conservation tool. The elements developed in chapter two of the dissertation as essential for enabling ICCAs shall be used to structure the critical review. The dissertation considers 2010 as marking a shift towards a human-centered approach in natural resource governance. The analysis starts with a critique of the legal framework pre-2010 before moving to a critique of the situation post-2010. This is to identify what differences, if any, have been introduced incorporating ICCAs as a tool in natural resource governance.

Chapter four constitutes the conclusion of the dissertation where the dissertation should be able to answer the main research question of whether Kenya's contemporary legal regime enables ICCAs. If not, what should be done to remedy the situation?

## CHAPTER TWO

### UNDERSTANDING ICCAs

“The iron rule is that no protected area can succeed for long in the teeth of local opposition”

- Adrian Phillips<sup>45</sup>

Through interactions with nature, the indigenous people and local communities have developed complex cultures and lifestyles in response to the many rich and diverse ecosystems on which they depend for their livelihood.<sup>46</sup> In the process, they have modified the ecosystems to suit their own needs to the extent that both the people and the ecosystems have become mutually dependent.<sup>47</sup> ICCAs have been in existence for millennia, only rising to prominence at international and national levels in the last decade or so.<sup>48</sup> Despite their historical existence, natural resource governance in the past has been driven through centralised bureaucracies in ways that totally or largely excluded local communities.<sup>49</sup> Although this exclusionary approach managed to save a number of crucial species and habitats for some time, it has not been sustainable.<sup>50</sup> If at all, modern conservationists who have had an experience with traditional societies now realise that it was certainly not they who invented the concept of conservation and protected areas.<sup>51</sup> They acknowledge that modern conservation is an attempt to undo the damage caused by excluding traditional natural resource management systems.<sup>52</sup>

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<sup>45</sup> Borrini-Feyerabend G, Banuri T, Farvar T, Miller K & Phillips A “Indigenous and Local Communities and Protected Areas: Rethinking the Relationship” (2002) (12)2 *Parks Journal* 11.

<sup>46</sup> Marie H “Protected Areas and Indigenous and Local Communities” in CBD *Biodiversity Issues for*

*Consideration in the Planning, Establishment and Management of Protected Area Sites and Networks* (2004) Montreal 106.

<sup>47</sup> Marie “Protected Areas and Indigenous and Local Communities” 106.

<sup>48</sup> Kothari et al *Recognising and Supporting Territories and Areas Conserved By Indigenous Peoples And Local Communities* 16.

<sup>49</sup> Kothari A “Protected Areas and People: The Future of the Past” 2008 (17)2 *Parks Journal* 24.

<sup>50</sup> Kothari (2008) 17(2) *Parks Journal* 23.

<sup>51</sup> Borrini-Feyerabend et al 2002 (12)2 *Parks Journal* 6.

<sup>52</sup> Borrini-Feyerabend et al 2002 (12)2 *Parks Journal* 8.

The global coverage of ICCAs has been estimated to be about 13 per cent of the terrestrial surface of the planet.<sup>53</sup> More land and resources are effectively conserved under community control in other ecosystems.<sup>54</sup> However, while these areas qualify to be considered and recognised as ICCAs, a substantial portion is.

The focus drawn on ICCAs can perhaps be attributed to three reasons. First, ICCAs are an efficient and effective means to environment sustainability and conservation as well as a tool to climate change mitigation and adaptation.<sup>55</sup> They are important in protecting ecosystems and species, maintaining ecosystem services and sustaining religious, cultural and identity needs.<sup>56</sup> They are one of the measures envisaged to attain the Aichi targets because they complement protected areas and help achieve the MGDs<sup>57</sup> by adding to the percentage of areas under protection, which is an indicator of environmental sustainability.<sup>58</sup> Second, ICCAs provide equitable means of securing a livelihood

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<sup>53</sup> *Indigenous Peoples' and Community Conserved Territories and Areas (ICCAs): A Bold Frontier for Conservation, Sustainable Livelihoods and the Respect of Collective Rights* <http://www.iccaconsortium.org> (accessed on 27.11.2014). The total coverage of ICCAs has been established as being comparable to the one of governments' protected areas with 400-800 million hectares of forests being owned or administered by communities.

<sup>54</sup> IUCN "Indigenous and Community Conserved Areas: A Bold New Frontier to Conservation" (2011) <https://iucn.org/about/union/commissions/ceesp/topics/governance/icca> (accessed on 13.02.2015).

<sup>55</sup> Kothari et al *Recognising and Supporting Territories and Areas Conserved By Indigenous Peoples And Local Communities* 26.

<sup>56</sup> Lopoukhine N "Protected Areas- For Life's Sake" in Janishevski L, Mooney K, Gidda S & Mulongoy K *Protected Areas in Today's World: Their Values and Benefits for the Welfare of the Planet* (2008) CBD, Montreal 1-2.

<sup>57</sup> COP 10 (*Nagoya, 2010*) Decision X/5 (*Implementation of the Convention and the Strategic Plan*). That by 2020, at least 17 per cent of terrestrial and inland water areas and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscape and seascape.

<sup>58</sup> Scherl L & Emerton L "Protected Areas Contributing to Poverty Reduction" in CBD *Protected Areas in Today's World: Their Values and Benefits for the Welfare of the Planet* (2008) Montreal 4. It should also be noted that MDG seven consisted of four targets. Target seven A aims to integrate the principles of sustainable development into a country's policies and programmes, and reverse the loss of environmental resources, while 7B aims to reduce biodiversity loss, achieving, by 2010, a significant reduction in the rate of loss.

for the indigenous people and local communities<sup>59</sup> as well as a means of eradicating poverty, hence achieving MGD one.<sup>60</sup> Third, through ICCAs, the indigenous people and local communities are able to be empowered. As a result, they are able to exercise their rights to make and enforce rules regarding natural resources within their territories as well as secure land tenure and resource rights, thus ensuring communities are not vulnerable.<sup>61</sup> It also enables them to develop resilience to adapt to growing threats like the effects of climate change.<sup>62</sup> ICCAs are a proof of effective participatory governance in natural resource governance.<sup>63</sup> This counters the exclusionary approach in natural resource management that many governments have employed.

This chapter looks at this new frontier, yet age old, paradigm of conservation. It starts by describing the origins and rise in importance of ICCAs, unpacking its definition then drawing a distinction between ICCAs and protected areas. It then proceeds to discuss the legal elements crucial for its success. These elements will subsequently be used in chapter three, which focuses on Kenya's natural resources legal framework. It creates the theoretical matrix against which to critique and evaluate whether changes in international conservation policy are being reflected on the ground.

## 2.1 Origins and Rise in Prominence of ICCAs

Although ICCAs have been termed an age old paradigm to conservation, their rise to prominence has been a result of global action in response to the change

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<sup>59</sup> Jonas H, Barbuto V, Jonas H, Kothari A & Nelson F "New Steps to Change: Looking Beyond Protected Areas to consider other Effective Area-Based Conservation Measures" 2014 (20)2 *Parks Journal* 117. The term 'livelihood' is broad, and varies from one community to another. It can be the sustainable provision of goods and services to communities, maintaining ecosystem functions on which livelihoods depend, provision of economic benefits through tourism and securing religious sites, thus serving a cultural need. Examples of ecosystem functions include pollination, water regulation, soil formation and retention, raw material and pharmacological resources, to name a few.

<sup>60</sup> Lausche *Protected Areas Legislation* 17.

<sup>61</sup> Jonas et al 2014 (20)2 *Parks Journal* 114.

<sup>62</sup> Borrini-Feyerabend G et al "Bio-Cultural Diversity Conserved by Indigenous Peoples and Local Communities— Examples and Analysis" (2010) *IUCN/CEESP Briefing Note*. 10 7.

<sup>63</sup> Kothari A "Community Conserved Areas: Towards Ecological and Livelihood Security" 2006 (16)1 *PARKS Journal* 6.

in approach to natural resource governance and environmental conservation.<sup>64</sup> This effort to recognise indigenous people and local communities and provide them with support they need to govern and strengthen their ICCAs can be attributed to the direct and indirect contributions from a range of international environmental resolutions, international human rights, agricultural and other instruments as discussed below.

It all began at the Rio Summit in 1992, when the *Rio Declaration*<sup>65</sup> and the *Convention on Biological Diversity (CBD)*<sup>66</sup> were introduced. Both instruments highlighted the role and rights of indigenous peoples and local communities in natural resource governance. The later document inscribed the aspect of ‘sustainable use’ which is underpinned by three pillars of relevance to indigenous people and local communities.<sup>67</sup> These pillars are: access to and use of natural resources; respecting, preserving and maintaining knowledge, innovations and practices of indigenous and local communities while promoting its wider application and involvement of indigenous people and local communities; and sharing of benefits arising therefrom.<sup>68</sup> Besides confirming the notion that conservation of natural resources cannot be driven by exclusionary perspective, it obliged states to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities.<sup>69</sup> It also encouraged states to promote the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices, with the holders of

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<sup>64</sup> The classic approach used for environmental conservation and natural resource governance was state-owned and state controlled. A move from this approach has been motivated by concerns over the alarming increase in the rate of biodiversity loss worldwide and the critical need to increase coverage of protected areas system to help achieve biodiversity goals.

<sup>65</sup> Principle 22 states that “Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development”.

<sup>66</sup> 31 *ILM* 818 (1992).

<sup>67</sup> Article 1.

<sup>68</sup> Article 8 (*In Situ Conservation*); Article 10 (*Sustainable Use of Components of Biological Diversity*); and Article 15 (*Access to Genetic Resources*).

<sup>69</sup> Jana S & Paundel N *Rediscovering Indigenous Peoples’ and Community Conserved Areas (ICCAs) in Nepal* (2010) Forest Action Nepal 3.

such knowledge and innovations.<sup>70</sup> This latter aspect was addressed when the Nagoya Protocol was adopted.<sup>71</sup>

A couple of notable events that followed advanced this recognition. During the Vth International Union for Conservation of Nature World Parks Congress (IUCN- WPC) held in Durban in 2003, the need to recognise diverse forms of protected areas governance was highlighted.<sup>72</sup> This included community conserved areas and indigenous conservation areas.<sup>73</sup> It called on states to empower indigenous people and local communities living in and around protected areas to effectively participate in their management.<sup>74</sup> The CBD provided for explicit recognition of ICCAs through its PoWPA and a number of its other processes. PoWPA was approved at the CBD COP 7 meeting,<sup>75</sup>

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<sup>70</sup> Article 8(j) encourages states through its national legislation to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices. This arose because not only were many people, excluding indigenous people and local communities, benefitting from the use of some of this knowledge and biodiversity to develop profitable goods, but also these local people bore the cost of conservation. As such, there was need to enable the benefits to trickle down to communities.

<sup>71</sup> COP 10 (Nagoya, 2010) Decision X/1(*Access to genetic resources and the fair and equitable sharing of benefits arising from their utilisation*) and “About the Nagoya Protocol” <http://www.cbd.int/abs/about/> (accessed on 15.12.2014). This document aimed to create greater legal certainty and transparency for both providers and users of genetic resources by establishing more predictable conditions for access to genetic resources, and helping to ensure benefit-sharing when genetic resources leave the contracting party providing it.

<sup>72</sup> Recognition of different types of governance is important to help fulfil the requirements of national protected area systems as called for under Article 8(a) of the CBD and in particular to ensure the biophysical connectivity essential to conserve biological diversity.

<sup>73</sup> V<sup>th</sup> IUCN World Parks Congress (Durban, South Africa 2003)- Durban Accord; Durban Action Plan; WPC Message to the CBD; and WPC Recommendations (V.17 *Recognising and Supporting a Diversity of Governance Types for Protected Areas*; V.24 *Indigenous Peoples and Protected Areas*; V.25 *Co-Management and Protected Areas*; V.26 *Community Conserved Areas*; V.27 *Mobile Indigenous Peoples and Conservation*.). The issue of land ownership and resource rights was also discussed and securing the indigenous and local communities rights to their lands and territories was acknowledged as a key element to ensuring sustainable protected areas.

<sup>74</sup> WPC Recommendation (V. 29 *Poverty and Protected Areas*).

