

**THE GENDERED EFFECTS OF GAZZETEMENT OF INDIGENOUS
LAND AS A GAME RESERVE. A CASE STUDY OF THE
ENDOROIS TRIBE IN RELATION TO LAKE BOGORIA GAME
RESERVE, RIFT VALLEY, KENYA**

Abstract

The writer of this dissertation, a social worker, employs a combination of modern research methodologies (especially, the Women's Law Approach) to collect a wide range of data to trace the effects of the cynical and unlawful destruction of the pastoralist way of life of the Endorois tribe, forcibly evicted from their ancestral lands in 1986, to make way for tourism. It has not only caused the impoverishment of the community, especially its women and girls, but also severe degradation of the environment whose resources used to be carefully communally-managed in terms of the tribe's gender-sensitive customs. Wide-ranging reforms in accordance with local, regional and international Human Rights instruments are recommended to restore the Endorois to their former livelihood and reinstate them as valuable members of Kenyan society.

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LIST OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

1. The Universal Declaration of Human Rights (1948).
2. The United Nations International Covenant on Civil and Political Rights (1966).
3. The United Nations International Covenant on Economic, Social and Cultural Rights (1966).
4. The African Charter on Human and People's Rights (1981).
5. United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979).
6. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003).
7. International Labour Organization (ILO) Convention No. 169 (1989).

LIST OF NATIONAL STATUTES

1. The Constitution Kenya,(1997)
2. The Water Act (2002)
3. The Wildlife (Conservation and Management) Act, Chapter 376
4. The Trust Lands Act, Cap 288.
5. The Forest Act, Chapter 385
6. The Environmental and Management act 1999

CASE LAW

1. Kemai & Others v The Attorney General & Others, High Court of Kenya at Nairobi, Civil Case No. 238 of 1999
2. William Yatich Sitetalia, William Arap Ngasia et al. v. Baringo Country Council, High Court Unreported Judgment of 19 April 2002, Civil Case No. 183 of 2000
3. The Mayagna (Sumo) Indigenous Community of Awas Tigni v The Republic of Nicaragua, 31st August 2001.
4. Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, 27th October 2001.
5. Richtersveld Community and Others v Alexko Limited and the Government of the Republic of South Africa, Supreme Court of Appeal of South Africa Case No. 448, 2001.
6. Mabo Queensland (No. 2) (1992) 175, CLR IF.C. 92/014, June 1992, High Court of Australia.

ABBREVIATIONS

EWC	Endorois Welfare Council
ILO	International Labour Organization
LBNR	Lake Bogoria National Reserve
CEMIRIDE	Centre for Minority Rights Developments
NGOs	Non Governmental Organizations
RECONCILE	Resource Conflict Institute
KLA	Kenya Land Alliance
WWF	World Wide Fund for nature

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CHAPTER ONE

INTRODUCTION

The Endorois are a distinct Kalenjin-speaking community, who were the traditional inhabitants of the Lake Bogoria areas, within the Rift Valley Province in Kenya. A community of approximately 60 000 people¹, they have practised pastoralism since time immemorial. Depending on their livestock for survival, the Endorois' traditional way of life has consisted of grazing their animals (cattle, goats, sheep, donkeys) in the lowlands near Lake Bogoria during the rainy seasons, and turning to the Monchongoi Forest through the dry seasons. The land surrounding Lake Bogoria is fertile, providing green pastures and also medicinal salt licks that are vital for the health of the livestock. The Lake has always been of the utmost importance to the religious and traditional practices of the community.

No challenges to the Endorois' customary rights over the Lake Bogoria region was made until the gazetting of the area as a game reserve in 1973.² At issue is the fact that the Endorois community was not consulted prior to declaring the land a protected area, nor were they duly informed of the gazetting after its coming into effect, until 1977, when the first game warden to the area informed them of his new role, and of the fact that construction of a road to facilitate access to the lake would soon be underway.³

In 1986, the community was finally evicted from the fertile land surrounding Lake Bogoria. They were displaced to a semi-arid land, which proved insufficient for sustaining their livestock. As a result, a great proportion of their animals died, reducing the community to a level of economic hardship and insecurity previously unknown to them. Moreover, attempts to gain access the lake for religious and cultural purposes were met with harassment and intimidation.

¹ www.cemiride.info, The justice and equality programme intervention in Endorois conflict.

² During the colonial period, the government did not interfere with the community's pastoralist activities in the lake Bogoria area, despite its sectioning into three separate districts. Furthermore, upon independence, the land inhabited by the Endorois was named Endorois location. As a Native reserve, it was then placed under the local authority of the respective County Councils, to be held in trust on behalf of the Endorois community.

³ Affidavit submitted to the Nakuru high Court, 2000, interview with Elder Richard Yegon.

Efforts to regain access to their land culminated in domestic legal action from 1997 to 2002, which ultimately failed. Details of the case will be discussed later.

The community has since taken the case to the African Commission Court of Human and Peoples Rights in Gambia.⁴

LEGAL ARGUMENTS AND AIMS OF THIS CASE STUDY

This case study raises issues of eviction without proper consultation or compensation. In tandem with this, it raises issues of effective participation in the community's development. As pastoralism not only consists of an economic activity, but also a distinct way of life, the case study also raises issues of a community's right to take part freely in their traditional cultural practices that have been passed on to them by their ancestors. In addition, since the Endorois people are pastoralists requiring fertile land for the survival of their cattle, the case study raises important issues relating to the use of natural resources that are found on ancestral lands. The community, therefore, alleges violations of the provisions of the African Charter on Human and Peoples Rights.⁵

Numerous interviews with the Endorois community have confirmed three main concerns: restitution of the Endorois' traditional land, adequate compensation and access rights.⁶

ABOUT LAKE BOGORIA

Lake Bogoria is one of the alkaline lakes in the Great Rift Valley of East Africa. It is situated partly in Baringo District and partly in Koibatek District, about 260 kilometers North-West of Nairobi. The lake covers an area of 34 square kilometers. It is rich in biodiversity, hosting about half of the world's population of lesser flamingoes. It also hosts other bird species including greater flamingoes, black necked grebe, fish eagles and several migratory species. Due to its bird richness, it has been designated as an 'Important Bird Area'. It also hosts several mammal species including zebras, gazelles, buffaloes, several primate species (e.g. patas monkey) and the only relatively accessible population of greater kudus. In addition to its rich biodiversity, Lake Bogoria has unique natural attractions in the form of its hot springs.

⁴ Information relating to this case is necessarily limited in view of its status before the African Commission.

⁵ Herein referred to as the African Charter, articles 8, 14, 16, 17(2), 20(1), 21 and 22

⁶ The interviews were conducted during the period of October 2007- January 2008

The area around the reserve is situated in a marginal agro-ecological zone that is suitable for livestock production, wildlife habitation and dry land agriculture. It is inhabited predominantly by members of the Tugen tribe with a few Njemps and Pokot tribes' people. The total population around the reserve is estimated at 8000 people. These communities are predominantly pastoralists and use the area enclosed by the reserve for dry season grazing, salt lick extraction for their livestock and some sections for prayers during exceptionally difficult times. They also grow crops on the edges of the wetlands and along the two rivers, rivers Weseges and Sandai, which feed the lake. Legal access to the Reserve is, however, restricted to dry season grazing that is allowed only during very severe droughts. The communities also enter the reserve in order to conduct special prayers at sacred sites within the Reserve and are allowed to pass through it en route to some villages.

STATEMENT OF THE PROBLEM

This case study seeks to examine the gendered effects of gazzetement of the Lake Bogoria National Reserve (LBNR) and how it has impacted on the rights of the community over the resources in these areas and, hence, the impact on community-based initiatives of resource management. In this context, this research argues that recognition of community rights over natural resources determines the extent to which local communities will be motivated to participate in the sustainable management of the same.

The Endorois case study raises issues of eviction without proper consultation or compensation. In tandem with this, it raises issues of effective participation in the community's development.

AIM OF THE RESEARCH

To Investigate the gendered impact of the creation of the Game Reserve by the Government which disregarded national laws, Constitutional provisions and, most importantly, numerous African Charter (Banjul) Articles, including the right to property, the free disposition of natural resources, the right to religion, the right to cultural life and the right to development of the Endorois.

OBJECTIVES OF THE STUDY

The study was carried out to:

1. Investigate the socio-economic impact of the gazettment of Lake Bogoria on the Endorois community.
2. Find out whether the gendered roles of the Endorois men and women have changed due to the community's lack of access to natural resources as a result of gazettment of Lake Bogoria.
3. Evaluate the roles and contributions of Endorois women and men in management access, use and control of pastoral resources.
4. Assess policy and legal options and institutional frameworks appropriate for effective participation of the Endorois community in resource decision-making processes at the local national levels.

STUDY ASSUMPTIONS

The following assumptions guided the study:

1. The gazettment of Lake Bogoria as a game reserve and the subsequent eviction of the Endorois tribe from their ancestral land have destabilised their traditional way of living due to lack of access to natural resources such as grazing areas and water sources.
2. The eviction of the Endorois from their ancestral land was for economic reasons, in particular, the development of the tourism sector, which has destroyed rather than improved the Endorois' pastoralist livelihood.
3. The Endorois community suffer discrimination in view of the fact that they have been denied the right to development as a result of lack to access to their ancestral land.
4. The government has not provided for policy recognition of communal land tenure, equitable sharing of resources and benefit-sharing measures that accrue from the tourism industry.
5. The gendered roles of the Endorois men and women have changed due to the community's lack of access to natural resources.

RESEARCH QUESTIONS

1. How has the gazettelement of Lake Bogoria as a national reserve impacted on the traditional way of living of the Endorois ?
2. How has the lack of access to natural resources such as grazing areas and water sources impacted on the Endorois' traditional way of living?
3. How the Endorois community adapted to life outside Lake Bogoria after their evictions?
4. How have gender roles of men and women changed?
5. Was eviction of the Endorois from their ancestral land carried out for development purposes?
6. Has the tourism industry improved or destroyed the Endorois' pastoralist livelihood?
7. What rights to development have the Endorois been denied due to displacement?
8. How have the rights to development of the Endorois been affected by their displacement from their ancestral lands?
9. Does the government recognize the Endorois' pastoralist way of life as a sustainable mode of production?
10. How does the government promote tourism and the traditional mode of production of pastoralists?
11. How does the government and tourism industry promote/protect the pastoralists' mode of production in relation to tourism?
12. How does the Endorois community suffer discrimination as a result of lack of access to natural resources?
13. How has the Endorois community benefited from the revenue earned from tourism in the Lake Bogoria Game Reserve which contains their ancestral lands?

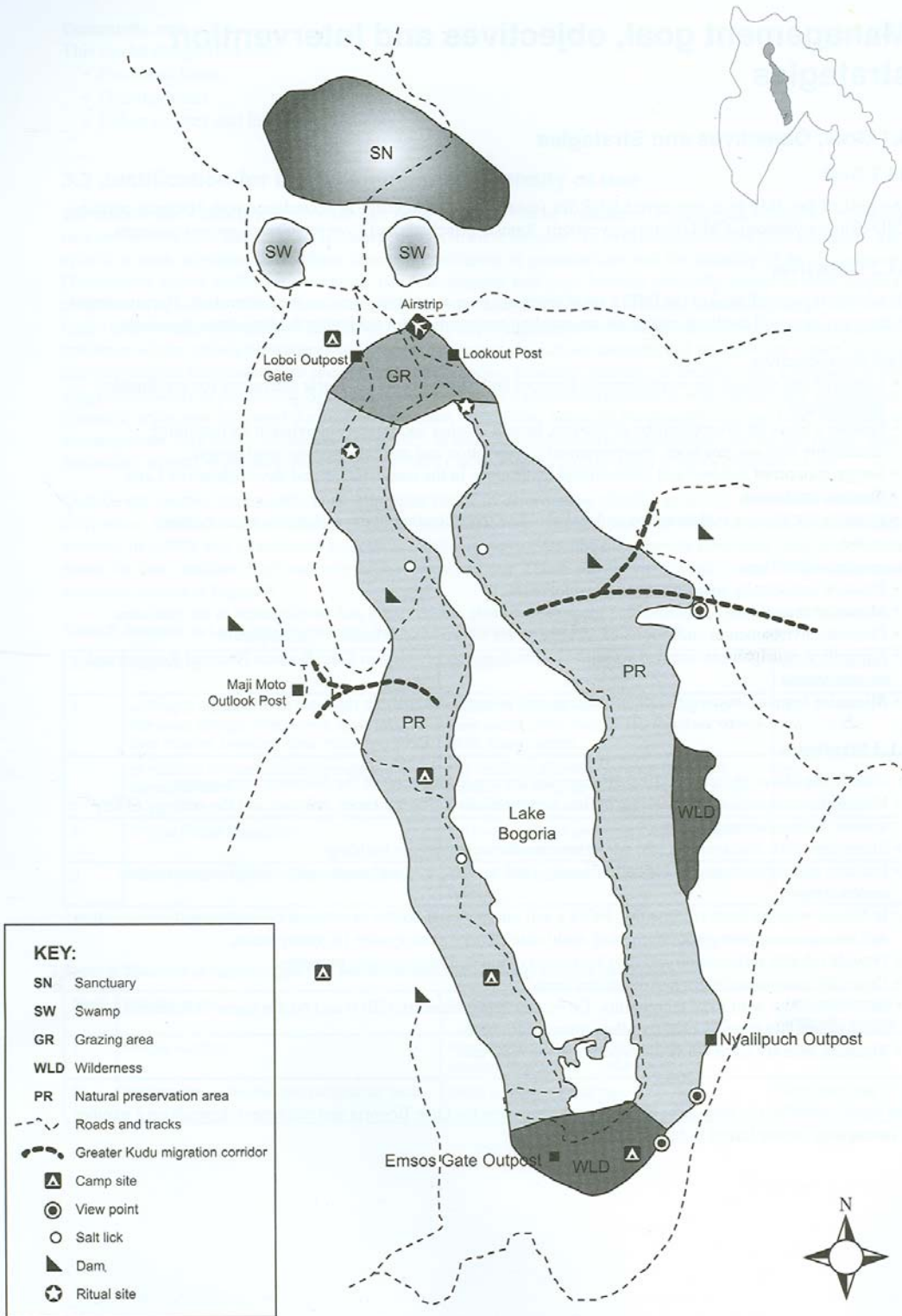
From these broad guiding questions, I developed sub-questions in order to extract specific information on the areas under investigation.

AREA OF STUDY

The study was undertaken in two locations, Sandai and Loboï where Mochongoi Forest and Lake Bogoria National Reserve (LBNR) are, respectively, situated. The study was concentrated here, as these are the places where there have been conflicts between the Endorois and the Government over management and ownership.

Prior to the field study, background information was collated through extensive reading around the subject. Other literature included policy and legislative and human rights instruments. The area of this study is shown on the map below. The map below shows the blocked grazing areas, sites of worship and the watering reservoirs, among others.⁷

⁷ Source Lake Bogoria Integrated Management Plan 2007-2012 by WWF (2007)



CHAPTER TWO

LITERATURE REVIEW

INTRODUCTION

This chapter presents literature related to the topic of the Endorois tribe in relation to Lake Bogoria National Reserve, pastoralists and indigenous people. The literature is analyzed to show gaps which this research seeks to address. The Chapter also details the policy and constitutional provisions, which, in the absence of clear legislation on natural resource management, is the basis for advancing pastoral non-discrimination and gender equality for men and women.

LITERATURE AND LAW REVIEW

The question whether or not the Endorois are indigenous peoples is far from settled between the Government of Kenya and the community. The Government has refused to recognize them because it is benefiting from the tourism industry which is taking place on the Endorois land. The Government has yet to ratify the ILO Convention 169 Concerning Indigenous Peoples in Independent Countries, notwithstanding strenuous efforts by interested civil society organizations with support from the ILO and other advocates supporting the land rights of the Endorois community. Notwithstanding this, the Endorois have identified themselves as indigenous peoples and are active participants in the indigenous peoples' movement at the global level and within the framework of the African Union.⁸

The idea of 'indigenous peoples' remains sensitive in Government circles, particularly because the claims of indigenous peoples are so closely related to the thorny issue of land and natural resources appropriation since colonial times. The Maasai, Ogiek, Sengwer, Pokot and other communities that have sought to be recognized as indigenous peoples in Kenya all have historical claims against the Government dating from colonial times concerning their lands and natural resources which have been alienated and appropriated

⁸ Pastoralist communities such as the Samburu, Maasai of Kenya and Tanzania, Rendille, Borana and Endorois identify as indigenous people. In Indigenous people in Africa, the forgotten people, The African Commission work on the indigenous people in Africa, www.iwgia.org

to other land use systems, including protected areas occupied by wildlife leading to the creation of numerous National Parks and Reserves.⁹

It is not in dispute that the Endorois, as a community, share in many of the attributes that characterize indigenous peoples globally. Their attachment to land and natural resources, as well as their strong cultural identity and its links to their livelihood system, their marginalization and pervasive poverty, the alienation of their lands and natural resources for purposes of so-called 'national interest', and their historical struggles for their land rights and their cultural identity are some of the characteristics that justify their claim to be recognized as an indigenous people.

Since colonial times, indigenous communities in the world over have been deprived of their ancestral lands and or their natural resources bases through unjust state policies and legislation. Despite the persistent struggles by indigenous peoples and human rights organizations against the forceful eviction and appropriation of the lands of indigenous communities, this unjust practice continues today, unabated. Conservation approaches pursuing protectionist and exclusionist policies have continued to alienate the rights of indigenous people, largely negating considerations of livelihoods, equity and human rights protection.

For purposes of this research and to provide some guidance in line with international norms, this report will adopt the definition of indigenous people given by the International Labour Organization (ILO) Convention No. 169.¹⁰ Article 1 provides that the Convention applies to:

- a) distinguish them from other sections of the national community and whose status is tribal people in independent countries whose social,

⁹ Currently the country has 26 National Parks, 28 National Reserves and one Sanctuary, which occupy 44000 km² (8% of the total territory) and harbour about 25% of total wildlife populations. About 75% of wildlife animals therefore live in privately owned lands, which are adjacent to these protected areas. The majority of the protected areas are situated in semi-arid lands, which previously had been occupied by traditional pastoralists.

¹⁰ The Convention was adopted by the international labour conference at its 76th session, Geneva, 27th June 1989 and entered into force on the 5th September 1991

cultural and economic conditions are regulated wholly or partially by their own customs or by special laws or regulations;

b) people in independent countries, who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest for colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their social, economic, cultural and political institutions.

A community will be defined as a group of people living in one locality; or a group of people having common ownership or participation; or a group of people having cultural, religious, ethnic or other characteristics in common.¹¹ The term “community” need not therefore refer to a traditional community: it applies equally to an urbanized community, a rural community or a traditional community. “Culture” refers to the total of inherited ideas, beliefs values and knowledge, which constitute the shared basis of social action; or the total range of activities and ideas of a group of people with shared traditions, which are transmitted and reinforced by members of the group.”¹²

In this research, a community is defined by reference to a group of users of identifiable natural resources. Culture refers to the cultural practices and values of the group of natural resource users.

¹¹ Collins English Dictionary, 3rd Edition, HarperCollins Publishers, (1991).

¹² Collins English Dictionary, 3rd Edition, HarperCollins Publishers, (1991).

THE CONSTITUTION OF KENYA

In Kenya, traditional indigenous activities such as pastoralism and honey gathering are not recognized as economic activities. The focus on cash economy has prevented recognition of their cultural and spiritual identity. The Endorois are among Kenya indigenous communities.

Indigenous peoples lack participation in the decision making process, especially on issues that affect them either directly or indirectly. There are also issues of lack of recognition (both actual and constructive)¹³ and discrimination by institutions of government, which appear to be allowed by law either actively or by default. Most laws in Kenya are fashioned to allow individual claims, while obstructing group identity rights or claims. Yet, communal solidarity is essential to the identity of indigenous people.

However, the Constitution in chapter V that deals with human rights is boldly titled Protection of Fundamental Rights and Freedoms of Individual. Relying on this broad title and anchoring its position on section 84 of the Constitution that deals with enforcement of the protective provisions, a judge recently said:

The scheme of the protection of fundamental rights envisaged by our Constitution is one where the individual as opposed to community or group rights are the ones enforced by the courts Except for a detained person for whom someone else may take up the cudgels, every other complaint of alleged contravention of fundamental rights must relate the contravention to himself as a person....there is no room for representative actions or public interest litigation in matters subsumed by sec 70-83 of the Constitution.¹⁴

Given the lack of group concerns coverage in the Kenyan Constitution, my study seeks to assess the legal instruments which can be used by the Endorois people as they advocate for the restoration of their land rights. This is because most cases brought by and on behalf of indigenous people as a group in Kenya normally fail on technical legal grounds.

¹³ Actual recognition means that there are people in the country who are not aware of these people as citizens, who fall within the brackets of minorities or indigenous peoples, they have never heard of them nor seen anyone from these communities. Constructive lack of recognition means a process by which important decisions are made and crucial activities take place that ignores the citizenship of the indigenous peoples

¹⁴ As per Ringera, J in H.C Misc. Civil application No 82 of 2004 (OS), Rev Timothy Njoya & others Vs the AG & others

This position has its roots in the development of the country's legal system. The dominant ideology in Western jurisprudence is that rights exist only as property of individuals. However, it is now widely accepted that communities, whether organized or not, or groups, defined simply by social and cultural ties, do have and enjoy rights by reason of their own characters.¹⁵ Despite such progressive provisions, several practical difficulties remain, including bringing cases to court.

The Constitution of Kenya does not define the term indigenous or indigenous interests. It does however have some provisions of interest to indigenous people.¹⁶

Chapter V of the Constitution deals with fundamental rights and freedoms. The most relevant sections for indigenous peoples are section 70, which deals with various rights and freedoms, section 78 which deals with freedom of conscience and section 82 which deals with protection from discrimination. Thus discrimination against minorities or indigenous peoples is prohibited. Chapter 1X of the Constitution relates to 'trust land'. Trust Land is vested in the County Council which holds the land in trust for the benefit of those ordinarily residents on that land and to give effect to such rights or other benefits vested in any tribe, group family or individual under customary law.

THE DRAFT CONSTITUTION 2004

The draft Constitution of Kenya 2004 refers to 'indigenous communities' in Article 306 as:

- a) A group who, as a result of laws and practices before or after the effective date, were or are disadvantaged by unfair discrimination on one or more prohibited grounds set out in Article 36; or
- b) A community which by reason of its relatively small population or otherwise, has been unable to fully develop its internal structures or resources sufficient to participate in the integrated social and economic life of Kenya as a whole; or
- c) A traditional community which, out of the need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; or
- d) An indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter gatherer economy; or

¹⁵ The Environmental Management and Co-ordination Act no 8 of 1999 section 3 talks of every person which has been taken to mean more than individuals

¹⁶ Constitution of Kenya section 33(1,3) & 43

e) A Pastoral person or communities, whether they are i) nomadic; or ii) a settled community which, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of the republic as a whole.

It is hoped that the Endorois people are covered by the draft Constitution and their claim to land rights may be protected if the draft Constitution is adopted. The civil society will also be able to use the new Constitution to lobby for group rights. My study seeks to investigate how the Endorois people are putting forward their claims so that if the draft Constitution is adopted my study among other researches can be used as a reference point to advance their cause.

Article 43 provides further provides that indigenous communities are entitled to enjoy all rights and freedoms set out in the bill of rights ¹⁷ on a basis of equality taking into account their special circumstances and needs. For the first time, Article 306 clearly recognizes group rights as a concept and in relation to indigenous peoples.