<sup>75</sup> COP 7 (Kuala Lumpur, 2004) Decision VIII/28 (*Protected Areas (Articles 8 (a) to (e))*). The overall purpose of the PoWPA was to support the establishment and maintenance by 2010 for terrestrial and by 2012 for marine areas of comprehensive, effectively managed, and ecologically representative national and regional systems of protected areas that collectively contributed to achieving the three objectives of the CBD as well as the 2010 target to significantly reduce the rate of biodiversity loss at the global, regional, national and sub-national

thereby supporting the approach to protected areas governance, calling for attention to governance types and quality, equity in conservation, and indigenous peoples' rights.<sup>76</sup> Subsequently, during the IUCN World Conservation Congress held in Barcelona in 2008, the importance of ICCAs was echoed and resolutions on supporting ICCAs were adopted.<sup>77</sup> In 2010, the parties to the CBD re-affirmed their desire to monitor progress towards the goals of PoWPA and adopted a reporting framework on national implementation, to be integrated with reporting on progress towards the CBD Aichi Biodiversity Targets,<sup>78</sup> with the aim of improving coverage of areas under conservation.<sup>79</sup>

While the above contributions have been direct and indelible, a range of other instruments and processes, especially in human rights, have contributed indirectly to the international discourse around ICCAs. Owing to the need to recognise the indigenous people and local communities and their right to exercise control over their own land and institutions, way of life and economic development, the International Labour Organisation (ILO)<sup>80</sup> focused on an element vital to the success of ICCAs, namely land.<sup>81</sup> It stressed the need to recognise the rights of ownership and possession of the indigenous people over the lands which they traditionally occupied as well as secure use rights over land not occupied by them.<sup>82</sup> Further, it stressed the need to safeguard the rights of these people to participate in the use, management and conservation of these resources. While this had an effect on ICCAs, it was not until the United Nations

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levels and contribute to poverty reduction and the pursuit of sustainable development, thereby supporting the objectives of the Strategic Plan.

<sup>76</sup> Programme element two titled 'Governance, Participation, Equity and Benefit Sharing' had two goals relevant to ICCAs to promote equity and benefit sharing, hence addressing poverty and enhance and secure involvement of indigenous people and local communities and other stakeholders in the management of existing and establishment of new protected areas.

<sup>77</sup> The WCC 2008 resolutions adopted (RES 4.049 *Supporting Indigenous Conservation Territories and other Indigenous Peoples' and Community Conservation Area*; RES 4.050 *Recognition of Indigenous Conservation Territories*; RES 4.052 *Implementing the United Nations Declaration on the Rights of Indigenous Peoples*; RES 4.053 *Mobile Indigenous peoples and Biodiversity Conservation*; RES 4.056 *Rights-Based approaches to Conservation*).

<sup>78</sup> Borrini-Feyerabend et al *Protected Areas Governance* 65.

<sup>79</sup> COP 10 (Nagoya, 2010) Decision X/2(*Strategic Plan for Biodiversity 2011-2020 annex V*).

<sup>80</sup> *Indigenous and Tribal Peoples Convention, C169*.

<sup>81</sup> Part II, C169.

<sup>82</sup> Article 14.

Declaration on the Rights of Indigenous Peoples (UNDRIP) that a breakthrough in setting international standards for Indigenous peoples' rights was established.<sup>83</sup> It recognised the importance of securing rights to land and natural resources and exercising prior informed consent.<sup>84</sup>

It is notable how these conceptual shifts have influenced the opinions of international conservation organisations in the way they now link conservation of natural resources to the contribution by indigenous peoples and local communities.<sup>85</sup> A prominent role in this has been played by the IUCN through its work related to ICCAs. In particular, the *IUCN Protected Areas Governance Guidelines* recognise diverse forms of protected areas governance including by indigenous people and local communities.<sup>86</sup> The *IUCN Protected Areas Management Guidelines*, on the other hand, recognise that protected areas have a wide range of management objectives.<sup>87</sup> As a result, it establishes different management categories, useful as the global standard for defining, recording and communicating about protected areas, and which are to be applied according to the management objectives.<sup>88</sup> The governance typology is

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<sup>83</sup> Jana & Paundel *ICCAs in Nepal* 24.

<sup>84</sup> Article 10 *Right against forcible eviction without prior informed consent*; Article 18 *Right to participate in decision-making in matters which would affect their rights*; Article 26 *Right to their lands, territories and resources and to use the same*; Article 29 *Right to the conservation and protection of the environment and the productive capacity of their lands or territories and resource*; and Article 31 *Right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions*.

<sup>85</sup> Paterson A *Bridging the Gap between Conservation and Land Reform: Communally-Conserved Areas as a Tool for Managing South Africa's Natural Commons* LLD (2011) University of Cape Town 71.

<sup>86</sup> Other forms of governance include governance by government (at various levels and possibly combining various institutions), governance by various rightsholders and stakeholders together (shared governance), governance by private individuals and organisations, governance by indigenous peoples and/or local communities. An in depth analysis can be found in the guidelines Borrini-Feyerabend et al *Governance of Protected Areas: From understanding to action* 29-42.

<sup>87</sup> Dudley *Guidelines for Applying Protected Areas Management Categories* 10.

<sup>88</sup> The protected areas management categories are the basis for listing in the UN List of Protected Areas and the World Database on Protected Areas (WDPA) maintained by IUCN and the UNEP World. They include- category Ia - Strict Nature Reserve, category Ib – Wilderness Area, category II – National Park (ecosystem protection; protection of cultural values), category III – Natural Monument, category IV – Habitat/ Species Management, category V – Protected Landscape/ Seascape and category VI – Protected Area with Sustainable Use of Natural Resources

applied to the categories aforementioned<sup>89</sup> and it clearly locates ICCAs across various IUCN protected areas categories. These events show that the international community realises the crucial role of indigenous peoples and local communities in conservation, particularly in the context of protected areas.

Leading to the shift is the increasing awareness that natural resources cannot be managed and conserved by the state alone.<sup>90</sup> This is because the territories and areas governed or managed by indigenous people and local communities also contain significant levels of resources and that the knowledge and practices of these people have contributed toward the conservation of ecosystem, species, and genetic diversity.<sup>91</sup> Therefore, their involvement in natural resource governance deserves to be recognised and supported in and through national legal policies and laws.<sup>92</sup>

The shift also recognises that indigenous people and local communities have needs in order to achieve self-determination. It therefore encourages transitioning from a dominant model of governance to a democratic one in which the communities have a say in how natural resources are managed.<sup>93</sup>

## 2.2 Definition of ICCAs

ICCAs have been defined as:

“natural and modified ecosystems, including significant biodiversity, ecological services and cultural values, voluntarily conserved by indigenous peoples and local and mobile communities through customary laws or other effective means”.<sup>94</sup>

From the above definition, four elements can be distilled. First, ‘natural and modified ecosystem’ echoes the presence of a complex network under the

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<sup>89</sup> Dudley *Guidelines for Applying Protected Area Management Categories* 5.

<sup>90</sup> Lausche *Protected Areas Legislation* 76.

<sup>91</sup> Kothari et al *Recognising and Supporting Territories and Areas Conserved By Indigenous Peoples And Local Communities: Global Overview and National* 16.

<sup>92</sup> Lausche *Protected Areas Legislation* 81.

<sup>93</sup> Cullinan C *Wild Law* 2ed (2011) Siber Ink, South Africa 176.

<sup>94</sup> Borrini-Feyerabend G, Kothari A & Oviedo G *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation* (2004) IUCN, Gland 51.

traditional territories and including an area demarcated or set aside.<sup>95</sup> This presumes that ICCAs are diverse, in form and nature, and are found in various geographical spaces including the terrestrial and marine environment as well as all types of ecosystems.<sup>96</sup> While some ICCA sites have been traditionally conserved since time immemorial, others represent the revival or the variation of traditional practices.<sup>97</sup> This is well explained by looking at the history which is characterised with state governments displacing their indigenous people and local communities to pave way for the establishment of protected areas.<sup>98</sup> It is only recently that the ICCAs have started gaining recognition and with land being restituted, the indigenous people and local communities have initiated efforts to protect and restore the local environments upon which they depend.<sup>99</sup> Second, 'voluntarily conserved' indicates that conservation is done in a self-directed manner. Third, 'indigenous and local communities' indicate the individuals who manage the ICCAs where conservation, as understood in this context, may be the intended objective or may be intended but as a secondary objective.<sup>100</sup> Fourth, 'through customary law and other effective means' indicates that conservation is conducted through community values, practices, rules and institutions, and other operative modes that help attain a given goal.

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<sup>95</sup> Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* 20. The territory otherwise called the physical environment includes indigenous bio cultural heritage territories, indigenous protected areas, cultural land- and seascapes, sacred sites and species migration routes of mobile indigenous peoples, sustainable resource reserves, communities' fishing grounds, wildlife nesting sites to name but a few.

<sup>96</sup> Borrini-Feyerabend G "ICCA Governance- What are ICCAs and how can Consideration of ICCA governance be integrated into the IUCN Natural Resource Governance Framework (NRGF)" (2013) *Internal CEESP NRGF Background Brief* No. 22 1-2.

<sup>97</sup> Corrigan C & Granzeira A A *Handbook for the Indigenous and Community Conserved Areas Registry* UNEP-WCMC 5.

<sup>98</sup> Willy L "Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the fate of Customary Tenure in Africa" (2012) *Reviewing the Fate of Customary Tenure in Africa Brief* No.1 4.

<sup>99</sup> Corrigan & Granzeira A *Handbook for the Indigenous and Community Conserved Areas Registry* 5.

<sup>100</sup> Borrini-Feyerabend et al *Protected Areas Governance* 49. When voluntary conservation is intended as a secondary objective it is referred to as ancillary conservation.

### 2.3 Relationship between ICCAs and Protected Areas

These two concepts, ICCAs and protected areas, can be puzzling. A protected area has been defined as:

“A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.”<sup>101</sup>

It seems to follow that the main objective of a protected area is conserving nature and ecosystems.<sup>102</sup> Conservation can be inferred to be a prerequisite for an area to be classified as a protected area.<sup>103</sup> Drawing from the earlier definition of ICCAs, it can be inferred that irrespective of where they are found, they possess certain distinct characteristics that enable them to be identified as such. These characteristics can be summarised in terms of their context, the action undertaken and the outcome. Firstly, the indigenous people and local communities have a strong relationship to the environments they associate with by virtue of their history, and economic and socio-cultural livelihood.<sup>104</sup> Secondly, they are actively involved in the management and decision making. Thirdly, the intended outcome is conserving their areas and natural resources,<sup>105</sup> an objective that is normally achieved through the application of their cultural rules and values.<sup>106</sup> ICCAs consist of two subcategories- the indigenous conserved areas and the community conserved areas.<sup>107</sup> The indigenous conserved areas are territories governed by the indigenous communities, whereas the community conserved areas are territories conserved by the local communities.<sup>108</sup>

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<sup>101</sup> Dudley *Guidelines for Applying Protected Area Management Categories* 8.

<sup>102</sup> Lausche *Protected Area Legislation* 14.

<sup>103</sup> Refer to the IUCN guidelines for Protected Areas Governance to see how the protected area definition has been interestingly unpacked 6-8.

<sup>104</sup> Corrigan & Granzeira *A Handbook for the Indigenous and Community Conserved Areas Registry* 5.

<sup>105</sup> Corrigan & Granzeira *A Handbook for the Indigenous and Community Conserved Areas Registry* 5.

<sup>106</sup> Kothari 2006 (16)1 *Parks Journal* 3.

<sup>107</sup> Lausche *Protected Areas Legislation* 81.

<sup>108</sup> Lausche *Protected Areas Legislation* 81.

ICCAs relate to the concept of protected areas in two respects. First, is the context where an ICCA meets the protected area definition- as provided by the CBD and IUCN- but fails to be designated as such for various reasons, including lack of consent from the indigenous people and local communities.<sup>109</sup> Second, is the context where ICCAs do not meet the protected areas definition by the mere fact that conservation is pursued as a secondary factor,<sup>110</sup> or conservation is not anticipated at all but is nevertheless taking place.<sup>111</sup>

While ancillary conservation is not compatible with the IUCN definition of a 'protected area', voluntary conservation can be compatible. This notwithstanding, territories and areas under voluntary conservation, for a variety of reasons, are often not formally recognised, legally protected or even valued as part of national protected area systems, even when such territories and areas fit the IUCN definition of a 'protected area'. Therefore, it is fitting to say that ICCAs are generally used to complement the other forms of protected areas since they can exist in a protected area.<sup>112</sup>

## 2.4 Legal elements relevant to the success of ICCAs

ICCAs reflect the complex relationship between humans, their cultural diversity and nature.<sup>113</sup> Conservation is placed in an economic, social and cultural matrix

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<sup>109</sup> Jonas et al 2014 (20)2 *PARKS Journal* 119.

<sup>110</sup> See Borrini-Feyerabend et al *Protected Areas Governance* 49 and Borrini-Feyerabend G "Governance on Protected Areas, Participation and Equity" in CBD *Biodiversity Issues for Consideration in the Planning, Establishment and Management of Protected Area Sites and Networks* (2004) Montreal 101 where this mode of conservation is also referred to as secondary voluntary conservation because conservation may not be the primary objective. The primary objective may relate to a range of linked objectives and values that indigenous people and local communities, through their interactions with their territories, associate with spiritually or otherwise.

<sup>111</sup> Borrini-Feyerabend (2013) *Internal CEESP NRGF Background Brief* No. 22 4. When conservation is not anticipated but is nevertheless taking place, it is also referred to ancillary conservation (See Borrini-Feyerabend et al *Protected Areas Governance* 49).

<sup>112</sup> Jana & Paundel *Rediscovering Indigenous Peoples' and Community Conserved Areas (ICCAs) in Nepal* 23.

<sup>113</sup> CEESP *Theme on Indigenous Peoples, Local Communities, Equity and Protected Areas* [http://www.iucn.org/about/union/commissions/ceesp/what\\_we\\_do/wg/tilcepa.cfm](http://www.iucn.org/about/union/commissions/ceesp/what_we_do/wg/tilcepa.cfm) (accessed on 24.02.2015).

where its success is determined by power relations, management processes and the benefits, all of which are underpinned by the principle of equity.<sup>114</sup>

There are several critical elements that effectively lead to the successful implementation of ICCAs. These elements are divided into four and they reflect an inclusive and human-centered approach as well as good governance principles. These elements are recognition, land tenure and resource rights, management, and access and benefit sharing. Laws act as a powerful tool for successful ICCAs because they determine the extent of participation in natural resource governance by the indigenous people and local communities'.<sup>115</sup> First, there is a need to establish whether ICCAs are expressly recognised within the legal framework; how they are declared and determine their form and status; determine how they are demarcated; identify who approves them and whether the entire process is participatory. Second, the legal framework should determine the forms and nature of land and resource rights to identify how they can be secured and establish the authority to hold these rights. Third, the legal framework needs to establish a form of management underpinning the governance of ICCAs; identify who the managers are, and determine how management is to be conducted. Lastly, there is need to determine the forms of access and use; how access and use are regulated and the rights granted; and identify the authority granting rights of access and use and the different benefits derived from ICCAs.

#### **2.4.1 Recognition and Establishment**

There are several ways in which ICCAs can be recognised. ICCAs can be recognised within the formal protected areas, or outside the system of protected areas.<sup>116</sup> Whichever mode of recognition is granted, the indigenous people and local communities have to be involved and their decision respected.

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<sup>114</sup>CEESP *Theme on Indigenous Peoples, Local Communities, Equity and Protected Areas*.

<sup>115</sup> Kothari A "Protected Areas and People: Participatory Conservation" in *Biodiversity issues for Consideration in the Planning, Establishment and Management of Protected Area Sites and Networks* 95-96.

<sup>116</sup> Lausche *Protected Areas Legislation* 81.

When recognised as part of the protected area system, it is normally through a Constitutional dispensation or statutory framework.<sup>117</sup> Formal recognition has both advantages and disadvantages. In a positive sense, it helps to sustain ICCAs by giving them for example, legal protection against threats or providing financial or technical support. In addition, the recognition and respect given to the customary governance systems of indigenous people and local communities' can enhance the conservation of their territories and areas.<sup>118</sup> It also has the effect of expanding a country's protected estate.<sup>119</sup> While this may be the case, formal recognition can be an inappropriate form of recognition because it has the potential to convert ICCAs to co-managed areas where the government gets the responsibility of making decisions with the option of consulting other stakeholders.<sup>120</sup> This may be detrimental to the indigenous people and local communities whose territories are not only based on customary law and traditional practice, but are central to self-determination and cultural identity.

When recognised outside the formal protected system, it is normally as a part of general conservation measures because of their supportive role.<sup>121</sup> Recognition granted in this case varies to include social recognition,<sup>122</sup>

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<sup>117</sup> Kothari et al "Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAs): How far do National Laws and Policies Recognize Them?" (2010) *A Rapid Assessment Report* 6.

<sup>118</sup> Borrini-Feyerabend et al *Protected Areas Governance* 20-21.

<sup>119</sup> Refer to the Aichi target 10 which envisions that by 2010 at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures.

<sup>120</sup> Kothari et al *Recognising and Supporting Territories and Areas Conserved by Indigenous People* 31

<sup>121</sup> Lausche *Protected Areas Legislation* 81. ICCAs may not be considered as part of the formal protected areas system for various reasons. First, they may not qualify for inclusion because they fail to meet the definition of a protected area or the essential conditions required. Second, The stakeholders may refuse formal and legal recognition because of the threats they may experience like issue of remaining independent also see Borrini-Feyerabend (2013) *Internal CEESP NRGF Background Brief* No. 22 4 for more reasons. Third, the legislation may not have explicitly provided for their recognition. When recognised as a general conservation measure, it can be as a buffer zone or a connection corridor.

<sup>122</sup> This is where Indigenous peoples and local communities are granted awards, have access to media coverage and platforms to tell their stories.

administrative recognition and programmatic recognition.<sup>123</sup> While this may not be a legal mode of recognition, it nevertheless supports ICCAs as they are able to be acknowledged and given support on many levels. For instance, their conservation knowledge could be documented to avoid a situation where the external threats gradually destroy them. They could be allocated financial assistance or assistance to network with other local groups thereby exchanging ideas or information on natural resource governance.

ICCAs have to be proposed for recognition before they are declared. The proposal is used to ascertain whether they meet the protected areas definition. This is done through a nomination process.<sup>124</sup> The legislation should therefore not only identify but empower individuals who can make the proposal. These may include a community that has already created an ICCA or an individual outside the community who has identified an area with high biodiversity values.<sup>125</sup> The legislation should also highlight the requirements for declaration, including a mandatory requirement for an agreement between parties involved.<sup>126</sup> This requirement is meant to ensure that conservation is not pursued as a short-term measure. The requirements identified are meant to assist to provide uniformity as well as ensure that futile processes are not commenced.

ICCAs may take various forms depending on the mode of recognition and the conservation objectives to reflect the IUCN categories I to IV.<sup>127</sup> This is helpful especially when reporting. Each jurisdiction has different classifications of land status including public, private and communal, where ICCAs may be established. This notwithstanding, the fundamental principle for recognising ICCAs within the protected areas system, whether formally or informally, is to ensure long-term conservation.<sup>128</sup> In order to achieve this objective, the general

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<sup>123</sup> Kothari et al 'Legal and Institutional aspects of Recognising and Supporting Conservation by Indigenous Peoples and Local Communities' 13-15.

<sup>124</sup> Lausche *Protected Areas Legislation* 150.

<sup>125</sup> Also see Lausche *Protected Areas Legislation* 84.

<sup>126</sup> Lausche *Protected Areas Legislation* 150.

<sup>127</sup> Lausche *Protected Areas Legislation* 25.

<sup>128</sup> Lausche *Protected Areas Legislation* 150.

principal is that a high-level policy authority within the government should have ultimate responsibility to formally declare an area through a gazette notice.<sup>129</sup> The legal framework should identify the authority responsible for designating an ICCA as a protected area or a conservation area.<sup>130</sup> A variety of factors may cause an alteration of protected areas, for instance, the effects of climate change. The legislation must therefore make provision for amendment of these areas as well as identify the authority with powers to amend.<sup>131</sup>

Following the good governance principles, the legal framework should ensure that it encourages public participation in every level of decision making.<sup>132</sup> This is based on the principle of Prior Informed Consent (PIC).<sup>133</sup> Where a decision requires consent of the stakeholders, the PIC procedures should be included. These procedures should invite and enlighten, not coerce, a certain outcome. Before an ICCA is recognised or declared as a protected area or a conservation area, the legislation should make provision for stakeholders to be informed and given an opportunity to contribute. Contributions can be in regard to identification of boundaries, defining management objectives, and negotiating an agreement, to name a few.<sup>134</sup> Relevant information should be made accessible and in local languages.<sup>135</sup> The legislation should also provide for means of meaningful participation, for instance inviting written comments and scheduling public meetings. It should expressly define timelines for each level of process.

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<sup>129</sup> Lausche *Protected Areas Legislation* 125-126.

<sup>130</sup> Lausche *Protected Areas Legislation* 140.

<sup>131</sup> Amendment of an area includes expansion or reduction on the area of conservation or cessation of an area altogether. Whichever decision is favoured should depend on whether a conservation objective is advanced or not. Also see Lausche *Protected Areas Legislation* 150.

<sup>132</sup> Lausche *Protected Areas Legislation* 162.

<sup>133</sup> See Shrumm *Access and Benefit Sharing* 4 where PIC involves three elements that signify the process that takes place and which enable indigenous and local communities participate in natural resource governance. 'Prior' requires a notification be provided before action is taken. 'Informed' infers a complete material and other information disclosure by the external parties. 'Consent' infers the affirmation by the indigenous people and local communities on activities affecting them.

<sup>134</sup> Lausche *Protected Areas Legislation* 162.

<sup>135</sup> Lausche *Protected Areas Legislation* 162.

## 2.4.2 Land tenure and rights

Land is an economic resource and an important factor in the formation of individual and collective identity as well as in the day-to-day organisation of social, cultural and religious life.<sup>136</sup> It is also an enormous political resource that defines power relations between and among individuals, families and communities under established systems of governance.<sup>137</sup>

Land tenure relates to who owns land ownership and use rights to resources on the site.<sup>138</sup> There are a variety of land rights that one can hold.<sup>139</sup> This includes use rights,<sup>140</sup> control rights<sup>141</sup> and transfer rights.<sup>142</sup> Land tenure and resource rights are central to the realisation of human rights, food security, poverty eradication, sustainable livelihoods, and social and economic growth of the indigenous and local communities.<sup>143</sup> This notwithstanding, insecure land tenure has exposed the indigenous people and local community territories to threats like land grabbing, destructive and unsustainable development like mining, and vulnerabilities to climate change.<sup>144</sup> This is perhaps founded on past experience where protected areas were established without adequate attention to, and respect for the rights of indigenous peoples. This includes mobile indigenous peoples, and local communities, especially their rights to lands, territories and resources, and their right to freely consent to activities that affect them.<sup>145</sup> As a result, many indigenous peoples were expelled from their

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<sup>136</sup> IFAD *Improving access to land tenure security policy* (2008) 5.

<sup>137</sup> *Improving access to land tenure security policy* 6.

<sup>138</sup> Lausche *Protected Areas Legislation* 99.

<sup>139</sup> "Land rights" are property rights over the land and natural resources found within the indigenous and local communities' territories.

<sup>140</sup> This right determines the access one has to the territory, for instance the rights to use the land for grazing or growing subsistence crops or gathering resources from the forest.

<sup>141</sup> This right involves power of decision making. It is used to determine how land should be used or what resources can be harvested.

<sup>142</sup> This involves conveyance of land or resources within it.

<sup>143</sup> Committee on World Food Security *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in context of National Food Security* (2012) food & Agricultural Development of the United Nations, Rome 6.

<sup>144</sup> Rivera V, Cordero P, Cruz I & Borrás M "The Mesoamerican Biological Corridor and Local Participation" 2002 (12)2 *PARKS Journal* 49.

<sup>145</sup> Marie "Protected Area and Indigenous and Local Communities" 106.

territories,<sup>146</sup> their relationship with their lands severed and their cultural integrity undermined, rendering them a vulnerable population.<sup>147</sup>

Most ICCAs are characterised by customary land tenure system where ownership, possession, access, use and transfer are determined by the community themselves rather than the state or state law.<sup>148</sup> This suggests that the land tenure system is important when considering the appropriate governance approaches for a particular site.

Land tenure systems are diverse and complex.<sup>149</sup> They may be in the form of full ownership title, lease, easements or covenants and other limited real rights which are afforded under customary law or statute.<sup>150</sup> On the other hand, land rights may vary to include common property or individual private property stemming from statute, contract, common law or custom.<sup>151</sup>

Land ownership and resource rights can be secured in different ways. ICCAs are underpinned by communal tenure. This is normally based on land reform where land has been restituted to a certain dispossessed community.<sup>152</sup> For secured ICCAs, it is important for land legislation to define communal tenure. It must identify the tenures that can be held and require recordable titles deeds to be issued against these territories.<sup>153</sup> Where the land is state owned, the legislation should ensure that it provides for security of resource rights through the use of leases, whether long-term or short-term, easements and covenants or through permits, licences and contracts.<sup>154</sup> Where resource rights arise as a result of traditional use rights,<sup>155</sup> the legislation should ensure that it recognises this right.

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<sup>146</sup> Rivera et al 2002 (12)2 *PARKS Journal* 49.

<sup>147</sup> *The Durban Action Plan* (2004) 248.