PROTECTION WITHIN OTHER LEGAL FRAMEWORKS

Over the last half a century, international law has been evolving a set of international legal and soft norms and principles regarding recognition and protection of the rights of indigenous peoples and minority groups such as the Endorois. The variety of these instruments cover such rights as the right to cultural identity and cultural heritage, land and land rights, self determination, economic development, environment and health rights. As demonstrated in the discussion below, it is clear that the Endorois, as an indigenous community, is entitled to protection under international law.

The first international instrument that promotes human rights generally is the United Nations Declaration on Human Rights.¹⁸ Article 17 of the Declaration guarantees the right to own property either individually or in association. To safeguard this right, the declaration proscribes arbitrary acquisition of property. Article 22 of the Declaration requires states to promote the right to social security and economic development. This

¹⁷ Right to life, equality and freedom from discrimination: the right to Health, education, housing, food water sanitation and Environment; the right to language, culture..

¹⁸ United Nations General assembly Resolution 217 A(111) of 10th December 1948

right includes freedom to exercise economic, social and cultural rights, rights that are indispensable to the dignity of mankind.

To realize the rights enumerated in the Declaration, three international agreements were concluded in 1966: the International Covenant on Civil and Political rights (ICCPR) article 27; the United Nations Convention on the Elimination of all forms of discrimination article 1, and the International Covenant on Social, Economic and Cultural Rights (ICESCRs) article 1(1 & 2).

General and specific aspects of indigenous people's rights are articulated throughout the ICCPR. For example, Article 1 of the Covenant contains the self determination clause, which calls upon states to grant indigenous groups the right to freely determine their political status and freely pursue their economic, social and cultural development. This Article implicitly recognizes the right to exploit natural resources in pursuit of social and economic development. Hence the denial of indigenous people's right to own, use and exclude them from exploiting natural resources is in contradiction to the right to self determination. In addition, Article 27 of the Convention specifically provides that:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their groups, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Covenant further prohibits states and other actors from depriving people or individuals of their means of subsistence, under any circumstance. This provision is perhaps the most instructive in so far as safeguarding communal land of indigenous people in general and addressing the historical injustices occasioned to the Endorois community in particular is concerned. The Article implies that deprivation of indigenous communities like the Endorois, of their ancestral lands and the resultant denial of access to these lands not only constitutes a violation of their right to sustenance but also undermines their constitutional right to life. This study seeks to find out the extent to which the Government of Kenya has fulfilled her international obligations relating to the rights of indigenous communities to resources.

There is also the Africa Charter on Human and People Rights (Banjul Charter)¹⁹. At a theoretical level, the African Charter represents the highest commitment by African states to promote and protect human rights of African peoples. Pursuant to Articles 2, 3, and 5, the rights to equality and human dignity belong to all individuals, including individual members of indigenous communities. The Charter also recognizes collective rights of people a concept that has been interpreted by a number of scholars to symbolize recognition of the unique lifestyles of indigenous and local African communities, thus the need for protection of their aspirations and rights under Articles 14 -24. The African Charter has also established the African Commission on People and Human Rights to monitor the implementation of the African Charter and examine complaints from states so as to promote human rights. Furthermore, Article 62 requires member states to submit reports every two years on measures they have taken to implement the provisions of the Charter.²⁰

Lastly, there is Convention 169 concerning indigenous and tribal peoples in newly independent countries, adopted by the General Conference of the International Labour Organization (ILO) in 1989. The Convention enjoins member states of the ILO to respect and promote the cultures and spiritual values of indigenous communities and collective rights that they enjoy in relation to their lands or territories. Some of the rights recognized under the Conventions include the right of ownership and possession of lands that indigenous peoples have traditionally occupied and the right to access to land from which they have traditionally occupied and the right of access to lands which they have traditionally derived sustenance. The Convention calls for greater participation by, and consultation with, indigenous groups in decisions that affect their rights. For example, Article 16 requires states to protect indigenous communities from eviction from their lands. In instances where it is necessary to acquire their land in public interest, states are required to seek their informed consent and provide them with adequate compensation.

¹⁹ Kenya ratified the African Charter on 23 Jan 1992

²⁰ During the research I could not establish the existence of any record that suggests that Kenya has ever submitted any reports as required by Charter

In summary, the indigenous question has not been dealt with seriously within the existing legal frameworks. In the few instances where the law does make provisions, the realization of those rights as enshrined has been a major challenge.

CASE LAW

Recent legal developments, both within and beyond the African context, confirm that success in obtaining the aforementioned remedies as set in the Endorois case²¹ are possible and within reach.

With regards to its jurisprudence, the African Commission took its most decisive step in confirming its commitment to collective rights in the case of *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, where the Ogoni were referred to as ‘people’, ‘communities’, and ‘society’.²² The decision also gained recognition as a landmark case by virtue of declaring that all rights contained within the African Charter were in effect justifiable.¹⁷

The range of ‘solidarity rights’ contained within the African Charter, and the reaffirmed commitment to uphold these rights is of critical importance for the protection of indigenous and pastoralist communities, such as the Endorois. The African Charter, in this respect, champions the indivisibility of human rights reaffirmed in the 1993 Vienna Declaration and Programme of Action.²³

Furthermore, cases within the domestic jurisdictions of member states of the African Charter also indicate an encouraging measure of progress in relation to rights that impact heavily on indigenous peoples and minorities, such as those relating to the use of, and access to, natural resources.

²¹ See legal arguments and aims of the case above

²² The African Commission noted in relation to Article 21(which provides people a right to freely dispose of their natural resources) that in all their dealings with the oil consortiums, the Government did not involve the Ogoni communities in the decisions that affected the development of Ogoni land. The commissioner further noted that the survival of the Ogonis depended on their lands and farms. These and similar brutalities not only persecuted individuals in Ogoniland, but also the Ogoni community as a whole.

²³ Vienna Declaration and programme of action, all human rights are Universal, indivisible and interdependent and interrelated...

A leading example of this is the *Richtersveld Community and Others* case,²⁴ in which an indigenous community affirmed its right to restitution of its customary law interests to land. In the judgment, the South African Supreme Court recognized that a nomadic lifestyle can support the exclusive use and occupation of land, especially where the community had a strong sense of entitlement to the land that others respected. It declined an overly technical approach to establishing occupation, holding that the community was not required to have occupied every bit of the subject land to support their beneficial occupation of the overall area.

Other significant developments relating to indigenous peoples in general, and land rights in particular, include the Australian decisions of *Mabo v Queensland*²⁵ and the Inter-American case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,²⁶ both of which are likely to guide any future decisions of the African Commission by virtue of Article 60 of the African Charter.

The added value of the *Mabo* decision stems from its achievement in inserting the legal doctrine of native title into Australian law.²⁷ The *Awas Tingni* case, on the other hand, accorded due attention to the communitarian tradition of indigenous peoples, which is reflected in their understanding of collective rather than individual ownership of land. Though communal property rights of indigenous peoples were recognized in Nicaragua's domestic law, the state was nonetheless found in violation of Article 21 of the American Convention on Human Rights on the right to property in view of its failure to carry out proper delimitation, demarcation, and titling of the territory belonging to the Community. The Inter-American Court accepted that this had created a climate of constant uncertainty among the members of the Awas Tingni Community, in so far as they did not know for certain how far their communal property extended geographically and therefore the scope of their freedom to use and enjoy their respective property.

²⁴ *Richtersveld Community and Others Vs Alexkor Limited and the Government of the Republic of South Africa*, Supreme Court of appeal of South Africa, Case No. 488/2001, 24th March 2003

²⁵ *Mabo v Queensland*, (No. 2)(1992), 175 CLR 1 F.C. 92/014, 3 June 1992, High Court of Australia

²⁶ *The Mayagna (Sumo) Awas Tingni Community vs. Nicaragua*, 31 August 2001, No 79 (2001)

²⁷ The new doctrine of native title replaced a 17th Century doctrine of terra nullis (no one land) on which British claims to possession of Australia were based. <http://foundingdoc.au/text-only/places/cth>

GENDER AND THE LAW IN KENYA

The term gender means the state of being either male or female. The male and female genders define the character and characterize all human beings in society. The two genders are distinguished from one another by physical, that is, biological sexual/reproductive differences.

The term gender has however increasingly acquired a social meaning in which it defines how the male and the female gender relate in society. The social meaning refers to social characteristics of one's biological sex. These characteristics include gender-based division of labour whereby duties are allocated on the basis of one's sex. For example, the female gender is allocated duties which belong to the private rather than the public sector while the male gender is allocated non-domestic duties, such as decision making which belong to the public sector.²⁸

Thus when one adverts to the issue of gender today, one is not merely talking about the physical difference that being biologically male/female would entail. One is also talking about social construction of maleness and females and these often translate into power relations between men and women. Sex then is distinguished from gender by what one is born as, that is female or male, and therefore it is a biological concept. Culturally-determined patterns of behaviours, such as rights, duties, obligations and status assigned to women and men in society (gender roles) are varied even with in the same society.²⁹

In Kenya, despite the gender neutrality of our legal provisions, equal rights and privileges cannot be assumed to have been guaranteed and realized. Gender neutral laws have, in many instances, resulted in de facto discrimination. As Tove Stang Dahl aptly points out:

As long as we live in a society where women and men follow different paths in life and have different living conditions, with different needs and potentials, rules of law will necessarily affect men and women differently. The gender neutral legal machinery...meets the gender specific reality" (Tove Stang Dahl, 1987).

²⁸ Clarion, An introduction to gender, law and society: Constitutional debate No.11 (Claripress limited, Nairobi 2001) p.2.

²⁹ P. Kamari- Mbote, gender Considerations in making: Engendering women's rights in the legal process in University of Nairobi Law Journal (2003)

This is because the Kenyan Constitution contains a tension between the principle and exemptions made for certain laws affecting women's right.³⁰ However, the ongoing national land policy formulation process seems to show more interest in gender issues and the Constitutional Review provides a framework for consideration of women's land rights.

When looking at the legal status of women in Kenya, one has to also look at both the international and domestic dimensions. This is because Kenya is a signatory to many international legal instruments that have a bearing on the legal status of women. The following are some of the international instruments relevant to the research topic, Convention on the Elimination Of All forms of Discrimination Against Women (CEDAW) and the African Charter on Human and People's Rights, even though some of these instruments have not found their way into the Kenya domestic regime because Kenya does not have an automatic domestication clause in respect of ratified International Covenants.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) stipulates the urgency of eliminating stereotypes, customs, and norms that give rise to the many legal, political and economic constraints on women. Article I of CEDAW defines discrimination as "any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, human rights, and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Discrimination contributes to the perpetuation of gender inequalities. For instance, when women are not adequately represented in decision-making levels, their rights and freedoms may be violated. Article 2 affirms the state obligation to pursue by all appropriate means and without delay a policy of eliminating discrimination of women. It requires states parties to undertake constitutional, legislative and socio-economic reforms aiming at the elimination of

³⁰ Section 82 (4) a number of laws are exempted from the provision against discrimination. The laws exempted by this section are in areas that directly affect women.

discrimination against women in both public and private sphere. Notice that equality relates to the dignity, rights, opportunities and worth of men and women to participate in different spheres of life (Kameri-Mbote, 2002). Empowerment demands political participation, civil rights and reproductive rights for all women and a review of the Constitution, laws and policies that inhibit equality would be necessary. Equally, an enactment of women-friendly statutes and policies would be a prerequisite for gender equality. This end my study seeks to examine the extent to which the Government of Kenya has handled the issues of gender and access to resources.

On the subject of the rights of women in Africa, the Protocol to the African Charter on Human and Peoples' Rights states in Article 17 that "Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies." This is in addition to Article 2 of the African Charter on Human and Peoples' Rights which "enshrines the principles of non-discrimination on the grounds of race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." Articles 60 and 61 of the above Charter also recognize the "regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights...". Despite the declaration and recognition of these regional and international rights, women in Africa continue to face inequality and inequity in many spheres of their right to live in a positive cultural context and to participate at all levels in the determination of cultural policies." This is in addition to Article 2 of the African Charter on Human and Peoples' Rights which "enshrines the principles of non-discrimination on the grounds of race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." Articles 60 and 61 of the above Charter also recognize the "regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights..." .

From the above reviewed laws and literature there is no study as such which has researched the plight of the Endorois people, especially their claim to the land which is

now a hive of tourist activity. It is for this reason that this aspect of the gazettment of the Endorois land deserves researching.

CHAPTER THREE

RESEARCH METHODOLOGIES AND METHODS

INTRODUCTION

I used six major methodological approaches which were carefully selected based on my background as a social worker to collect data that would best answer the research questions as fully as possible. The methodology chapter discusses the approaches used in this research dissertation. By methodology, I refer to theory and analysis of how research was carried out. The overall methodology is the women's law approach within the wider context of women's human rights perspectives; this is because this is a guideline that explores the realities of women's lives and experiences in order to have fundamental understanding and analysis of their legal rights so as to improve their legal status in society as propounded by (Stang Dhal: 1987). The specific methodological approaches discussed below are the women's law approach, Grounded theory, actors and structures, gender sex perspectives, human rights approach and legal pluralism. The second part deals with methods of data collection. Since the research questions deal with issues of knowledge, culture, policy and intervention, data collection methods were selected based on their suitability to each category of questions. The data collection methods are discussed in terms of their usefulness and limitations.

WOMEN'S LAW APPROACH

Women's law approach is associated with the grassroots-oriented collection of data about lived realities and experiences of women and, in this case, even girls, in order to gather empirical evidence and use it to understand women's position in law and society. The strength of this method is its bottom-up approach which tends to reveal what goes on in actual practice, as opposed to what is contained in policies or statutes. My starting point was women's lived realities, where I interviewed and listened to the women themselves talking about their experiences and this formed the empirical data for my research. In order to achieve my aim of properly documenting all the relevant evidence gathered after giving these women a full and proper hearing of their stories, I started off with assumption that the gazzetment of Lake Bogoria had changed the livelihoods of the Endorois, while constantly keeping my mind open to new issues and insights. Initially,

the research was informed by my understanding of human rights issues. However, through knowledge of the Women's Law approach, I was able to collect data through interviews and observation and then interpret this data to understand the claims by the Endorois people, their present challenges and the activities that are now being carried out in the land which was occupied by the affected people. The flexibility with which I used the Women's Law approach meant I could, especially in the case of key informants, go back to them to get more information and meaning on their interpretation of policy and constitutional provisions as they relate to the Endorois case. The aim was to use empirical data from the women's lived realities in order to understand the position of women in society and then relate that knowledge to how the constitutional provisions, as highlighted in the Literature Review section, can be used to change their legal position.

This approach was ideal because it created room for interrogating customs and beliefs in the ideal situation and how these relate to constitutional provisions on indigenous communities and gender equality. This gave room for women to open up and share their perspectives of the customs and beliefs and how these impact on their ability to access resources and development in general.

Through the Women's Law approach, the positions and relationships of power dynamics were analyzed from gender perspectives to look at who has power and who controls who. It became clear while talking to women that the eviction from the communities' indigenous land has brought with it a great deal of gendered dynamics and challenges, with women being affected differently from the way men are affected, as will be discussed more fully in the findings.

GROUNDED THEORY

Grounded theory is an interactive process in which data and theory, lived reality and perceptions about norms are constantly engaged with each other (Bentzon et al, 1998). The knowledge of Grounded Theory helped me to on a daily basis analyze collected data to get the meaning out of it and identify gaps and other new sources of data to help fill the gaps so identified. For instance, initially I did not consider church leaders as sources

of data, neither did I plan to undertake in depth interviews with men and women in the Endorois community until I discovered that, for a sensitive topic on communal land, I needed to recast and add on to data collection tools. As soon as I had made the initial contacts at the research sites, I came up with a research design to guide data collection. At the beginning of the research, my question skills were not good enough. Most of the questions were closed ended instead of giving respondents a chance to talk about their lives.

The Grounded Theory approach also helped me to discover the procedures which may be pursued by people lobbying for their rights of access to resources. Throughout the data collection, I was mindful of what proponents of the theory say about the interaction between developing theories and methodology being constant as preliminary assumptions direct the data collection which, when analyzed, indicates new directions and new sources of data. As I collected data from sources, it helped me to understand better the feminist radical theory on patriarchy being the root causes of women's subordination. For example, as I moved from one source to another, I became increasingly aware of the fact that church leaders are prominent in entrenching patriarchy in the family structure. The Grounded Theory approach helped me later to categorize the findings of this research using gender inequality and patriarchy as themes. Throughout the research, I was able to rethink the issues of women subordination and how these affect and influence women's after the gazzement.

ACTORS AND STRUCTURES

The research focuses on gendered effects of gazettment of Lake Bogoria implying that there is a need to understand relational and power dynamics and how such relationships and performance patterns have an effect on women and men. During data collection, it became apparent that women, and in some cases even men, deal with a number of actors within the family structure before they can be able to make decisions. Such actors include but are not limited to church elders, chiefs, in-laws, members of parliament, Non Governmental Organizations (NGOs), political structures and, in some cases, leaders from neighboring communities. Through this understanding, I was able to include church

leaders as a group of actors whose role needs to be understood. Charting and delineating the position of women vis-a-vis men facilitated a comparative analysis of women's status and rights with those of men. The actors and structures analysis was also helpful in understanding how people's choice of action may be limited by the social or family, legal, religious or the economic structures within which they think and act, which tends to explain the difficulties related to decision making. This methodology was also found relevant to the extent that if there are changes to be made to the law and gender relations, the actors and structures need to be clearly identified and targeted with clear interventions.

This methodology was also useful in helping me understand the different practices adopted and the decisions and arrangements made by the actors. For example, it was useful in highlighting that where customary laws concerning land give women equal access to land, kinship is used as an organizational structure by men to organize women. While I had originally assumed that women's oppression originates wholly from men, through interaction with different actors and structures, I gradually came to the realization that sometimes women are used by men within the structures to enforce what is culturally or religiously deemed acceptable behavior.

GENDER AND SEX PERSPECTIVES

The research focuses on gendered effects of gazettement of indigenous land. The sex and gender perspective therefore is useful in understanding issues which are based purely on one's biological sex and those attributed to a person based on gender, which is a social and cultural construct. The realization that women and men do not generally have equal access to resources such as information, power and influence, prompted me to use the gender and sex analysis as an organizing principle. It helped me to bring out and clarify the nature of the social relationship between men and women and their different social realities, life expectations and economic circumstances. Throughout the entire research process, my thinking had a gender perspective. While analyzing figures from the land office in Bogoria, for instance, I was able to ascertain that men were more powerful than women from the point of view of ownership based on the fact more men than women had

land registered in their names. The gender and sex perspective also gave insight in the gender division of labor, the power relations between men and women and how all these affect, in particular, women's access, control and ownership of natural resources. Through the gender sex analysis, I was able to realize that women do not operate in the same conditions as men and that the fact that they are women may be either a positive or negative factor in any particular comparative context. It turns out that although women have more gender-defined roles than men, their sex hinders them from exercising their right to own, control or access resources due to cultural expectations or issues of patriarchy which apply exclusively to women and not men.

LEGAL PLURALISM

In Kenya, as in several other countries, the legal system in place for the management of natural resources is pluralistic in nature. Legal pluralism in this research refers to a situation in which communities operate under multiple legal systems and natural resources management frameworks, all of which they consider simultaneously, but in different contexts, to be valid (Von Benda Beckman et al, 1997: 37).

In most African countries Kenya included, due the colonial legacy, there is in place a system of laws which was introduced by the colonial administration and which was carried over into the independence era. Although only recently introduced into the country, the "state based" laws have proved themselves hegemonic on account of the backing of the State and of cultural change, which has caused the disintegration of traditional structures. Consequently, the state based legal systems have tended to override and displace the local "community based" laws, which predated them.

The legal pluralism helped understand /interrogate how women and men are affected by a plurality of norms because of the multiplicity of cultures of the Endorois community , and plural systems that are in place in Kenya, that are used interchangeably or side by side. For instance, in Kenya, the courts of law are required to be guided by African customary law "*so far as it is applicable and is not repugnant to justice and morality or*

*inconsistent with any written law ...”*³¹ The underlying assumption, of course, is that concepts such as justice and morality are value neutral. In reality they represent value judgments, based on particular cultural perceptions. Given the overarching influence of western cultural values over the African state systems, including the judiciary, the effect of provisions such as these is to undermine the validity of community based legal systems in favour of state based legal systems and institutions.

HUMAN RIGHTS BASED APPROACH

Human rights provisions help to legitimise claims of disregard of rights in whichever sector. I consequently set out to demonstrate that indigenous rights are collective rights even though they also recognise the foundation of individual human rights. Some of the most central elements in the indigenous rights regime are the collective rights to land, territory and natural resources. Whereas land and natural resource rights are core elements of ILO Convention 169 (arts 13-19) and the UN Declaration on the rights of indigenous people article (25-30) the Endorois rights have been violated and their efforts to their land is continuously being ignored. Collective rights to land and natural resources are one of the most crucial demands of indigenous peoples as they are closely related to the capability of these groups to survive as peoples, and to be able to exercise other fundamental collective rights such as the right to determine their own future, to continue and develop their mode of production and way of life on their own terms and to exercise their own culture.

The human rights approach helped me understand problems that indigenous people face. In this particular case of the Endorois is the protection of collective rights and access to their traditional land and natural resources. It is on the basis of the land that their lives depend and that the indigenous human rights system is more relevant.³²

Lastly this methodology helped me in interpretation of international human rights laws, national laws and policies at the national and international level in translating human rights.

³¹ Section 3(2) of the Judicature Act, Chapter 8 of the Laws of Kenya.

³² The African Charter, articles 8, 14, 16, 17(2), 20(1), 21 and 22

DATA COLLECTION METHODS

In order to generate quality data, a number of methods were utilized. This allowed for verification or triangulation of data which is defined (Bentzon et al, 1998) as trying to address the same research question using more than one source. The choice of method depended on the type of questions to be answered and these have been explained below.

The different sources and methods used were

1. Interviews with key informants
2. Random Interviews
3. In-depth interviews
4. Group discussions
5. Focused Group discussion
6. Observation
7. Data analysis

A table with methods of data collection methods and details is as annex 1

INTERVIEWS WITH KEY INFORMANTS

The key informants were the leaders of the Endorois people, human rights activists, women and government officials working in the tourism sector. Interviews were both structured and unstructured form. The structured consisted of very specific list of questions and there was no deviation from the list which meant that I had to be objective. The unstructured interviews were more flexible and thus allowed me to engage in conversation. The questions were adjusted according to the way the interviewer was responding

Key informants were identified based on their closeness and expertise on the topic gender, indigenous land rights. The interviews with key informants were meant to give an overview on the topic and set the possible area of focus as well as important documents to read related to the topic under study. Key informants were very useful in the area of policy and laws related to indigenous land right.

From the Endorois Welfare Management Committee (EWMC), this a community organization that was formed in the year 1994 to cater for the welfare of the Endorois community in general so as to ensure recognition of the rights of the Endorois over their ancestral lands, I wanted to learn more about the welfare and check if all my assumptions were holding. This was actually the starting point of my research because the members were able to clarify that indeed they had been evicted out of the lake and that my topic of research was something that the community could identify with. After a number of interviews the Endorois welfare council members they were able to introduce and direct me to different members of the community who would help me in the different assumptions that I had prepared. For example, they were able to refer me to old members of the community who were in a better position to answer questions with regard to the gazetment of Lake Bogoria and also clarify issues on the Endorois traditional way of living and production.