<sup>148</sup> Willy (2012) *Reviewing the Fate of Customary Tenure in Africa Brief No.1* 1.

<sup>149</sup> *Improving access to land tenure security policy* 6.

<sup>150</sup> Lausche *Protected areas legislation* 141.

<sup>151</sup> Lausche *Protected areas legislation* 140.

<sup>152</sup> Paterson *Bridging the Gap between Conservation and Land Reform* 96-97.

<sup>153</sup> The titles issued can be freehold or leasehold titles.

<sup>154</sup> Lausche *Protected Areas Legislation* 141.

<sup>155</sup> Traditional use rights are informal rights over natural resources exercised by a group of people and which are already in existence.

The legal framework should therefore be framed in a way that determines whether land ownership rights are limited or full. It should also identify the entity holding the rights. The rights may be held individually or communally.<sup>156</sup> These entities include the state, statutory corporations, registered associations or legally recognised indigenous people or local communities.<sup>157</sup>

### 2.4.3 Management

As indicated earlier, natural resource governance was characterised by state centralised management systems. The framework did not provide for rights and responsibilities to be transferred to or shared with the indigenous people and local communities, hence crippling their efforts towards conservation.<sup>158</sup> With time, there has been an increased focus on local participation in the management of natural resources. For ICCAs to be a success, this element has to be clearly determined and defined.

Management in this context is the process of dealing or controlling things and people.<sup>159</sup> It is about what is done in pursuit of a given set of objectives and the means and actions to achieve such objectives both in law and practice.<sup>160</sup> ICCAs are subject to different management systems based on custom, statute, practice and contractual agreements.<sup>161</sup> The management can take different forms depending on the stakeholders involved. This is determined on a case by case basis. The form of management will depend on the form of governance. This should however be determined through negotiations which should be open and transparent in order to foster trust and solid partnerships.<sup>162</sup> The forms of

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<sup>156</sup> Lausche *Protected Areas Legislation* 99.

<sup>157</sup> Lausche *Protected Area Legislation* 141.

<sup>158</sup> Lockett S, Mkhize K & Potter D "The Experience of Local Boards in Kwazulu-Natal, South Africa" 2003 (13)1 *Parks Journal* 16.

<sup>159</sup> Borrini-Feyerabend et al *Protected Areas Governance* 11.

<sup>160</sup> Borrini-Feyerabend "Implementing the CBD Programme of Works on Protected Areas: Governance as Key for Effective and Equitable Protected Areas System" (2008) *TGER and TILCEPA Briefing Note* No. 8 1.

<sup>161</sup> Paterson *Bridging the Gap between Conservation and Land Reform* 91.

<sup>162</sup> Beltran *Indigenous and Traditional People and Protected Areas* 10.

management include sole management, co-management, joint management and transboundary management.<sup>163</sup>

Sole management refers to a situation where one party undertakes all the responsibilities and duties of a territory. In this case, it can be the government authorities or the local community representatives and traditional leaders. Co-management is a situation in which two or more social actors negotiate, define, and guarantee amongst themselves an equitable sharing of the management functions, entitlements, and responsibilities for a given territory or set of natural resources.<sup>164</sup> In this context, the actors can be the government authorities, the traditional leaders and local community's representatives, non-governmental organisations or the surrounding land owners.<sup>165</sup> Although this has the potential to empower the indigenous people and local communities participation in natural resource governance, in practice it has a way of strengthening state control over the resources.<sup>166</sup> This is because power vests on one actor who has the option of consulting the stakeholders before making any decision. Joint management on the other hand refers to a situation where the actors involved are as diverse as discussed in co-management. The difference is that regardless of the actors involved, there is a mandatory requirement for representatives to deliberate and make decisions together.<sup>167</sup> Transboundary management refers to a scenario where the conserved area or territory traverses different countries or areas hence requiring management to be shared across the boundaries. Though rare, this form of management has been acknowledged to be a mode of reducing tension and conflicts along the borders.

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<sup>163</sup> Borrini-Feyerabend (2008) *TGER and TILCEPA Briefing Note No. 5 4*.

<sup>164</sup> Borrini-Feyerabend G, Farvar M, Nguinguiri J & Ndangang V *Co-Management of Natural Resource: Organising, Negotiating and Learning by Doing* (2007) GTZ and IUCN, Kasperek Verlag, Heidelberg Germany 1.

<sup>165</sup> Borrini-Feyerabend G, Bueno P, Hay-Edie T, Rastogi L & Sandwith T *A Primer on Governance for Protected and Conserved Areas* (2014) IUCN World Parks Congress, Gland 10-11.

<sup>166</sup> Castro A & Nielsen E "Indigenous People and Co-management: Implications for Conflict Management" 2001 (4) *Environmental Science and Policy* 230.

<sup>167</sup> Borrini-Feyerabend et al *Governance for Protected Areas* 32.

ICCAs should be managed by a management authority. The legal framework should therefore identify the authority and define its powers and responsibilities.<sup>168</sup> The legal framework should also envisage a scenario where management authority is devolved to the indigenous and local individuals and institutions.<sup>169</sup> The institutions involved can be formal or informal, traditional or modern, but should be tailored to the context.<sup>170</sup> While devolution should be encouraged, the legal framework should identify the authority with power to delegate, assign or transfer powers and responsibilities. This is because, not only is authority without responsibilities likely to be dysfunctional and cause difficulties in achieving the objectives intended, but transferring responsibility without authority lacks the legal basis for its efficient exercise.<sup>171</sup> The institutions may also differ regarding the role they play. They can be advisory institutions or decision making institutions or an institution to manage funds.<sup>172</sup> The framework should provide for the establishment of these institutions and depending on the governance underpinning the ICCAs, determine the individuals it will comprise of. Nonetheless, the institutions should be representative.<sup>173</sup> They should comprise of local community representatives or a mix of individuals representing the actors involved in the management. Within the community, the local institution should integrate different classes, clans and individuals, and hence reflect different voices indiscriminately. This is because effectiveness of devolution is at times questioned when particular groups like women and children are not included, thereby subjecting them to vulnerabilities.<sup>174</sup>

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<sup>168</sup> Lausche *Protected Areas Legislation* 124-125.

<sup>169</sup> Kellert S, Mehta J, Ebbin S & Lichtenfeld L "Community Natural Resource Management: Promise, Rhetoric and Reality" 2000 (13)8 *Taylor & Francis Journal* 709.

<sup>170</sup> Kothari et al *Recognising and Supporting Territories and Areas Conserved By Indigenous Peoples And Local Communities* 22.

<sup>171</sup> Paterson *Bridging the Gap between Conservation and Land Reform* 105.

<sup>172</sup> Jonas H, Bavikatte K & Shrumm H "Community Protocols" 2010 (12)3 *Asian Biotechnology and Development Review* 56.

<sup>173</sup> Borrini-Feyerabend et al *A Primer on Governance for Protected and Conserved Areas* 17.

<sup>174</sup> Stalenberg N "Vulnerable Populations - What does this term mean, what are the assets of vulnerable populations, and why is it important to strengthen their voices and decision-making power and how can that consideration be integrated into the NRGF design and application?" (2013) *Internal CEESP NRGF Background Brief* No. 10 1-2.

Management without direction is likely to be ineffective and therefore fail to attain a certain set of goals. The legal framework should therefore contain other management tools like a management plan so that it can aid monitoring to evaluate whether progress is made within conservation areas. Management plans are a tool by which the indigenous and local communities decide whether or not they intend to manage their land for conservation of biodiversity and associated cultural heritage in perpetuity.<sup>175</sup> The framework should expressly prescribe for mandatory preparation of management plans and prescribe its content. The legal framework should encourage reviews and updating of management plans.<sup>176</sup> This helps to have plans that are skilled at adaptive management and capable of being flexible to respond to intervening change both in the short-term and long-term,<sup>177</sup> especially in light of the global changes that are rapid and have long-term effects like climate change. The content of the plan should indicate who the managers are, stipulate their rights, powers and responsibilities, identify the area that is being demarcated for conservation and how often the plan should be reviewed.<sup>178</sup> These assist in assessing the progress and achievements as well as identifying individuals who should be held accountable. The framework should identify who prepares the management plan following the PIC procedures as well as the individual approving of it.<sup>179</sup> Time frames for the process should be included in order to encourage accountability. Since natural resources under community territory and control are usually managed according to customary rules and knowledge common to a particular community,<sup>180</sup> the plan should acknowledge the role traditional knowledge has in natural resource governance. This is because there is much in traditional

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<sup>175</sup> Davis J, Hill R, Walsh F, Sanford M, Smyth D & Holmes M “Innovations in Management plans for Community Conserved Areas: Experiences from Australian Indigenous Protected Areas” 2013 (18)2 *Ecology and Science* 5.

<sup>176</sup> Lausche *Protected Areas Legislation* 171.

<sup>177</sup> Borrini-Feyerabend G & Kothari A “Recognising and Supporting Indigenous and Community Conservation; Ideas and Experiences from Grassroots” (2008) *Internal CEESP NRGF Background Brief* No. 8 7.

<sup>178</sup> Lausche *Protected Areas Legislation* 170-171.

<sup>179</sup> Lausche *Protected Areas Legislation* 167.

<sup>180</sup> Borrini-Feyerabend 2002 (12)2 *Parks Journal* 5.

practices and knowledge from which modern conservation can learn, and much in modern conservation science that traditional communities can benefit from.<sup>181</sup>

#### **2.4.4 Access, use and benefit sharing**

Indigenous people and local communities depend on ICCAs for their livelihood. Though conservation areas are established to protect biodiversity, care should be taken to ensure that it should not be at the expense of the people. Mutual benefits should be encouraged in order to avoid situations which lead to unsustainable use of natural resources or land degradation.<sup>182</sup> The legal framework should make express provisions for access and use of natural resources as well as for benefit sharing. It has to strike a balance between costs and inputs with the benefits accrued.

The legal framework should therefore provide for access and use of resources by regulating activities on the designated area.<sup>183</sup> This can take various forms. It can prohibit certain activities from being undertaken; it can identify activities which require permission before being undertaken; or it may allow certain activities without written permission as long as general rules of the area are followed.<sup>184</sup> This approach to regulating activities helps in that it provides a basis within which to institute proceedings in court.

When rights of access and use of ICCAs and resources within it are granted, they take various forms. The rights are granted to the local communities or external individuals depending on the kind of use. Rights can be granted in form of a licence, contract, lease, concession or any other agreement which stipulates the rights and obligations of the parties to it.<sup>185</sup> The legal framework should therefore have a provision for this, stipulate conditions for access and use, and identify the authority with responsibility to grant the same.

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<sup>181</sup> Kothari "Protected Areas and People" 97.

<sup>182</sup> Coad L, Campbell A, Miles L & Humpheries K *The Costs and Benefits of Forest Protected areas for Local Livelihood: A Review of the Current Literature* (2008) UNEP-WCMC Working Paper Cambridge, UK 16.

<sup>183</sup> Lausche *Protected Areas Legislation* 174. Activities inferred here include harvesting of resources for food, bioprospecting, tourism, religious reasons to name a few.

<sup>184</sup> Lausche *Protected Areas Legislation* 175.

<sup>185</sup> Lausche *Protected Areas Legislation* 178.

This will depend with the management authority. The legal framework should encourage diverse institutions to grant rights, including formal institutions as well as traditional institutions.<sup>186</sup> It should encourage the mutual assessment of performance through regular monitoring and transparent reporting by institutions accountable for management.<sup>187</sup>

Since ICCAs are an important tool for contributing to poverty reduction, strengthening livelihoods and sustaining economic growth, it is important for the legal framework to address the issue of costs and benefits in order to avoid the risk of incurring far-reaching economic and development costs for failing to understand its benefits.<sup>188</sup> The types of benefits accruing depend on the responsibilities of the parties- owner, manager or beneficiary. The indigenous people and local communities should be able to benefit directly and equitably from the conservation and ecologically sustainable use of natural resources.<sup>189</sup> When exploring the potential benefits to accrue, caution should be taken to ensure that it is not limited to monetary benefits. Potential benefits should vary to include non-monetary benefits like employment of the locals, legal protection of territories, technical and financial support, use of natural resources to name a few.<sup>190</sup> The legal framework should provide for a benefit sharing agreement and the basic contents to guide the parties in the negotiations. For the sake of flexibility and adaptability, the legal framework should leave room for parties to tailor-make their agreements to fit the circumstances and for the high level policy making body to review the benefits.<sup>191</sup> When a party is the owner or manager of the ICCA, the legal framework should provide incentives to encourage the individuals running ICCAs. The incentives include tax cuts, financial support,

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<sup>186</sup> Beltran J & Phillips A *Indigenous and Traditional People and Protected Areas: Principles, Guidelines and Case Studies* (2000) IUCN, Gland 10.