Interviews with the staff at Centre for Minority rights development (Cemiride) an NGO that works to strengthen capacities of minorities and indigenous communities in Kenya were carried out. I focused on how the organization had mainstreamed the Endorois as indigenous people in overall policy processes, policy advocacy and human rights advocacy. More so I paid attention to ongoing formulation of policies that was going on in Kenya so as to learn further how the litigation of their case was being handled.

The challenge with interviewing key informants was their availability. Though appointments were made in good time, some of them would be postponed last minute making the smooth collection of data rather difficult.

RANDOM INTERVIEWS WITH RESPONDENTS

The random interviews were helpful to get voices of ordinary Endorois community members. Most of the interviewees were located during trainings that I participated in or at the market places and community functions that I attended for example one women's meeting I attended organized on behalf of one woman political aspirant.. I used structured questions to get respondents views on all my assumptions.

The initial interviews were done before I mastered the skills of asking people to tell their stories as opposed to using the questions to strictly get the type of information I was looking for. The shortfall of the random interviews is that it is difficult to go back to the same respondent and fill gaps should be there any. In some instances, respondents interviewed at civic education meetings organized by the electoral commission or market place which was only one day a week (Thursdays) would come from places far from location of the study area due to resettlement or migration.. Since the trainings were being conducted in one day, chances of meeting the same respondents in the next trainings were few. The other challenge with random interviews is that some respondents would refuse to be interviewed while others would not be sure of how information will be used and therefore they would censor the responses to give what in some cases politically acceptable responses.

IN-DEPTH INTERVIEWS

Individual in-depth interview for the Endorois community members started with initial visits to the lake Bogoria so as to introduce the topic of research and get to know the research area. Respondents were those willing to share their life stories on the eviction. Once respondents were identified, interviews were conducted over a period of several weeks to establish rapport and get the respondents to open up. In four homes the family members were interviewed on the impact of gazzement of Lake Bogoria to their traditional way of living, change of gendered roles this was because the four families had actually encroached back into the game reserve and I had a feeling that the gazettment might have different or no impact to their lives.

To better understand the gendered dynamics and the different experiences between men and women, in-depth interviews were done with 10 women, 5 of them married and five

of them single parents. In-depth interviews were also done separately with 9 men, five who are married and four who are not married. Due to the sensitivity of my research topic and the cultural set up of the community I discovered that I could not ably deal with personalized issues in either group discussions or individual interviews conducted at first contact. This therefore meant establishing rapport with the respondents over a period of time and following up to get information on their stories. In four cases, it was necessary for me to visit respondent's homes and farms to appreciate what the respondents were explaining to me.³³ This gave me a feel of some of the problems the community was facing after being evicted and forced to settle in inhabitable land. I was also able to get peoples real stories narrated through their life experiences. The method is flexible in that the respondent takes charge of the interview and thus the advantage of getting more information. It was quite useful in collecting historical data on the case.

GROUP DISCUSSIONS

Group discussions proved very useful since my study focus was the community, I was able to gather a range of information in a relative short space of time, and I preferred using open-ended questions because it allowed me to explore all my assumptions. Group discussions were pre-arranged, depending on the assumption to be tackled.

This method allowed me to hold separate discussions with men, women, boys and girls separately. The decision to hold separate discussions was made after I realized that some respondents were not participating actively in group discussions, while others were and tended to dominate them. I later found out that this was due to the difference between the sexes, the lack of confidentiality in a group setting, conflicts between individuals with different opinions and the disparate levels of education between the group members. I did not assemble all of the groups. Some of them constituted themselves informally, such as the Chelaba women, whom I would arrange to meet at about 2 pm on any given day as they normally gathered at about this time before they started working at the various curio shops.

³³ These were families that were staying near river weseges which would change course and cause floods and destroy people's food crops and even houses. This was confirm that the areas the families had been settled is not only inhabitable but also not suitable for farming or livestock keeping

From the initial group discussions, I was able to identify members who were willing to share their lived realities in depth and so I arranged for follow up meetings with them. Group discussions proved quite useful both in dynamics and the information collected. The advantage of group discussions is that I was able to get more information freely from men and women separately and secondly discovered that there were issues affecting either sex and needed space for effective open discussions. The disadvantage of this method is that it was time consuming and sometimes the group would want to tell stories that were not relevant with my research topic but I had no choice but to be patient or to politely take them back to the interview. Some interviewees would give me answers that they thought would be acceptable to the whole group and this was common with the young who would confirm their opinions with the older members before agreeing on an issue.

FOCUS GROUP DISCUSSIONS

The focus group discussions, on the other hand, were planned in good time with clear specifications of who should form the groups in order to have people of similar experience and interest in the groups in order to have a productive discussion and to maximize discussions. I had 18 respondents during the focused group discussions and the groups had been divided so as to provide full insight into my research questions. I met separate groups to have discussions on different topics. For example, I met with traditional leaders in order to gain a thorough background to the problem; I met with NGOs working in and with the community on the land issue, namely, Kenya Land Alliance (KLA); I met with World Vision on food security and HIV/ Aids and WWF on conservation efforts. The advantage of this method is that I was able to get more information which could not be elicited in larger groups and it was also useful in following up issues related to culture and socialization. It is also was useful in getting cultural practices, especially from the traditional leaders who are normally seen as custodians of culture in a community. This method was also useful in answering some questions that some community member thought were controversial, for example, the issue of the sharing of revenue from Lake Bogoria and also the issue of compensation of their ancestral land. Some disadvantages of this method were that I had a hard task trying

to explain to some of the interviewees the reasons for my research. They suspected that the information I was collecting could be used against them. Therefore, unlike ordinary community members, some of the Non Governmental Organizations were reluctant to give interviews.

OBSERVATION

These were made during interviews, group discussions or when looking at development programmes in the study area. Observation helped in observing gender roles, for example, the type of chores that women would do during the day in their homesteads, such as household chores, herding livestock and farming, while the men would be at the town centre having small meetings with friends. Through observation, I was also able to see the levels of poverty from which the community suffered, especially in people's homesteads, where some of them were simple thatched mud houses, and the poor state of the roads to and from their area and the national park. Lastly, observation enriched the information gathered through interviews, especially when I observed non verbal communication, group dynamics and the feelings of group members in general.

DATA ANALYSIS

This was an ongoing exercise. I reviewed the progress of the research data and the strategic aspects of this research. The process of identifying the various themes and their significance was continuous. The themes that emerged include: the gazettelement of the Lake Bogoria National Reserve (LBNR) and its consequent destabilization of the Endorois' way of life and impact on the gender roles of the Endorois people; the fact of tourism as an economic reason for gazettelement; the impact of gazettelement on the right of the Endorois to development due to the failure of Government (a) to recognize pastoralism as a sustainable mode of production to be promoted alongside tourism and (b) to include the Endorois in the decision-making process that affects natural resources (to which they require access); the law and policy which deals with the recognition of communal land and the sharing of revenue accrued from the tourism industry.

LIMITATIONS OF STUDY

The study area was small and, therefore, could not warrant a generalization of the findings. Due to lack of transport, I was not able to cover the whole area of study, Lake Bogoria. Though the findings cannot be generalized, they provide useful insights on the gendered dynamics of the gazettement of Lake Bogoria. Further, the study was supposed to be conducted in a four month period but, due to the political situation before the elections and the post election violence, the time frame was reduced substantially.

Thirdly, there was also a language barrier as most of the community members were more comfortable in expressing themselves in kalenjin. So some interviews were done in the local language. Translators were used to conduct the data collection process. Hence, first hand information was not obtained from the respondents. There was also the risk of the translators interpreting the narratives according to their own understanding, with the risk that, in some cases, the interpreter would tell you her personal views instead of the verbatim words of what the respondents were narrating.

Lastly, failure to interview some key informants was due to lack of time, bureaucratic red tape, clearance procedures and difficulties in making contacts. Therefore, some informants such as chiefs, government officials, were not interviewed. It is submitted that while the absence of their evidence does not materially affect the outcome of this case study, they would be good informants to pursue in relation to some of the issues which emerge from this research.

CHAPTER FOUR

RESEARCH FINDINGS AND DISCUSSION

RESEARCH QUESTIONS

This chapter details the research findings and analysis. To recapitulate the key questions which informed the research were as follows:

1. How has the gazettelement of lake Bogoria into a national reserve impacted on the traditional way of living of the Endorois?
2. How has gender roles of men and women changed?
3. What rights to development have the Endorois been denied due to displacement?
4. What roles and contribution do Endorois women and men play in management of, access to, use and control of pastoral resources?
5. Does the government recognize the Endorois pastoralist way of life as a sustainable mode of production?
6. How do the Endorois community suffer discrimination as a result of lack of access to natural resources?
7. How have the Endorois community benefited from their ancestral lands from the earned revenue that accrues from tourism from Lake Bogoria Game Reserve?

The details of the research findings and analysis are covered under the following themes;

1. The impact of gazettelement and destabilization of the Endorois way of life.
 - a) Tourism as an economic reason for their eviction from lake Bogoria.
 - b) Gender roles of men and women after the eviction of the Endorois from lake Bogoria.
2. The roles and contribution of Endorois women and men in management, access, use and control of pastoral resources.
3. The impact of gazettment on the right to development due to the failure of government to recognize pastoralism as a sustainable mode of production

that can be promoted alongside tourism and lack of the community participation in decision making that targets their natural resources.

4. Lastly, the content of the law and policy in communal land management.

This chapter details the research findings and analysis. It further discusses gender effects of the gazzement of Lake Bogoria. The findings are focused on the cultural, the legal and social contexts in which pastoral women establish and maintain their access to and their usage, management and disposal of natural resources like controlling resources, accessing and using benefits, derived from land use and participating in decision making with regard to the same. It also assessed the accessibility of, social services and extent to which women benefit from development project in the area.

FROM PASTORALISTS TO FARMERS

My first assumption was that the Endorois way of live had changed due to the gazzement of lake Bogoria. Below is a discussion of my findings that explain how my first assumption was sustained.

Traditionally the Endorois lived as pastoralists, residing in temporary huts in what is now referred to as Lake Bogoria Game Reserve, and they derived their sustenance from forest resources like honey, wild fruits, and vegetables. Each clan owned land collectively/communally. They had grazing land and watering points within which they grazed and obtained food and medicine for their sustenance. The lake was a sacred place where men and women would conduct prayers especially during dry seasons; the community was also allowed to collect salt for their livestock or for any other human diseases like chest complications. The hot springs which the community considers religious sites, had healing effects for chest complications and arthritis. During interviews some respondents pointed out that tourists still use the geysers for healing purposes during visits to the hot springs.

The narrators young and old, men and women took me through the ordeals they encountered. It was revealed that, the eviction of the Endorois emerged with independence when Lake Bogoria was gazzeted in 1973. The Endorois were ordered to

vacate the land. Since they could not and would not do that voluntarily, they had to be evicted forcefully. They ordered the people to remove their belongings from their huts and proceeded to torch the some huts. In addition they said that those who were not fast enough or willing to do so had their property burnt in the ensuing fire. I was informed that some of the people were forced to torch their own houses.

Their livestock were rounded up in lorries and dumped further away from Lake Bogoria National Reserve. They commented that the aim of transporting livestock was to have the people follow their animals and hence make the eviction process easier. It was clarified that this move was perhaps taken in realization of the fact that it would have been difficult to remove the people from the forest and the lake than simply barring them from entering the park. An emotional charged old man concluded that people lost their animals as they strayed and got lost, stolen or eaten by wild animals or people.

Those who were displaced described in detail the great loss of their land and the subsequent decline of their livestock due to lack of pastures and water. Mrs. Grace Torkok langat who was around eighty years of age confirmed that:

The people who were moved are a village of about two hundred households... It did not take us long, it took only two days but we got a lot of problems with our livestock because where we were moving to, was not an area that livestock were used to...it does not have enough pasture... And we got a lot of problems and even our livestock developed problems - some died, others got lost and were eaten by wild animals ...the land we left is no longer ours and so when animals stray there, no one can go in to get them back.

Jeremiah Kibrotich was only a boy when they were forcefully evicted over twenty years ago, to make way for a game reserve. He got the eviction incident from his parents, noted that,

Before we stayed in maji moto but now we live in Kapkuikui. Those days I was very young, but after asking I was told that it was over 20 years since we left there. We were evicted from the place forcefully by the government. Very early one-morning security personnel were deployed where we were, without our knowledge, and we were moved. They surrounded the (villages) and beat up people, and then we moved away. None of them told us where to move. We had nothing to do, but we just move.

The Endorois, having been evicted from Lake Bogoria, did not go far but settled outside its environs. They could no longer get inside the forest, as there were guards all around to enforce the restriction. For years the Endorois have endured the harsh conditions that they are being subjected to in their new habitat. During the dry season they have to try and survive with the scarce resources in these areas. They cannot access the lush pastures within the park even as their animals, and as a result, people are dying of starvation. They cannot access building materials inside the forest nor can they access wild fruits, vegetables, fuel wood or medicinal herbs. In short, their life has been completely disrupted and, so long as things remain unchanged, it can never be the same again.

The community was not given prior notice of this eviction from Lake Bogoria and there was no clear negotiation process as put down by Mr. James Kiptek one of the Endorois welfare council members who were evicted from his land 30 years ago by the government to make way for a game park.

We moved because the government made us move. They moved us because they said the land is for government and it has to be gazetted and we were told people will not occupy the area and we had to be moved. In lobi area we were told Kenya Wildlife Service would occupy [it] and near the shores of the lake.

After the loss of their cattle the Endorois were now forced to turn to farming. Most of the community members did not take to farming so easily, nor was the diet that they had been introduced to satisfactory as explained by Mr. Kipketek

That work is nothing to joke with. It is a work of blood... If you dig for a short distance, you cannot sleep at night due to tiredness, which does not go away...[but] with time we got used to it until we did not even want to sit down, our bodies were hardened and we even liked it, until we even started feeling body pains if we do not dig the land. We also had a problem with cooking...people did not know much about it. Things like maize are put on fire and eaten when ready, but what disturbed us was something called beans, this thing people did not know how to cook. So they ate it while raw and it gave children stomachache and diarrhea, which became persistent and the government did not have any programmes on community education on cooking.

Another woman Mrs. Cecelia Bogoria also told me of how they started farming, only to have their crops regularly eaten by wildlife especially during the dry season. Like others, she describes how hard they found the change in diet.

After we lost livestock, the government gave us maize and when we saw this...we mobilized our people to do farming... The unfortunate thing is that we do not reap even what we grow because animals destroy our crops. The game wardens herd them into our farms and many people have been killed and we plant our crops for wild animals. We really suffer a great deal. Initially we got some problems of stomachaches because these foods were foreign to us. We were accustomed to milk and meat but not to these dry foods like maize and beans and our people never liked such foods. The only foods that we knew needed cooking was meat and we did not even boil our milk. We drunk milk from cows, and goats without boiling it; it is only the meat that we cook... Now if you put a sufuria (cooking pot) of beans on fire in the morning it gets ready in the evening, and we do not know this. Some people put beans on the fire and thinking that it was ready, ate it, and made their children eat and as a result got stomach aches and constipation.

Despite the difficulties the community faced they were a number of people who felt that their eviction from Lake Bogoria helped the community to be independent as voiced further by Mrs. Bogoria:

...Since we moved here, we have seen a lot of changes. We grow our own food and we depend on ourselves but at that time we were depending on someone else's hands (meaning they were buying food) and once it stops, we are dead. But thank God, now we grow our own food and with the help of God we are doing well.

The loss of land affected men, women and children in the community. The Endorois are being forced to live under challenging conditions since their pastures were down sized by the creation of the Game Reserve.

Despite the above there is still gender bias in control of benefits from farming. Although the area is arid, some crops do well and this include water melon, vegetable, maize and passion fruits. Cash crop farming tends to be controlled by men; women provide for their families and are in charge of food crop produce which include hand irrigated vegetables garden and from common pool resources that are obtained free of charge while the men sometimes use high technology machinery. I later learnt that men benefit more from the agricultural extension officer's lessons. This is because women are not likely to attend trainings due to lack of time. A distinction between domestic and productive use of land may lead to indirect discrimination. Control of cash within the family varied according to the respondent's gender. Twenty percent of the women said they controlled cash and eighty percent women indicated that their husband did.

THE LOSS OF CULTURE

Culture is one thing that has bound the Endorois community together. The community had a way of determining where and how they lived, how the animals grazed, where they were watered, and even how to take care of the less fortunate members of the community. Their animals, which are used to fulfill most of the cultural practices and traditions, further enhanced this strong sense of identity. Pastoralist cultural practices in fact provided the institutions and structures, which allowed them to live together in harsh environments, utilize common property, and divide roles and responsibilities. One respondent Mrs. Kabon Tomno, explained how some cultural practices have been abandoned, partly because of people's inability to fulfill certain roles without animals:

Once you become a destitute, you are not able to meet a lot of cultural requirements. Even so, in the olden days, someone used to meet these needs through the help of his clan... For instance, if one wants to marry and does not have any animals for dowry, the clan gives him [the resources] to do it; for the poor who cannot do a naming ceremony for his children for lack of animals, its the clan who will help him meet his obligation. However today there is a lot of hardship, people are not as wealthy as they were and are not willing to help like in the past. Cultural practices like naming of children, marrying and other rituals, are now abandoned due to [the] lack of animals.

The displaced community concludes that the loss of their animals has in essence made them lose their culture and their dignity, saying that even the number of children you have does not earn you social standing the way livestock does. Extracts from the testimonies attest to this, like this from one old man Targot Kiborbor:

One who has no cattle in the Endorois community is not a complete being and has nothing, he has no say. Today, if you say this is the village head you get that title because of your livestock. And if you have no livestock and have very many children spread over a distance of 2-3 miles, your name will not be heard - but if you have livestock and a family, your name will be heard due to this livestock”

However an Endorois elder Mr. Richard Yegon maintains that the Endorois will never throw away their culture, regardless of whether they have lost their animals:

Our customs are our laws and they are enacted by the Endorois, so even if they have lost livestock they have not thrown away their laws. We use the same laws to run our affairs and an aggressor is punished by the same laws; one who injures another is punished by the same law; even marriage is conducted under the same law so we have not thrown it out.

With animals, which signify wealth, comes respect and identity. The loss of animals in the process of resettlement has reduced communal activities such as festivals, as well as unity, the same man said.

Finally, this elder pointed out that in the Endorois culture, there were things that men should not do; if they did, their wives would be despised and the men would be the talk of the village. But the loss of animals means the community has ceased to consider such cultural restrictions or practices. He explains some changes in the traditional roles of men and women:

In the past according to our culture - let alone the issues of cooking by men, if men were seen near the fire, just that used to be considered very shameful. In fact, one would be a subject of discussion and people would call such men people of no integrity, who would want to know and count all that is done by their wives

During a focused group interview of eighteen people, twelve of the respondents indicated that the cultural trends are of course being eroded not only due to the gazetment of Lake Bogoria but also due to the communities economic transformation from pastoralists to farmers. As such they cannot continue practicing some ceremonies, for example, with regard to marriage.

It was also agreed unanimously that the community needs respect for and protection of their religious sites and cultural heritage essential to the community identity including Lake Bogoria which is said to be sacred and used for prayers and rituals. One such ritual is the ndasim-blessing ritual performed by men and (karertapaik) or (karebei) performed by women. These rituals are performed at specific points around the hot springs to appease their ancestors and secondly during hardship time for example during droughts or in case of outbreaks of disease.

CHANGE OF MEN'S AND WOMEN'S ROLES

My research also had an assumption that gendered roles of the Endorois men and women have changed due to the community lack of access to natural resources. Below is the discussion on the same.

As the above discussion suggests, resettlement brought many changes to women's roles in the family and in the community. It also brought additional responsibilities. This has in turn caused shifts in the way men and women perceive their roles and position in society.

Before, there were clear lines of responsibility for men and women. But much has changed since resettlement. Loss of property has meant that husbands have divorced their wives, as this old man Mr. Jonathan Tiereto who is seventy four years old confessed.

Gazzetment and eviction from Lake Bogoria has really brought harm since I had four women and when I lost my wealth I sent one back to her father. I have divorced. I did this because I don't have enough wealth to support all these wives and I had to do so.

He goes on to explain how communal roles have changed and put an extra burden on women, even if they remained with their husband:

During the old days men used to protect the family, herd cattle and even milk the cows. The women used to milk the cows and do other housework, but they couldn't be compared to the men. Now women are doing more work than men since they go to the bush to cut firewood to sell - thus they are the breadwinners of the family nowadays. Even they are called and informed on issues that were only to be discussed by men.

This Endorois elder agrees that many women have taken over the role of men as breadwinners, because loss of livestock has reduced the responsibility of men to provide food for family, and water and pasture for the animals.

Over thirty years ago I was the family breadwinner, since I had cows, but now she has more responsibility for she does a lot of work to bring food. I was more responsible and powerful as I dug wells, looked after the cows, I was much more committed than now. Now she cuts down firewood, she goes to the farm, so she is much busier than me.

Despite all this some of these changes have brought improvements in their wake. The same woman, who mentioned that she has benefited from the gazzetment by being an

independent farmer, describes other positive aspects of life since resettlement. Over thirty four years ago the old days, she says, women were not respected but with the changes in their roles and responsibilities, they now are being seen as more valuable:

They were taken as inferiors in the homes, they had no say in front of men; they were not even given the accorded respect. They have now improved because even the women are now working so they are now the same [as men].

This finding (that a change in gender roles had taken place) was a real eye opener for me as it inspired me to investigate how this was possible in the face of the community's strong adherence to their old cultural practices.

TOURISM AS AN ECONOMIC REASON FOR GAZETTMENT

The following is a discussion on my assumption that the eviction of the Endorois from their ancestral land was carried out for an economic reason: the development of the tourism sector. As a result, it has effectively destroyed the Endorois pastoralist's livelihood rather than improve their situation.

Kenya is widely admired for its national parks and game reserves, which have become a major tourist attraction and therefore important for the national economy. The Government thus takes utilization of land by wildlife as a very important aspect of land use, tourism being the largest earner of foreign exchange. (Calestous Juma, 1996). About 27% of earning in the tourism industry can be attributed directly to wildlife and another 26% indirectly.³⁴

In recognition of the importance of its biological resources, a number of national parks and reserves have been gazetted, including Lake Bogoria Game Reserve.³⁵ The tourism industry also generates employment and contributes to the growth sectors of the economy. Secondary economic activities benefit from tourism, especially in the service industries such as restaurants, car hire companies, curio shops, food and beverages producers and banks. Tourism also generates incentives to improve certain services, such as telecommunications, banking and infrastructure.

³⁴ Kenya Wildlife Service 1990,p. 6

³⁵ Lake Bogoria National reserve was gazetted as wildlife protected area, vide legal notice number 270 of 01/11/1970; and is found in boundary plan 216/26 delineating a total area of 107 Km square

I observed that Lake Bogoria has indeed benefited from the tourism sector as a result in the improvement of certain infrastructure. Although the roads in the area have been poorly maintained, Lake Bogoria Dry Land Environmental Education Centre, is an educational centre equipped and supplied with education materials used in promoting the sustainable use of natural resources through awareness creation among the local community, schools and visitors to the reserve. There are several curio shops along the main road leading to the reserve, offering locally made handicrafts, papyrus mats and other artifacts. These include the Chelaba women group curio shop located opposite Lake Bogoria Hotel. There are several cultural centers depicting Tugen and Endorois community cultures. The Tugen cultural centre displays traditional homesteads built in Tugen architectural design, old stools used by elders and other traditional artifacts. Traditional dancer's troupes and dishes are available at the centre on request. There are two categories of accommodation facilities in the reserve. There are at least four camp sites owned by community members and one hotel, Lake Bogoria Hotel, which is a three star hotel, Papyrus Inn and Zakayo Hotel, which are low budget establishments.