<sup>187</sup> Beltran & Phillips *Indigenous and Traditional People and Protected Areas: Principles, Guidelines and Case Studies* 10.

<sup>188</sup> Scherl & Emerton "Protected Areas Contributing to Poverty Reduction" in *Protected Areas in Today's World: Their Values and Benefits for the Welfare of the Planet* 5.

<sup>189</sup> Beltran & Phillips *Indigenous and Traditional People and Protected Areas: Principles, Guidelines and Case Studies* 9.

<sup>190</sup> Beltran & Phillips *Indigenous and Traditional People and Protected Areas: Principles, Guidelines and Case Studies* 11.

<sup>191</sup> Paterson *Bridging the Gap between Conservation and Land Reform* 107.

training and other skills or support from government programmes like public campaigns to raise awareness.

## **2.5 Conclusion**

ICCAs are truly an age old regime. It is however ironical that most government are embracing this measure of conservation as a 'project'. This discussion reveals that ICCAs are a way of life for the indigenous people and local communities. It is important for states to help ICCAs deliver their potential for conservation and livelihood security. To achieve this goal, the legal elements discussed herein need to be incorporated in the relevant domestic legislation.

## CHAPTER THREE

### KENYA'S LEGAL FRAMEWORK OF RELEVANCE TO ICCA'S

“We have to find the strength to make a place for ourselves in this world. Otherwise there will soon be no more of us. We will all be gone. And so will our memories.”

- Mario Mahongo<sup>192</sup>

It is clear from chapter two's analysis that ICCAs have a valuable role to play in future natural resource governance regimes. Furthermore, it is clear that there are several legal elements that need to be entrenched in a country's national legal framework to enable ICCAs.

For decades, Kenya pursued policies and laws which alienated conservation from the people and people from conservation.<sup>193</sup> This approach was centered on the belief that exclusion of communities from protected areas would lead to the ultimate protection of natural resources.<sup>194</sup> In addition, natural resources legislation and policies were highly fragmented and hence posed a barrier to effective implementation and management of conservation areas. The Constitution (1963) was not comprehensive. It did not expressly recognise the indigenous people and local communities as marginalised communities.<sup>195</sup> The environmental right was similarly not expressly provided for. This was also reflected in the natural resources legislation pre-2010 including the Forest Act 7 of 2005 (KFA) and Kenya Wildlife Conservation and management Act 16 of 1989 (KWCMA).

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<sup>192</sup> Gilbert J *Indigenous Peoples' Land Rights Under International Law: From Victim to Actors* (2006) Transnational Publishers, USA xiii.

<sup>193</sup> Barrow E, Gichohi H & Infield M *Rhetoric or Reality? A Review of Community Conservation Policy and Practise in East Africa* (2000) IIED 14.

<sup>194</sup> Barrow et al *Rhetoric or Reality?*14.

<sup>195</sup> See sections 71, 74 and 75 where the indigenous people and local communities rights had to be inferred from other rights provided for in the Constitution, for instance protection of life, protection from inhuman treatment and protection from deprivation of property. The Environmental rights were inferred in the context of governmental powers for the purpose of conservation.

Since then, Kenya's legal framework has undergone significant reform. The reform has been precipitated by the Constitution (2010).<sup>196</sup> As a result, the Kenya Wildlife Conservation and Management Act 2013 has been enacted. The Kenya Forest Act before 2010 is, however, still in force.

This chapter considers the relevant legal framework prior to introduction and post introduction of the Constitution 2010, to see if Kenya's policy makers are moving in the right direction to promote legal recognition for ICCAs. The themes used in chapter two are used to structure the analysis herein. This chapter starts by analysing the legal framework pre-2010. It then moves to analyse the legal framework post-2010. This will help determine whether Kenya's legal framework has moved to promote the recognition of ICCAs as a key component of its natural resource governance system.

### **3.1 The Legal framework- Pre-2010**

#### **3.1.1 Recognition and Declaration**

The legal framework did not expressly recognise ICCAs. The KWCMA provided for the establishment of areas where wildlife resources could be conserved. The Minister was tasked with the declaration of National Parks, Nature Reserves and Local Sanctuaries.<sup>197</sup> He was to consult with the competent authority before making a decision. The competent authority was dependent on the category of land in which a conservation area was to be set up.<sup>198</sup> Trust land was held by the County Councils in trust for the communities and, therefore, they were the competent authorities to consult during establishment. The communities were,

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<sup>196</sup> The new Constitution was successfully promulgated after a long review process. The aim was to have a Constitution that was responsive to the social, economic and political needs of the people as envisioned in Kenya's Vision 2030 (Also see Ministry of Planning and National Development *Kenya's Vision 2030* (2008)). Apart from entrenching the environmental right (Section 42 Constitution 2010), other gains that were to flow from the Constitution (2010), and which issues were relevant to ICCAs, related to land reforms, the substantial devolution of resource management and revenue sharing through devolved funds.

<sup>197</sup> Sections 9 (*National Park*), 18 (*Nature reserves*), 19 (*Local Sanctuaries*) and 7(1) KWCMA (repealed).

<sup>198</sup> In relation to Government land, the Minister for the time being responsible for matters relating to land, in relation to Trust land, the County Council in which the land is vested, and in relation to any other land, the owner thereof or the person for the time being entitled to the rents and profits thereof;

however, not effectively involved in the process. Similarly the Minister was charged with responsibility to amend<sup>199</sup> or declare that an area had ceased to be a National Park, National Reserve or local sanctuary.<sup>200</sup> Before cessation, the public was invited, through a gazette notice and a newspaper of wide circulation, to submit their objections and thereafter the matter forwarded for approval by the national assembly.<sup>201</sup>

Similarly, the KFA tasked the Minister with the responsibility to establish a state forest, and a local authority forest on recommendation of a forest conservation committee and the local authority.<sup>202</sup> Just like with the KWCMA, it seems that communities were not involved in the declaration of conservation areas. However, variation or cessation of state and local authority took effect when certain important requirements like public participation were met.<sup>203</sup> A detailed procedure for public participation was provided for in the third schedule. It required publishing a notice in the Gazette, two national newspapers and one newspaper circulating in the locality to which the proposal related to, and in one Kenyan radio station broadcasting in that locality. In addition, comments to the proposal could either be submitted in writing or verbally at a public meeting. The provision for different modes of making contributions was beneficial to the communities considering that the level of literacy could be low. It also helped provide a forum enabling members of the public to express themselves in the best way possible. The information received on the different mediums was detailed and informative

### **3.1.2 Land Tenure and Rights**

The legal framework regulating land during the post-colonial period recognised three categories of land tenure: government land; private land; and trust land.<sup>204</sup>

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<sup>199</sup> Section 8. This however seems to apply specifically to National Parks.

<sup>200</sup> Section 7(1).

<sup>201</sup> Section 7(2)(b).

<sup>202</sup> Sections 20-24 KFA.

<sup>203</sup> Section 27(2)(d).

<sup>204</sup> Chap IX Sections 114-120, Constitution of Kenya (1963). Trust land was a system of land ownership which was characterised by common holding. Land belonged to no particular individual but to members of a community as a whole.

The applicable laws, which included both statutory law and the customary law, were dependent on the category of land.<sup>205</sup> The statutory law recognised two forms of tenure- freehold tenure, and leasehold tenure, while the customary law recognised communal forms of tenure.<sup>206</sup>

The indigenous people and local communities lived in trust land.<sup>207</sup> They were entitled to rights in the trust land by virtue of existing African Customary Law (ACL).<sup>208</sup> These rights included occupation, use, control, inheritance, succession and disposal of lands. While communal ownership of land was recognised, it was not secured and guaranteed.<sup>209</sup> This is because trust land was vested in local authorities<sup>210</sup> designated as councils who managed resources and the development of land under their jurisdiction.<sup>211</sup> Since the local authorities were entities of the government at the local level, it can be concluded that that the government held and controlled the land and all dealings concerning it.

The Constitution (1963) allowed for individual titles to be registered on trust land.<sup>212</sup> The effect of first registration vested on an individual either absolute interest or leasehold interest to the land together with its rights and privileges.<sup>213</sup> The rights acquired could only be challenged and defeated by

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<sup>205</sup> Wanjala S *Land Law and Disputes in Kenya* (1990) Oxford University Press, Nairobi 2.

<sup>206</sup> Wanjala *Land Law and Disputes in Kenya* 40. Communal tenure was based on the ACL of communities residing within a certain territory.

<sup>207</sup> Trust land was previously known as 'reserves'. The Swynerton plan of 1954 sought to change the system of land tenure through land consolidation and registration of individual's freeholds as well as improve on commodity production in the reserves.

<sup>208</sup> Trust Land Act (Section 69).

<sup>209</sup> Wachira G *Applying Indigenous Peoples' Customary Law in Order to Protect their Land Rights in Africa* (2010) IWGIA, Denmark 8.

<sup>210</sup> The government's structure was three tiered: National government, Provincial government; and local government. The local authorities were entities of the local government.

<sup>211</sup> Section 115(1). See also Section 117(2) which demonstrates ACL as not being where rights, interests and benefits of a community, tribe or clan was extinguished once the County Council set apart an area of land in trust land.

<sup>212</sup> Section 116 Constitution. The Land Consolidation Act and Land Adjudication Act and other laws that allowed for registration of individual title applied. See *Report of the Commission of Inquiry into the Land Law System of Kenyan* 55, where registration of individual title over Trust land was justified on grounds that individual tenure ensured sound and environmentally sustainable land use, while communal tenure systems were environmentally destructive.

<sup>213</sup> Section 27 Registered Land Act (Repealed).

various overriding interests.<sup>214</sup> Unfortunately, a prior right based on ACL was not an overriding interest and therefore could not be used to defeat first registration. If at all, ACL was subject to repugnancy if it conflicted with any written law.<sup>215</sup> The Land Adjudication Act (LAA)<sup>216</sup> similarly allowed for land to be owned in groups.<sup>217</sup> However, the group representatives were limited to not more than ten or less than three.<sup>218</sup> They were to be incorporated and hold land on behalf of and for the collective benefit of the members of the group.

The above description demonstrates the capitalistic nature of Kenya's land laws and the subordinate nature of ACL.<sup>219</sup> The legislation gave no security of tenure to land held under ACL. As a result, not only did this exclude certain groups who would have had access to land under customary tenure, it also failed to support the role of the indigenous people and local communities in land administration.<sup>220</sup>

In situations where individual land ownership was registered, the effect was that of converting customary tenure to individual ownership. As a result, access thereto by communities previously occupying the land was impacted severely.<sup>221</sup> As mentioned earlier, trust land was broadly regarded as the property of local government authorities hence communities living in these areas often found that they could not assert any rights to the land when decisions about its use and allocation were made. This happened specifically when the local authorities exercised their "setting apart" rights which enabled them to designate the land in question for a purpose they saw fit.<sup>222</sup> Since the County Councils had power relating to land within their jurisdiction, there were chances of having corrupt County Council officials and individuals taking advantage of

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<sup>214</sup> Sections 28-30 RLA.

<sup>215</sup> Section 115(2) Constitution.

<sup>216</sup> Land Adjudication Act 35 of 1968.

<sup>217</sup> A group is defined as a tribe, clan, section, family or other group of persons.

<sup>218</sup> Section 5(1)(b) Land(Group Representative) Act.

<sup>219</sup> *Wanjala Land Law and Disputes in Kenya* 77.

<sup>220</sup> Weideman M "Tenure Reform: The Former Homelands" 2004 (31)2 *Politikon* 301.

<sup>221</sup> Mbote P "Land Tenure, Land Use and Sustainability in Kenya: Towards Innovative Use of Property Rights in Wildlife Management" (2005) *IELRC Working Paper* 6.

<sup>222</sup> Section 117 Constitution.

unenforceable customary land rights to grant communities or allocate to other individuals, even themselves, land in exchange for money.<sup>223</sup> The vulnerability of communities and their rights under this system of ownership of land was also demonstrated with their lack of ability in securing credit and other development finances using land as collateral.<sup>224</sup> This is because they lacked title deeds to confirm ownership of land. ICCAs in this case, therefore, could only exist outside the legal framework.

### 3.1.3 Management

Natural resources in Kenya were governed by different statutes.<sup>225</sup> These resources were mostly associated with the indigenous people and local communities. It was therefore important to ensure that communities were involved in management. The Kenya Wildlife Service (KWS) was the management authority for wildlife resources, in National Parks and National Reserves, both in the terrestrial and marine environment,<sup>226</sup> while the Kenya Forest Service (KFS) was the management authority of forest resources.<sup>227</sup> While each Act stipulated the powers and responsibilities for resource management, it is important to highlight that the resources were managed under different ministries of the government. Perhaps the challenge faced with this was the coordination of management policies.