There is also a significant proportion of the Endorois who are engaged in tourist-oriented businesses, for example, they make curios from trees, mats, baskets and beadwork which are sold to tourists visiting the national reserve or to the neighboring communities. A small percentage of the community members are employed in the tourism sector. These include salaried employees who work in the Lake Bogoria tourist hotel, or who are employed by the Kenya Wildlife Service as administrators, tour guides or wardens in the National Reserve. Some provide entertainment at social functions at the game reserve and hotels.

During the interviews and sampling of the businesses, I learnt that women participate more in the tourism sector than men. This is because women had organized groups and, with support from WWF, participated in ecotourism activities, like managing the camp sites, cultural centers and the selling of curios. I was informed that men did not like this kind of business because it is considered humiliating and culturally repugnant. There was also the issue of the number of people employed by the government sector. During the

interviews it was reiterated that the number could be bigger but the illiteracy levels and the acrimony between the County Council and Kenya Wildlife Service affects the communities' ability to acquire employment.

The issue of revenue sharing from the tourism industry was also discussed and about thirty percent of the respondents were concerned that the community was not benefiting from the revenue collected. During an interview with a Kenya Wildlife Service employee, it was clarified that money collected from the game reserves benefits is supposed to benefit the community through the local County Council. He also indicated that this is an issue that the community can follow up if they need clarification.

Displacement of the Endorois from their ancestral land demonstrates how the alienation of national parks from indigenous and minority communities can undermine rural livelihoods. The history of the Endorois coupled with their current social, cultural and economic situation present a unique challenge for both conservation and development practitioners. Displacement of the Endorois has caused significant social and political marginalization and general disenfranchisement.

From the above, it is clear that the Endorois' way of life has changed and they are now considered an agro-pastoralist people because I learnt that there are households that practise farming and some of the crops grown are water melon, passion fruits, vegetables (kale) and maize. Others are local herbalists and provide herbs and spiritual treatment to local communities.

THE RIGHT TO DEVELOPMENT

This section covers the assumption that the Endorois community suffer discrimination due to the fact that they have been denied the right to development as a result of lack to access to their ancestral land.

POVERTY, INEQUALITY AND ACCESS TO SOCIAL SERVICES

Among the challenges that are unique to the Endorois with regards to the development process is the fact that their dependence on land and natural resources constitute the basis of their pastoral livelihood system. The requirement of access to large areas of land to

support periodic movement of cattle in response to ecological variability runs counter to the mainstream development approach that is based on settlement. The national development approach since before independence has been predicated on the ideal of settlement, so that education, health and other social facilities are targeted at settled communities. Moreover, the focus of development infrastructure has been in the so-called high potential agricultural areas, with the result that overall investment within the areas occupied by the Endorois has remained minimal. Indeed, the first national framework for development planning following independence, *African Socialism and its Application to Planning in Kenya*³⁶ specifically provided that “development money should be invested where it will yield the largest increase in net output” and acknowledged that “(t)his approach will clearly favour the development of areas having abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development.”³⁷

As a consequence, Lake Bogoria areas register very poorly on the key development indicators, including education and health. Indeed, the levels of poverty within the districts are quite high. Constituencies occupied almost entirely by the Endorois, namely Koibatek, Nakuru, Bogoria and Lakipia all have between 44 and 54% of the population living below the poverty line³⁸.

It is not being suggested here that the Endorois community is homogeneous in terms of development needs. As with every other community in Kenya, there are rich and poor individuals and families. Indeed, as a general rule, and in common with other parts of Kenya, the urban areas tend to do better, in terms of key development indicators, than their rural counterparts. In the social context, the incidence of extreme poverty, access to primary education, opportunities for women, child and maternal health, and even access to medical HIV/AIDS services, differ as between rural and urban areas, with urban areas having better indicators.

³⁶ Government of Kenya, 1965. Sessional Paper No. 10 of 1965. Nairobi: Government Printer

³⁷ Paragraph 133, page 46. Only in 2003 did the *Economic Recovery for Wealth and Employment Creation* seek to privilege the arid and semi arid lands occupied by pastoralists for special attention regarding development interventions.

³⁸ Central Bureau of Statistics. *Geographic Dimensions of Well-Being in Kenya: Who and Where are the Poor. A Constituency Level Profile, Vol II*, p. 26

Due to their historical marginalization and social exclusion, the Endorois consistently show higher poverty rates and lower levels of social and human development as compared with the rest of the population. This is in spite of the fact that this is a tourist area. The community representatives I interviewed during group discussions outlined the primary causes of poverty as being the unequal distribution of land and the lack of access to productive resources; the lack of access to a variety of social services; ineffective development programmes; and a lack of basic infrastructure and marketing opportunities.

UNEQUAL DISTRIBUTION OF LAND AND THE LACK OF ACCESS TO PRODUCTIVE RESOURCES

To date, the major economic problem facing the Endorois is limited access to land and insecure land tenure. Land is the most critical, if not, the only resource for production and means of deriving a livelihood for the majority of those in this rural setting. Lack of security of tenure for most Endorois families only serves to exacerbate their problems. Their tenure is so insecure and leaves them entirely at the mercy of the landlords. Most of them are squatters. They cannot carry out meaningful development on the land which could provide them with an income. This was clearly put across by one village elder Toroitich Chepkurgat, who said:

The banks cannot give us loans. We are left as beggars without land and livestock, depending on handouts from the neighboring communities and NGOs, we are being forced to be farmers but as you can see the land and climate is unfavorable, we cannot produce as much food as we would like, because of the unfavorable climate, that why World vision has a feeding programme which feeds school children because parents have no food.

For it to work successfully, pastoralism requires freedom of movement dictated by the availability of good pastures and water. The quality of pastoralist practices and the condition of the ecosystem in which they are exercised are so intimately interrelated, that they cannot be studied in isolation of one another. The interrelationship is a delicate one and the combined effect of increasing populations and overgrazing in areas where mobility is restricted severely diminishes the capacity of natural resources (e.g., soils and vegetation) to regenerate. This is clearly the case being experienced by the Endorois in

that they can only graze in one area throughout the year since the other grazing areas have been gazetted. Drought periods further exacerbate the problem.

Despite their fragility, the dry lands surrounding Lake Bogoria have for centuries supported indigenous pastoral peoples and their animals. Generally, property relations consisted of individual or household ownership of livestock and herds, and community or shared access to pasture and related resources. Land ownership, to the extent that it has been articulated, has usually been one of common property within a defined group or community. Access to key resources, including water and highly productive areas reserved for dry-season grazing (such as wetland and upland) was regulated temporarily and spatially. (Lenaola, H et al(1996).

Through this system of complex social structures and institutions, these traditional societies learned to cope with the general poor soils and shortage of water. These practices were seriously challenged by with the gazzement of Lake Bogoria and the subsequent eviction of the community from their ancestral land. This, according to government policy, is justified on the erroneous basis that these lands were simply empty spaces with no individual resource owners, and that, in any event, the pastoral way of life represented irrational resource management.

As a result of the gazettment of Lake Bogoria as a major wildlife tourist attraction area, the Endorois believe, to a large extent, that their land rights have been lost. The Endorois traditional systems were highly dependent on their natural resources and thus they exercised an holistic approach toward managing and utilizing the various products and services which nature provided. As a matter of custom, the Endorois tenure regime assigned to different clan members all sorts of rights in aid of good animal husbandry practices, including rights of access to: different types of watering points, various arable field sites, trees, riverine as well as wet season pastures. Under this communal system these resources were generally not held by a single ownership unit. I also learnt that this ensured that both men and women participated equally in management, control and ownership of land. The status quo has since changed as the Endorois are increasingly taking up cultivation, especially in response to loss of grazing lands, poverty and loss of livestock and other outside pressures to diversify economically. Through land registration

they are increasingly taking more tangible claims to rights to land as a means of preserving land which is in danger from outside encroachment. These changes restrict women's access to natural resources important for family welfare, such as medicinal plants, wood for fuel and water.

The community suggested that, instead of the government concentrating on farming activities in the area, they should instead support the development of their pastoralist practices by providing adequate water and land for grazing; by introducing rangeland management techniques; by supporting animal health care by building dips for livestock and by assisting the marketing of their farm and animal produce.

Political participation is also an issue that is closely linked to land alienation. The Endorois are limited in participating in government structures except at the local (village) level which includes chiefs and councilors. There are several factors that explain the minimal participation or influence of the Endorois in local politics. Firstly, they constitute a very small portion of the overall population in the districts where they reside. As a result, it is very difficult for them to secure positions of leadership through local elections. Secondly, the fact that the majority of the Endorois are landless or squatters on the other peoples land means that they are generally perceived as temporary residents and, therefore, not suitable to be elected to leadership positions. Thirdly, the traditional perceptions among other communities that the Endorois are backward and primitive make it difficult for the Endorois to influence either the decision-making process or to be elected to positions of responsibility. In the long term this is detrimental to the development of the community because its members are not able to participate in policy and legislative processes that to a large extent affect the natural resources on which they are so traditionally dependent.

WOMEN AND RESOURCE CONTROL

While it is apparent that activities traditionally performed by men, such as clearing new lands and looking after livestock, are being increasingly taken over by women, this, surprisingly, has not changed the women's role in the decision-making process in respect

of resource allocation and control. They are still not allowed to make any unilateral decision unless they consult a senior member of the community or at least their mothers-in-law. Given that women face continued weak tenural rights as opposed to their husbands' exclusive ownership over family resources, women are forced to struggle for tenure reforms that are sensitive and responsive to gender dynamics. And since the traditional institutional framework for the administration of community resources is so weak, women are still not adequately represented in the institutions of communal authority. For example, they are not meaningfully represented in the community-based development programmes that look into natural resource management, such as the rehabilitation of degraded sites or river banks.

The patriarchal socio-cultural values governing the Endorois community have prevented the resource needs of women from being recognized as legitimate interests of the community. As a result, these cultural prejudices continue to militate against the participation of women in decision-making processes relating to natural resources. As a result the women, who have access to but not ownership of natural resources, feel understandably alienated and insecure in the community. In so far as access is concerned, they may be available to be consulted by men (as evidenced by their presence on water committees), they are apparently never consulted. In other words, their access to natural resources is even dictated by the men.

The present situation, in which the men leave traditional pastoralism in order to find employment for wages, has forced women to work harder and longer in family fields and end up with no adequate time to attend to other domestic chores, especially, the raising of their children. They are also forced to engage the services of their children on farms due to the pursuant labour shortage. This has had a negative impact on the children who seldom find time to go to school or if they do, girl children are often forced into early marriages and boys withdraw from school. This adversely affects the economic sustainability of the family.

One very crucial factor that has continued to impact negatively on women with regard to their gaining access to community resources is the practice of circumcision. Despite attempts by the government and feminists to eradicate this bad practice, it has remained entrenched in the culture of the Endorois. It is still widely accepted that a woman who has not undergone this rite is considered immature and not fit to participate in community matters. The belief that one is not regarded as a woman unless one undergoes this bad practice continues to infringe on the individual rights of women against whom it is used as an illegitimate excuse to deny them access to and control of natural resources.

CONSEQUENCES OF LAND ALIENATION

Environmental Degradation and Human-Wildlife Conflict

The effects of land alienation on the economy of the Endorois are serious. The alienation of Lake Bogoria potential dry season grazing areas and permanent watering point has squeezed people into smaller areas that now have to be used all year round. The restriction on the movement of people and livestock has increased pressure on the resources base which, in turn, has increased competition and conflicts over land and related resources, making the governance of pastoral resources more difficult and costly. Conflicts over land in the Lake Bogoria area has manifested itself in various forms. There is competition and conflict between livestock and wildlife in areas adjacent to wildlife parks and conflicts between livestock and crop farming in all the areas where agriculture is being practiced. During dry seasons there have been reports of animals gaining access to farms and destroying the crops due to the human/wildlife competition for resources. This was confirmed by an angry community member who thought that wildlife was being given priority over the community.