Functions of the KWS included formulating policies and undertaking other responsibilities relating to the management, utilisation and conservation of wildlife resources.<sup>228</sup> KWS was managed by a Board of Trustees and although the Board included individuals from different departments of the government, the indigenous people and local communities were not represented. KWS was also managed by the Wildlife Advisory Council who, though not involved in the day to day management of wildlife conservation and management, assisted KWS to

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<sup>223</sup> Nelson "Recognition and Support of ICCAs in Kenya" 10.

<sup>224</sup> *Assessment of Natural Resource Governance in Garba Tula , Northern Kenya* 16.

<sup>225</sup> Water resources, forest resources, wildlife resources and marine resources.

<sup>226</sup> Sections 3 & 4 KWCMA (repealed).

<sup>227</sup> Section 3(1) KFA.

<sup>228</sup> Section 3A KWCMA.

better perform their duties and responsibilities.<sup>229</sup> However, the responsibilities of this institution were not clearly set out, and hence vague.

Functions of the KFS included managing all state forests and provincial forests in consultation with the forest owners, formulating policies for management, utilisation and conservation of forests, conducting research, promoting the empowerment of associations and communities in the control and management of forests, and assisting in all matters appertaining to managing, utilising and conserving forests.<sup>230</sup> KFS was managed by a board which was broadly represented and highly skilled, considering the required level of education and work experience.<sup>231</sup> The indigenous people and local communities were represented in the board because the Act required community representatives to be appointed. This meant that the representatives were the voice of the natives. The board's function of relevance to support ICCAs included approving all policies prepared by the service, considering management agreements and granting management licences for state plantation forests, developing guidelines to promote joint management of forests, establishing forest conservancy areas and negotiating for financial and other incentives for the advancement of forest related activities of, among other entities, the communities.<sup>232</sup> The KFS was also required to keep a book of accounts for income, expenditure and its assets and submit the same to the Controller and Auditor-General for auditing purposes.<sup>233</sup> This helped to keep KFS accountable in the manner they used the funds allocated to them to manage conservation areas.

From the above, it is evident that communities were involved in the institutional arrangement to oversee management of forest resources but not wildlife resources. The Act allowed for assignment of management powers and responsibilities to other institutions like the forest conservation committee which

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<sup>229</sup> Section 5B.

<sup>230</sup> Section 4(a)-(p).

<sup>231</sup> Section 5.

<sup>232</sup> Section 6(a)-(o).

<sup>233</sup> Section 16.

was tasked with overseeing management in forest conservancy areas.<sup>234</sup> The powers and responsibilities of each institution were clear and this helped in establishing and promoting accountability.

Different forms of management were recognised. Under KWCMA, National Parks and National Marine Reserves were under KWS. Therefore, these areas did not allow for whatever form of devolved management to local communities and hence did not have scope to be managed as ICCAs.<sup>235</sup> However, shared management implemented in the form of joint agreements was recognised and occurred only to the extent and for the purpose of ensuring that animal migration patterns essential to the continued viability of a National Park or National Reserve were maintained.<sup>236</sup>

The KFA, on the other hand, recognised different management categories under which the indigenous people and local communities could take part in the management of conservation areas. These include sole management and joint management. These could be implemented by way of license, concession, contracts or joint agreements.<sup>237</sup> Sole management arose where a forest community was in need of utilising or conserving any grove or forest which was part of a Nature Reserve for cultural, religious, educational, scientific or other reasons.<sup>238</sup> As such, an application was to be made to the board which became final upon approval. Joint management with the Community Forest Association (CFA) was recognised.<sup>239</sup> As such, it provided a situation where the communities were involved but not in a subordinate position as is always the case with co-management. The association herein could therefore undertake conservation and management of forest and its resources as it deemed fit, informing the KFS of their progress and consulting when required.

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<sup>234</sup> Section 12.

<sup>235</sup> Nelson F *An Analysis of International Law, National Legislation, Judgements and Institutions and the Interrelation with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Kenya* (2012) Natural Justice in Bangalore and Kalpavriksh in Pune and Delhi 26.

<sup>236</sup> Section 20 KWCMA (Repealed).

<sup>237</sup> Section 39 KFA.

<sup>238</sup> Section 32.

<sup>239</sup> Sections 40(3) & 46.

The KWCMA (repealed) required the KWS to prepare and implement management plans for National Parks and Nature Reserves.<sup>240</sup> The indigenous people and local communities were not consulted or involved in any manner. The legal framework did not expressly state the basic content of the management plan, meaning there was no overall standardised guiding framework on the basic and minimum content of a plan. It also did not stipulate a period within which the plan could be revised. This meant that the authorities' decision to revise the plan was at their discretion, and was not mandatory. However, it could be inferred that reviews of management could be done on the advice of the Advisory Councils.

The KFA, on the other hand, expressly required the KFS and the local authority to prepare and adopt management plans with respect to state forests, provincial forests and local authority forests.<sup>241</sup> It also envisaged instances where these bodies could delegate this function because it allowed them to adopt management plans drafted by other persons or bodies, including the indigenous people and local communities through the Community Forest Association (CFA).<sup>242</sup> This shows that indigenous people and local communities were partly involved in the management of resources, though not as solo actors. The management plans were to be used as pointers in conservation and management. However, the Act was silent of the issue of monitoring and review of the plan. It also was silent of the action needed to give the plan legal effect.

### **3.1.4 Access, Use and Benefit Sharing**

The KWCMA made provision for access and use of wildlife resources, though for limited purposes. Access and use could be for scientific purposes, sport and hunting, or commercial purposes.<sup>243</sup> Any person could access conservation areas. However, it prohibited the undertaking of certain activities without

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<sup>240</sup> Section 3A(d).

<sup>241</sup> Sections 4(g) & 34(3) KFA.

<sup>242</sup> Section 34(4).

<sup>243</sup> Sections 22, 26 & 27 KWCMA

permission and prescribed offences in instances of breach.<sup>244</sup> For instance, it prohibited unlicensed hunting. Hunting was categorised into two: hunting protected animals and hunting game animals.<sup>245</sup> For protected animals, any person was allowed to hunt on condition that they possessed a licence. On the other hand, hunting game animals was subject to strict rules because the activity could only be undertaken in the presence of a professional hunter.<sup>246</sup> Apart from specifying what could be accessed, the Act made provision for access to be regulated by use of closed seasons.<sup>247</sup> The Minister was given the mandate to make and gazette regulations for the same. The right to access and use wildlife resources was granted through a license or authorisation granted by the Director.<sup>248</sup> However, communities were not involved in the licensing process nor were they given enforcement powers in case of contravention. The Act provided for cancellation of licenses.<sup>249</sup> While it did not expressly provide for monitoring and review of rights granted, this requirement could still be inferred. This is because, for a license to be cancelled, a review must have been done to check compliance with the law. The Act did not provide for adequate incentives to motivate communities and land owners to adopt land use practices that were compatible with wildlife conservation and management. Indeed, the situation was aggravated by the existence of incentives in other sectoral policies that distorted land use decisions.<sup>250</sup> As a result, Kenya's wildlife was increasingly under threat and consequently opportunities were being lost for it to positively contribute to economic growth, wealth creation and increased employment.<sup>251</sup>

The KFA similarly allowed access and use of forest resources in Nature Reserves.<sup>252</sup> Indigenous people and local communities and other individuals could access a forest and its resources for cultural, religious, educational,

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<sup>244</sup> Section 37.

<sup>245</sup> Section 22.

<sup>246</sup> Section 23.

<sup>247</sup> Section 38

<sup>248</sup> Sections 23(3)(c), 26(1), 27(2)

<sup>249</sup> Section 28.

<sup>250</sup> Ministry of Forest and Wildlife *The National Wildlife Conservation And Management Policy* (2012) 12.

<sup>251</sup> Dudley *Guidelines for applying Protected Areas management categories* 8.

<sup>252</sup> Sections 21 & 32 KFA.

scientific or other reasons.<sup>253</sup> ‘Other reasons’ meant that the list was not exhaustive. The use rights were granted through licenses or permits and agreements.<sup>254</sup> Use rights to a Nature Reserve were granted by the board after an application was made, while use rights through an agreement are granted by the Director.<sup>255</sup> Although the Act provided for monitoring and review of rights granted, it did not specify the timeframes for the same.<sup>256</sup> The legal framework afforded the communities financial assistance from the fund established, and this came off as an incentive to support community-based projects.<sup>257</sup> The board negotiated the funds on behalf of the communities.<sup>258</sup> Incentives were only given to individuals who had opted to set aside land for purposes of conservation.

The legal framework for both wildlife and forest resources failed to address the issue of bio-prospecting, which more often than not affected the indigenous people and local communities. The need to protect Traditional Knowledge (TK) grew because outsiders were getting access to and use of this knowledge for profitable purposes, and the knowledge was fading because of modernisation and lack of codification. This is probably because the Constitution (1963) had not made reference to TK, hence providing no legal arrangement for the survival of the TK or protection of the legitimate interest of the communities. With communities living in trust land, the issue of genetic resources found within their territories arose. Kenya’s first regulation to govern ABS, the Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access and Genetic Resources and Benefit Sharing) Regulations 2006 was developed and adopted, subsequently coming into force in 2009.<sup>259</sup>

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<sup>253</sup> Section 32(1).

<sup>254</sup> Sections 32 & 46(2) where a management agreement between the Director and the association could confer on the association all or any of the forest user rights which included collection of medicinal herbs, harvesting of honey and timber, grazing, eco-tourism and recreational activities, among others.

<sup>255</sup> Sections 32(2) & 46(2).

<sup>256</sup> Section 12(3).

<sup>257</sup> Section 17.

<sup>258</sup> Section 6(g).

<sup>259</sup> Section 53 of the Environment Management and Coordination Act (EMCA) required NEMA to issue guidelines that prescribed measures for sustainable management and utilisation of genetic resources.

The scope of the regulation was limited to genetic resources. However, while it did not expressly mention TK, the mention of intangible components associated with genetic resources could be inferred to include TK.<sup>260</sup> For one to obtain genetic resources, one requires an access permit.<sup>261</sup> The application for the permit was to be accompanied by evidence of PIC from interested persons and relevant lead agencies, and a research clearance certificate from the National Council for Science and Technology.<sup>262</sup> Authorisation from different lead agencies showed what a lengthy process it was to obtain an access permit. This is because different natural resources required authorisation from their lead agency. Therefore, access to forest resources and wildlife resources required authorisation from the KFS and the KWS respectively. The recognition of the need for PIC was important because it afforded the indigenous people and local communities an opportunity to be involved in decision making over resources they depend on. However, while the indigenous and local communities got to be involved through this process, the issue that was likely to arise was: what constitutes true representation? Who represents a community, considering that modernisation had led to dilution of community structures? For this reason, one was likely to have easy access to PIC which was not representative and which could later on be challenged.<sup>263</sup>

Once one obtained all the authorisation required, the regulations restricted the transfer of genetic resources outside Kenya unless a Material Transfer Agreement (MTA) had been signed.<sup>264</sup> The regulation did not provide guidance as to the essential content of the MTA. This was precarious because while the communities had the opportunity to negotiate their terms, there were

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<sup>260</sup> Angwenyi "The Law Making Process of ABS Regulations" 179. See also definition of 'intangible components' which refers to information held by persons that is associated with or regarding genetic resources within the jurisdiction of Kenya.

<sup>261</sup> Rule 9(1).

<sup>262</sup> Rule 9(2).

<sup>263</sup> Kamau E & Winter G "Streamlining Access Procedures and Standards" in Kamau E & Winter G (eds) *Genetic Resources, Traditional Knowledge & The Law: Solutions for Access & Benefit Sharing* (2009) Earthscan London 369.

<sup>264</sup> Rule 18. A Material Transfer Agreement is an agreement negotiated between the holder of an access permit and a relevant lead agency or community on access to genetic resources and benefit sharing

chances that the situation would work against them because they had no standard content to guide them in negotiations.

The regulation also provides for the ways in which the holder of an access permit could facilitate an active involvement of stakeholders in the execution of the activities under the permit.<sup>265</sup> The benefits include both monetary and non-monetary and they were not exhaustive.<sup>266</sup>

## **3.2 Legal Framework Post-2010**

### **3.2.1 Recognition and Establishment**

The current legal framework supports ICCAs in a variety of ways. Under the KWCMA, the Cabinet Secretary is vested with power to establish wildlife protected areas.<sup>267</sup> This is done by way of notice in the Gazette, only after consultation with the relevant authorities and mandatory public consultation.<sup>268</sup> For protected areas established on state land, the Minister is required to, upon recommendation of the KWS, consult the National Land Commission.<sup>269</sup> Where land falls under the county government jurisdiction, the Cabinet Secretary is required to, upon recommendation by the county government, consult the National Land Commission in the case of the National reserve,<sup>270</sup> and lead agencies with respect to a Marine Conservation area.<sup>271</sup> The national assembly must approve before the protected area becomes formalised. Unlike the previous regime, these protected areas provide varying degrees of community involvement in their establishment.

The Cabinet Secretary is required by notice in the gazette to, upon consultation with the relevant authorities, the county government and the KWS, where land falls under jurisdiction of a county government, together with the

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<sup>265</sup> Rule 20(1).

<sup>266</sup> Rule 20(3)-(4).

<sup>267</sup> Section 31 KWCMA.

<sup>268</sup> Section 24(2).

<sup>269</sup> Section 32 (*National Park and Marine Protected areas*); S 33 (*Protected wetland*).

<sup>270</sup> Section 35(1).

<sup>271</sup> Section 31(1).

Land commission, vary or revoke boundaries to a protected area.<sup>272</sup> This is subject to mandatory requirements of an approval by the national assembly, prior public consultation and conducting an environmental Impact Assessment.<sup>273</sup> In addition, the Act gives the communities power to establish conservancies and sanctuaries on their land.<sup>274</sup> Since the Act has been enacted under the auspices of the new Constitution, the three categories of lands recognised are reflected herein. While sanctuaries can be established on any category of land, this provision envisages sanctuaries and conservancies established under community land. Before it is established, the Act envisages the existence of a registered Community Wildlife Association.<sup>275</sup> This enables communities to establish their conservation areas within their land and manage them. It also reflects a model where the communities are the owners, managers and beneficiaries.

From the above, it is evident that the Act is progressive. First, it is evident that there is an increase in the degree of public participation in all levels of decision making and especially when declaring protected areas. Second, community conservancies and sanctuaries allow communities to be responsible for conservation. This indicates there is full respect for the rights of the indigenous people and local communities and an acknowledgment of the role they play in environmental protection. This is based on the right that those who may be affected must have a say in the determination of their environmental future.<sup>276</sup> Not only does it promote transparency and accountability, but a sense of ownership. The consultation of the National Land Commission is important, owing to the different forms of land use and the land reform that has been and still is being undertaken. There is, however, need for reform in the KFA to extend the requirement of public participation by communities when declaring protected areas.

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<sup>272</sup> Section 37 KWCMA.

<sup>273</sup> Section 37.

<sup>274</sup> Section 39.

<sup>275</sup> Section 40.

<sup>276</sup> Anton D & Shelton D *Environmental Protection and Human Rights* (2011) Cambridge university press 381.

### 3.2.2 Land Tenure and Rights

Although the Constitution (2010) provided a foundation and pushed for land reforms, the National Land Policy (NLP) adopted in 2009 provided a base from which a simplified land administration system could be made. The NLP recognised that land related issues were complex, owing to many land registration regimes.<sup>277</sup> The reforms specifically related to ICCAs were based on the principle of good governance, secured land rights, gender equity, and equity.<sup>278</sup> Before 2010, the land tenure systems were operated under different statutory regimes which neglected the ACL on property, leading to mass disinheritance of communities.<sup>279</sup> With the inadequate environmental management and increase in conflict over land and land-based resources, there was need for change. In addition, for land administration to be effective there was need to bring development and compulsory acquisition powers under control. As such, the NLP recognised the need for different categories of land including the “community land”, as a way of securing community rights to land and land-based resources.<sup>280</sup>

The Constitution (2010) classifies land into three including community land which is important to ICCAs.<sup>281</sup> It expressly lists what constitutes community land.<sup>282</sup> What was classified as trust land under the Constitution (1963) is now classified as community land with the county government holding unregistered community land on behalf of the communities.<sup>283</sup> It also establishes the National Land Commission (NLC) to handle land matters, including

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<sup>277</sup> *National Land Policy* 1.

<sup>278</sup> *National Land Policy* 2.

<sup>279</sup> *National Land Policy* 10.

<sup>280</sup> *National Land Policy* 14.

<sup>281</sup> Articles 61(2) & 63 Constitution of Kenya 2010.

<sup>282</sup> Article 63 Constitution. Community land consists of land lawfully registered in the name of group representatives; land lawfully transferred to a specific community; land declared to be community land by an Act of Parliament and land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by the county governments.

<sup>283</sup> Article 63(3) Constitution. The Constitution adopts a two tier system of governance- national government and county government, phasing out the previous two tier system of governance. The county government has now taken the place of the local authority with respect to community land, previously referred to as trust land.

investigating and recommending appropriate redress regarding historical land injustices, and encouraging the application of traditional mechanisms for dispute resolution in land conflicts.<sup>284</sup>

Currently, land management, administration and land registration are regulated under separate, but consolidated regimes.<sup>285</sup> The Land Act 6 of 2012 has consolidated and rationalised land laws, thereby providing for the sustainable administration and management of land and land based resources, while the Land Registration Act 3 of 2012 has consolidated and rationalised the registration of titles to land, thereby giving effect to the principles and objects of devolved government in land registration. There are four forms of land tenure recognised. These are freehold, leasehold, customary land rights and partial interest like easements.<sup>286</sup> Once land is registered under this tenure system, the Registrar is required to issue a Certificate of Title or Certificate of Lease, depending on the interest transferred, and record it in the community land register.<sup>287</sup> Management and registration of community land is, however, to be regulated by the legislation envisioned in Article 63 of the Constitution discussed below.<sup>288</sup>

In addition to allowing customary land to be held under a different tenure system, the Communal Land Bill (2013) also provides for individual as well as group ownership of land.<sup>289</sup> Unlike the old system, it requires a participatory process in documenting, mapping and developing community land. This helps in the decision making process as it is more participatory. It proposes the establishment of a communal land management committee, as a legal entity, to facilitate in the management, allocation and registration of land and land

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<sup>284</sup> Article 67.

<sup>285</sup> The different legal regimes used to administer and register interest in land in the old regime included the Indian Transfer of Property Act 1882, the Government Lands Act, (Cap 280), the Registration of Titles Act, (Cap 281), the Land Titles Act, (Chapter 282), and the Registered Land Act, (Cap. 300) all of which have since been repealed.

<sup>286</sup> Section 5 Land Act.

<sup>287</sup> Section 8 Land Registration Act.

<sup>288</sup> The Communal Land Bill, 2013 was first introduced in parliament in November 2013. It is intended to provide a guide as to the communal management of land in Kenya. It is supposed to be enacted into law by 2015. As it currently stands, it is yet to become law.

<sup>289</sup> Section 6 & 7, Communal Land Bill 2013.

rights.<sup>290</sup> This does not, however, correspond with the constitutional approach of vesting legal rights directly on the community, thereby treating the community as an indivisible collective entity.<sup>291</sup> In addition, a proposal to appoint a separate Registrar for community land also contravenes the constitutional effort to unify registration of all categories of land under the chief land registrar.<sup>292</sup> The unregistered community land vests in the county government.<sup>293</sup> The concern here is that while they hold it in trust for the community, they still retain the “setting apart” powers. In addition, it is not clear what the role of the county government is over the community land under NLC. The bill proposes the recognition of traditional mechanisms of dispute resolution relating to land.<sup>294</sup> Similarly, the right of restoration is recognised as a way of dealing with historical injustices.

From the above summary, the proposed change in land status now provides communities more opportunity to strengthen their role in establishing ICCAs, land administration and to secure rights to land. There is also greater opportunity for communal ownership of land to be recognised and secured and for secondary users’ access rights to be protected.<sup>295</sup> In addition, since communities are able to be allocated titles in land, this means they can also secure credit facilities using their titles as collaterals because it is conclusive evidence of proprietorship. However, after all is said and done, this still remains a far-fetched dream. With the Bill still pending in Parliament, the communities land tenure security still remains uncertain.

### **3.2.3. Management**

The Constitution (2010) bestowed a duty on everyone to cooperate with State organs and other persons to protect and conserve the environment and ensure

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<sup>290</sup> Section 15.

<sup>291</sup> Land Development & Governance Institute *Technical Review of the Community Land Bill* (2014) 8.

<sup>292</sup> Section 5.

<sup>293</sup> Section 3(d).

<sup>294</sup> Sections 56-59.

<sup>295</sup> Sections 43 & 44.

ecologically sustainable development and use of natural resources.<sup>296</sup> It encourages public participation in the protection and management of environment and natural resources. Whereas all natural resource laws were supposed to conform to the new Constitution, only the KWCMA was amended and came into force in January 2014. Currently, natural resource management falls under one ministry, the Ministry of Environment and Natural Resources, unlike before where different ministries were in charge. This aids in coordination of policies.

The current KWCMA bestows management on the KWS,<sup>297</sup> the county conservation committee, the individuals and communities who own land.<sup>298</sup> It requires communities to register a community wildlife association with the county wildlife and compensation committee as recognised wildlife managers.<sup>299</sup> They are established to facilitate cooperative management of wildlife within a specified geographic region or sub-region. This infers that in areas where the communities own land and have established sanctuaries or conservancies, the management authority for these places will vest on these communities and the county wildlife conservation committee.

While the KWCMA allows conservancies and sanctuaries to be established and registered individually or collectively, the Act prescribes that they must be cooperatively managed. This infers the existence of a contractual agreement. Consequently, comparing this law to the previous one, it is noticeable that the community conservancies registered do not acquire any new rights in the bargain, but simply have to adhere to a new set of bureaucratic procedures.<sup>300</sup>

Management plans are to be prepared by either the KWS, in consultation with the communities, or the communities themselves.<sup>301</sup> The fifth schedule of the Act details the minimum information that should be included. These are a

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<sup>296</sup> Article 69(2).

<sup>297</sup> Section 6 KWCMA.

<sup>298</sup> Section 40.

<sup>299</sup> Section 40.

<sup>300</sup> Nelson "Recognition and Support for ICCAs in Kenya" 29.

<sup>301</sup> Sections 40(3) & 44.

legal description of the area covered, wildlife management goals and objectives, the species covered, life span of the plan, and a report to show participation of communities in preparing the plan. It also includes wildlife resources and conservation initiatives, user rights proposed, land use practices to ensure compatibility with wildlife conservation, and methods of monitoring wildlife. In addition, the communities are to be involved in the management of recovery plans for threatened species.<sup>302</sup> Stating the life span of the plan expressly helps in adaptive management because it ensures that the authorities mandatorily review the management plan and adjust it where necessary in order to achieve management objectives. The Act also requires that provision for monitoring is to be undertaken and its frequency should be detailed.<sup>303</sup> This will aid the management authorities especially when evaluating whether the tools they have employed in wildlife conservation and management are effective. Public participation has been widely elaborated in the KWCMA under schedule four which includes notices, public meetings, public comments and distribution of information. This ensures that the communities' contributions are factored in. It also promotes transparency and accountability, which are the basis for good governance. The Cabinet Secretary is tasked with approving the management plan and thereafter, publishes it by Gazette Notice.<sup>304</sup> This ensures that the public is aware of the plan and also demonstrates that it is binding.

#### **3.2.4 Access, Use and Benefit Sharing**

The Constitution (2010) provides for the need to ensure sustainable exploitation, utilisation, management and conservation of natural resources, while ensuring the equitable sharing of the accruing benefits. In addition, it calls for the protection and enhancement of intellectual property in indigenous knowledge of biodiversity and the genetic resources of the communities.<sup>305</sup> To implement this provision, the NLP is required to develop rules and regulations regarding

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<sup>302</sup> Section 49.

<sup>303</sup> Fifth Schedule Part 2.

<sup>304</sup> Section 44(3).

<sup>305</sup> Article 69(a) & (c) Constitution.

conservation of natural resources and measures to ensure benefit sharing toward the affected communities.<sup>306</sup>

The KWCMA makes express provision for access to wildlife resources by any person or entity in any area.<sup>307</sup> This means that an individual or a community association can be recipients of wildlife resources user rights. This right is to be used reasonably and sustainably.<sup>308</sup> The rights granted may be for consumptive or non-consumptive purposes.<sup>309</sup> One has to successfully register with the County Wildlife Conservation and Compensation Committee before the right is granted in the form of a license.<sup>310</sup> The Cabinet Secretary is the issuing authority of rights and he can also withdraw the rights if conditions are breached. Whereas protected areas have been set aside for purposes of wildlife conservation, areas outside protected areas which serve as dispersal areas are communally or individually owned.<sup>311</sup> This devolved right over wildlife management in community lands<sup>312</sup> is drawn from the reforms to the land policy and general spirit of devolution in the constitution (2010). It ensures that communities are able to control tourism investments in their conservancies without introducing punitive levels of taxation on community tourism ventures.<sup>313</sup> The benefits that accrue therefrom are used by communities to empower themselves economically. To help support and promote such initiatives, the KWCMA has made financial provisions by creating the wildlife endowment fund and the wildlife compensation fund.<sup>314</sup> These funds are used to manage and restore protected areas as well as facilitate community based wildlife

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<sup>306</sup> Section 19 Land Act.

<sup>307</sup> Section 71 KWCMA.

<sup>308</sup> Section 72.

<sup>309</sup> Section 80(1) & (3). Consumptive wildlife use includes game farming; game ranching; live capture; research involving off-take; cropping; and culling while non-consumptive wildlife use include wildlife-based tourism; commercial photography and filming; educational purposes; research purposes; cultural purposes; and religious purposes.

<sup>310</sup> Section 80(1).

<sup>311</sup> Section 74.

<sup>312</sup> Section 70(1) "Every person has the right to practice wildlife conservation and management as a form of gainful land use.

<sup>313</sup> Nelson "Recognition and Support of ICCAs in Kenya" 32.

<sup>314</sup> Section 14, 23 and 24 KWCMA.

initiatives.<sup>315</sup> The sources are donations, monies appropriated by parliament, amounts levied for services on beneficiaries and investments. The Act also acknowledges the importance of incentives in wildlife conservation and management and therefore requires the Cabinet Secretary, in consultation with the Commission on Revenue Allocation, to formulate guidelines regarding incentives and benefit sharing, and the nature and manner in which the same shall be distributed.<sup>316</sup> The guidelines are to mandatorily comply with two conditions. First, a minimum of five per cent of the benefits from national parks shall be allocated to local communities neighbouring a park; and second, that private investments in conservancies shall benefit local communities and investors shall provide such benefits by applying various options including infrastructure, education and social amenities. These two conditions show a range of benefits that the indigenous people and local communities can draw from wildlife conservation and management. They are not limited to monetary benefits.

The Act also shows an improvement from the previous regime because it addresses the issue of bio-prospecting. It prohibits bio-prospecting except where a permit has been issued.<sup>317</sup> It requires the interests of communities as stakeholders to be taken into account before a permit is issued. This legal requirement recognises the notion of PIC of traditional knowledge holders before accessing genetic resources or traditional knowledge.<sup>318</sup> The Act further requires two agreements to be executed between the stakeholders and bio prospectors before a permit is issued. These are the MTA and Benefit Sharing Agreement (BSA).<sup>319</sup> This implies that the community get to negotiate their terms with the bio-prospectors. Since the KWS is mandatorily a joint partner in all bio-prospecting, it assures the welfare of communities will not be undermined.

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<sup>315</sup> Section 23(3).

<sup>316</sup> Section 76(1).

<sup>317</sup> Section 22.

<sup>318</sup> Cullet P "Environmental Justice in the Use, Knowledge and Exploitation of Genetic Resources" in Ebbesson J & Okowa P (eds) *Environmental Law and Justice in Context* (2009) Cambridge university Press 375.

<sup>319</sup> The MTA regulates provision for access to resources while BSA provides for sharing by the stakeholders in any future benefits that may be derived from the relevant bio-prospecting.

Currently there is a Bill in Parliament on benefit sharing.<sup>320</sup> Its purpose is to establish a system of benefit sharing in resource exploitation between resource exploiters and local communities, among others. It is intended to apply to all natural resources.<sup>321</sup> It establishes a benefit sharing authority to coordinate the preparation of benefit sharing agreements between local communities and affected organisations.<sup>322</sup> Further, it provides that where the law is silent, the authority shall have the power to determine the amount of royalties and fees payable by affected organisations.<sup>323</sup> However, where the law specifies the authority, then that particular law shall apply and the authority shall monitor compliance with the agreement.

While this has the potential of co-ordinating BSA in Kenya, it also has the potential of causing fragmentation as well as overlapping of functions. For instance, the KWS and KFS oversee protection and management of wildlife resource and forest resources respectively. Hence, having another authority to oversee these resources will result in replicating functions unnecessarily. The power accorded to the Authority to determine royalties and fees payable in all circumstances undermines the ability of the communities to negotiate for themselves.

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<sup>320</sup> The Natural Resources (Benefit Sharing) Bill, 2014.

<sup>321</sup> Section 3(1). The natural resources include petroleum, natural gas, minerals, forest resources, water resources, wildlife resources, and fishery resources.

<sup>322</sup> Section 5.

<sup>323</sup> Section 24.

## CHAPTER FOUR

### CONCLUSION

Everywhere people have been fighting for the rights of the indigenous people and local communities to participate in natural resource management. It has been part of the aspiration of the local people. ICCAs are a way for indigenous people and local communities to take back their land and manage resources their way, as they have done for centuries. While the concept of ICCAs has risen to prominence in the last decade, the majority of countries are yet to adopt their legal system to give practical realisation to their implementation. The focus of this thesis has been on the ICCAs and how the law can facilitate participation of indigenous and local communities in natural resource governance.

This dissertation sought to analyse the legal framework governing natural resources in Kenya to determine whether it enables the indigenous people and local communities to participate in natural resource governance. It began with an overview of the state of the environment in Kenya to set the necessary context. It then looked at the history of natural resource governance in Kenya. It established that it was characterised by indigenous people and local communities being owners, managers and beneficiaries of areas they had set apart for conservation. This was followed with dispossession of land on arrival of colonial masters who introduced unfavourable legislation that sought to exclude communities by entrenching an individual system of land holding. This system effectively destroyed many community conservation initiatives.

The dissertation then discussed the concept of ICCAs and how it rose to prominence, highlighting how it has been embraced internationally and been entrenched in many key decisions and guidelines emerging from IUCN, CBD and COP. It sought to unpack what ICCAs are and their relationship to protected areas. It found that while ICCAs may be puzzling, the form of recognition given determines whether they form part of the formal protected areas system or as conservation measures which complement protected areas. This dissertation also established that while ICCAs are an effective means to achieving

environmental sustainability, securing the livelihood of the indigenous people and local communities, and empowering them, they face both internal and external challenges. These include unfavorable land legislation and competing exploitative land uses. It then argued that certain legal elements appear to be vital for the success of ICCAs and explored how these should be dealt with within the relevant domestic legal framework. These were divided into four broad themes namely: recognition and establishment, land tenure and rights, management, and access, use and benefit sharing.

First, the dissertation argued that ICCAs could be recognised through a Constitutional dispensation or a statutory framework. This notwithstanding, the legal framework should expressly recognise ICCAs failing to which it should have provisions supporting it. It should stipulate the process of declaring them, and identify a high level policy authority to declare it. It further argued that the legal framework should adhere to principles of good governance and ensure that the indigenous people and local communities effectively participate in decision making.

Second, the dissertation argued that secured land tenure and rights was a prerequisite for successful ICCAs because it reduced the chances of state interference, and that it presented an opportunity for traditional institutions to exercise their role in land administration. As such, it argued that the legal framework should define the forms of land ownership and resource rights, which could be individual or collective, and that the interest transferred to the entities owning land could be full or partial. It established that rights could be secured by recording them against title.

Third, the dissertation argued that management of conservation areas was important and that regardless of the form it took, it was important for indigenous people and local communities to be involved in management. It could be community managed or state managed. It established three forms of management, including single management, joint management and co-management. It argued that the legal framework should identify management

authorities and establish their appointments. It should also identify different institutions within the management and determine their composition. It argued that a management plan is important to act as a guide. The legal framework should therefore make provision for it, state the basic content of a management plan, establish a period within which to review it for purposes of adapting to the changing environments, and provide for means of giving the plan legal status.

Lastly, the dissertation established that there was need to regulate access to and use of genetic resources and TK by the indigenous people and local communities as well as the outsiders. It argued that the legal framework should expressly provide for access and use rights in the conservation areas for different purposes, and establish means of granting those rights. It argued that the legal framework should address the issue of cost and benefits because more often than not, indigenous people and local communities' input, resource-wise, was not commensurate to the benefits they received. In order to motivate conservation initiatives, the legal framework should expressly state the incentives that could be enjoyed through these initiatives, and provide means of how benefits accruing could trickle to the communities.

The dissertation analysed Kenya's legal framework, both pre- and post-2010. It started with pre-2010 where the following was established. First, the dissertation established that the legal framework did not recognise ICCAs. While KWCMA and KFA identified that the Ministers held the responsibility of establishing protected areas, communities were not involved in the process. The concept of public participation was only employed when varying boundaries. Second, the land tenure and resource rights were insecure. Third, wildlife resources were state managed. The indigenous people and local communities were only involved in as far as ensuring and maintaining animal migration patterns. They were not effectively represented in management institutions nor while preparing management plans. While the wildlife resources law provided for management plans, it failed to provide for its review. On the other hand, the forest resources were managed by both the state and communities. The indigenous people and local communities were represented in various

management institutions. They were also involved in the preparation of management plans. Both pieces of legislation were, however, silent on review of the plans and means of giving the plans legal effect. Lastly, both pieces of resource legislation provided for access and use rights. However, wildlife resource rights were limited. Both did not address the issue of bio-prospecting, and as a result a comprehensive regulation was enacted to do the same.

The legal framework post-2010 was progressive. First, while it did not expressly recognise ICCAs, it supported them. It allowed communities to establish conservancy areas and manage the same. It also mandatorily required the indigenous people and local communities to be involved in not only establishing protected areas, but also in natural resource governance. Secondly, the dissertation established that the legal framework recognised that communities could own land and resources therein, and provided means by which land ownership and resource rights could be secured. The dissertation established that secured land ownership and resource rights would remain a dream until the Constitution (2010) is enforced. Third, the dissertation established that communities are involved in management of natural resources and in preparation of management plans. It also established that the legal framework gives the management plan a life span after which monitoring and reviews are to be done, hence facilitating adaptive management. The plan is also given legal status. Lastly, the dissertation established that the legal framework not only addresses access and use rights, but it also addresses the issue of bio-prospecting which was silent in the previous legal regime.

From the above analysis, it is evident that Kenya has made strides in enabling ICCAs. However, while this is a move in the right direction, there is a need for more work to be done.

First, the Constitution (2010) should be enforced. While land legislative reforms are underway, the status quo remains. The community land law is meant to complete the set of regulations envisaged in the National Land Policy of 2009. Four land related laws were enacted between 2011 and 2012 including

the Land and Environment Act, Land Act, Land Registration Act and National Land Commission Act. However, these laws remain incomplete with the community land bill yet to become law. This will be a game changer as it will address issues like the recognition of community land tenure and rights, issues of title to land and recognition of customary land administration systems, hence it will support and strengthen ICCAs.<sup>324</sup> In addition, it will present an opportunity for resolving historical injustices through restitution of land previously grabbed.

There is need to review existing legislation and draft new legislative and institutional frameworks to recognise indigenous people and local communities' customary governance systems. This is especially evident with the KFA which still refers to the old system of land holding- trust land - and which only provides for co-management or joint forest management in state forest reserves. It however seems that this will only be possible when the land tenure issue has been addressed, because only then can other natural resources law harmonise management.

Wide selections of ICCAs have been operating under diverse piece-meal and fragmented legislation. They have been complemented by different institutional and management mechanisms. These mechanisms have often times overlapped in the performance of their functions. As such, there is need to harmonise the protected areas legislation.

Over the years, there has been a general lack of political good will in enabling ICCAs. There is no point of having excellent legislation if they are not going to be implemented to the letter. Law and practice certainly have to be in tandem. This is drawn from the recent acts of forceful eviction of the Sengwer community from their areas in the name of conservation.<sup>325</sup> In addition, the

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<sup>324</sup> Hussein A *Recognising Sacred Natural Sites: An Analysis of how Kenyan Constitution, National and International Laws can Support the Recognition of Sacred Natural Sites and their Community Governance System* (2012) Institute for Culture and Ecology (Kenya), African Biodiversity Network and the Gaia Foundation 11-13.

<sup>325</sup> Forest Peoples Programme "Kenya Defies its own Courts: Torching Homes and Forcefully Evicting the Sengwer from their Ancestral Lands, threatening their Cultural Survival" <http://www.forestpeoples.org/topics/legal-human-rights/news/2014/01/kenya-defies-its-own-courts-torching-homes-and-forcefully-evi>. (Accessed on 24.02.2015).

government should lead by example in obeying court orders, for instance compensating the Endorois community.

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