Now after we lost livestock, the government gave us maize and when we saw this...we mobilized our people to do farming... The unfortunate thing is that we do not reap even what we grow because animals destroy our crops. The game wardens herd them onto our farms and many people have been killed and we just plant our crops for animals.

Some of the other noticeable consequences of the depletion of resources are the following: it has rendered the usual daily and seasonal migration more difficult,

expensive, dangerous and often impossible, depending on the area. The resource base has been reduced in quality and quantity and this has, in turn, reduced the number of livestock that can be kept per household, hence, decreasing the viability of the pastoral economy. Since livestock are the productive assets of the pastoralist, their decrease in number also implies increased poverty.

There is also environmental destruction which has increased as livestock is forced to concentrate on small marginal areas that used to be used only seasonally. In 2006 during the drought that severely affected Kenya, the Endorois lost 50% of their cattle,³⁹ despite the availability of fresh water and grazing pasture in their ancestral lands situated within the Lake Bogoria Game Reserve. Some of the pastoralists are finding it difficult to reconstitute their herds. This is not made any easier when, after the drought and as a part of drought relief efforts, they are given seeds to plant instead of assistance with restocking their herds. Because of this, some households are unable to return to the pastoral economy.

THE LACK OF ACCESS TO AND DISTRIBUTION OF SOCIAL SERVICES

Over sixty percentage of the people I interviewed thought that the community has suffered due to the poor distribution of social services. Not only are there few social services such as schools and health facilities in the Lake Bogoria area, the distances between them are great and their infrastructure is poor. This has a negative impact on the staffing level of these institutions and the quality of services offered. As a result, illiteracy levels and mortality rates in this area are higher than the national averages. The community pointed out that most of these social services had grown out of community (as opposed to larger) projects which means that the government has done little in terms of development. For instance, the area has only one dispensary called Lobo dispensary and it is managed by one nurse and the nearest health clinic is at Marigat town, which is about 30 kilometers from Lobo. There is also only one public health officer, one agricultural technical assistant and one veterinary officer to serve in the entire region.

³⁹ Interview with community Endorois community members

The community still harbors some bitterness towards the government and believes that they are being marginalized because they are pastoralists. One old man who requested that I should not mention his name for fear of being victimized had this to say,

Many pastoralists have difficulties accessing veterinary services because of the distances involved. For example during the recent outbreak of rift valley yellow fever in October 2007 of rift valley fever, a lot of pastoralists in Bogoria and the nearby districts had no idea what the disease was, fortunately we were not affected very much by the outbreak. Imagine if it had spread to our areas, when veterinary officers are only found in district head quarter, what we would have done?

I think it is time livestock keepers were recognized and accorded the respect they deserve for their pastoralist's way of life. We need more cattle dips for our animals, better veterinary services and slaughter houses we can access easily if our lives are to improve.

The area has three preschools, one primary school and one secondary school. Few Endorois people have adequate access to schooling. School attendance in the area is less than 50 % below the national level and the literacy rate is also usually very low. The reason for these low figures is attributed to a range of factors, including, the lack of schools and the unsuitability of schools that are available in that their curriculum does not suit indigenous people. Many of the parents interviewed complained that whilst primary school education is attainable within a reasonable timeframe, access to secondary schooling is more complicated and costly. Therefore, only a select few Endorois children actually make it through secondary schools and even fewer manage to achieve university level education.

Mr. Elijah Kipteroi the acting assistant chief of Maji Ndege had this to say concerning the illiteracy level of the Endorois,

The Endorois are not well educated and this is now catching up with the community. For example we had a vacancy for an administrator (chief) which was advertised and because the requirements were high. No body from the community met the qualifications. We might end up getting a chief who is not from our community.

He also said that he thought that the decline of educational achievements over the last few years was due to the government's reduction in spending on educational

infrastructures and material as well as the lack of qualified teachers. There was also a complaint about the lack of easy access to primary health care due to long distances, the lack of transport and the lack of essential supplies in the health centers and their high cost when they are available. Another key challenge to the provision of primary education has to do with the high demand on the labour of children who are frequently used to cover great distances in search of pastures. A model of education that depends on settlement and the building of permanent schools obviously cannot be expected to work well for children who have to move around with cattle.

There is also the issue of gender disparity in school enrolment. There are major cultural challenges stemming from the fact that the position of women in pastoral societies, generally, and the Endorois, in particular, has tended to discourage the full and effective participation of girl-children in education. Parents tend to marry off their girl-children at an early age, denying them the opportunity of further education. Programmes of awareness creation are necessary if parents are to appreciate the need to provide equal opportunities for all their children to access education. Recent developments, such as the enactment of the Children's Act, provide a framework within which resources can be mobilized for the creation of such awareness in order to ensure that the children of pastoralists also benefit from these developments.

As regards health, the Endorois in common with other pastoral communities and indeed other rural Kenyans are greatly disadvantaged by the absence of infrastructure for the provisions of health services in rural areas. Health facilities are few and far between, while those that exist have few or no facilities and personnel to offer serious services. People have to walk long distance to get to the nearest health facility.

In the absence of public health, people rely on traditional medicine which the Kenya Research Institute has recommended be legalized.

One area in which women have always excelled in the Endorois community is in health, especially reproductive health. Apart from being the protectors of cultural traditions, customs and beliefs, women are also the preservers of indigenous knowledge related to

herbal medicine and spirituality. Women are involved in childbirth, gynecological treatments, cosmetic treatments, and massage techniques for expectant women. Midwives and birth attendants know the right diet for pre-natal and post-natal mothers. Traditional birth attendants among the Endorois are called *mererian*, *kikob lagoi*, or *chebos*, are respected in the society. *Nkaitoyoni* is a traditional birth attendant who gives advice to pregnant women on diet, work and exercise. A *nkalopani* is a specialist who deals with gynecological problems. She monitors the position of the foetus, its movements, and general development. She prescribes medicines and delivers babies.

In view of the distances to health centers and the fact that traditional birth attendants and herbalists live close to the people, it makes sense for them to be properly equipped in order to deal with health challenges which face women. Most community members agree that over the years they have become their own repository of knowledge of natural health care remedies and methods. The community boasts their own traditional herbalists. Such knowledge is a form of intellectual property and deserves legal protection. Most of this knowledge is possessed by women and it is sad to note that its continued possession and growth is under threat of extinction due to modernization and the lack of access to the forest and the Lake where most of the herbs and trees are found.

THE LACK OF BASIC INFRASTRUCTURE AND MARKETING OPPORTUNITIES

As I have already discussed above, Lake Bogoria is a tourist site and the community has to some extent, benefited from tourism, through secondary economic sectors, for example, infrastructure and employment. There are a number of complaints from the community and especially those that work closely with the tourism sector. The Chelaba women group which owns a curio shop located opposite Lake Bogoria Hotel complained that they lack customers due to competition from the hotel. The women complained that most tourist visiting the areas do not buy goods like curios or honey from them but instead prefer to buy from the hotel. This they think is due to lack of marketing of their products and the quality of products that they produce. I also heard the same complaint from Mr. James Cherutich who manages the tugen cultural centre at Kapkuikui. He said

that one of the challenges that he faces is competition from Lake Bogoria Hotel which also has a cultural centre. He therefore proposed that the government through the Ministry of Culture and Social Services should step in to help the community in promoting the communities tourism initiatives. This problem has apparently arisen because the government seems only to be interested in increasing its own revenue base by promoting its own hotels and game reserves through the Kenya Tourism Board, thereby ignoring community development efforts.

Lastly, what the Endorois need is more affirmative action. This should focus on development and especially on provision of appropriate and quality health and education services. This could involve the establishment of Endorois community institutions as well as programmes to ensure the preservation of and respect for the Endorois cultural identity.

Discussion of the Legal/Policy Framework Impacting on the Problem

This section analyses the statutes which deal with conservation of the wildlife environment and the management of natural resources in Kenya with a view to demonstrating that they have, by and large, they have had the effect of marginalizing communities in their efforts to conserve the environment and manage natural resources. It thus covers the assumption that the Government has not provided for policy recognition of communal land tenure.

This research argues that Kenyan law on environmental conservation and natural resources management has marginalized communities by vesting management of natural resources almost wholly in the state and, therefore, fails to utilize the cultural norms of communities in environmental and natural resources management. This is why the Endorois community is suffering the effects of environmental degradation because the government ignored their traditional management system by gazeting their area, thus making it impossible for them to move from one place to another looking for fresh pastures and water.

In his article “The Tragic African Commons: A Century of Expropriation, Suppression and Subversion” (Okoth Ogendo, 2003) argues that land and associated (natural) resources in Africa were *common property resources* whose key characteristic was their permanent availability to all generations, past, present and future. In other words the ‘commons’ or commonly-held natural resources were a complete trans-generational asset, whose radical title was vested corporately in all members of the group (or community), past, present and future.

The *commons* was available exclusively to specific communities, lineages or families operating as corporate entities, and constituted “the creative force in social production and reproduction.” Access to the resources of the commons was open to individuals and groups on the basis of socially-defined membership criteria reinforced internally by obligations assumed on the basis of reciprocity. Decision-making with regard to the use of the resource was by reference to common values and principles, ensuring a reasonable measure of compliance.

The colonial state viewed the commons as *terra nullius* (open access resources). Its perspective was that radical title in property must be vested ultimately in some juridical person (the sovereign) with authority to grant exclusive rights of use and disposition. Since, according to this school of thought, African communities did not have legal personality, they could not *own* property, hence, the view that the commons were open access resources without an owner. This perspective set the stage for the expropriation by the colonial state of the commons.

The expropriation of radical title to the commons by the colonial sovereign was followed by the grant to individuals of exclusive rights of ownership and use in accordance with English common law principles, which had little regard to the entitlement of indigenous communities. Okoth-Ogendo argues that the deterioration of the commons and common property resources that followed was a direct result of the breakdown of community resource management systems. The breakdown was a consequence of the denial of

community rights over these resources, as well as the marginalization of community resources management regimes (customary laws) by the colonial and post-colonial state.

Kenya's environmental conservation and natural resources management laws provide an excellent case study of this theme.

The Water Act 2002 grounds ownership and control of the country's water resources in the state. Section 3 of the Act vests every water resource in the State. "Water resource" is defined to mean "any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below ground." The effect of this provision is to appropriate all water resources, which, traditionally, were common property resources.

State ownership of water resources sets the stage for State control of the right to use water resources, as stipulated in section 6:

"No conveyance, lease or other instrument shall be effectual to convey, assure, demise, transfer, or vest in any person any property or right or any interest or privilege in respect of any water resource, and no such property, right, interest or privilege shall be acquired otherwise than under this Act."

With minor exceptions, the right to use water can only be acquired through a permit, issued under the Act. Use of a water resource without a permit is a criminal offence punishable under the Act with imprisonment for a period of up to twelve months or a fine of up to Kshs 100,000/- or both such imprisonment and fine. In addition, the equipment used to utilize the water resources is liable to be confiscated and destroyed.

Permits run or are connected to the land. Section 34 of the Act requires that a permit specify the particular portion of any land to which the permit is to be appurtenant. The permit passes with the land on transfer or other disposition. Where the land does not belong to the permit holder of water works that are to be constructed on it, the permit holder must acquire an easement over the affected land (section 28 of the Act). Thus, under the law it is not possible to obtain an open permit or a permit in gross (i.e., which is not linked to particular land). In effect, therefore, the permit system privatizes water

rights by confining them to a small section of the community, essentially property owners who are able to acquire and use water resource permits.

The above clearly explains how the act marginalizes the Endorois community from access to and management of water resources. The Endorois can no longer own and manage water resources like they used to because they no longer own the land where this water resources are located.

In 2005 a new law, the Forest Act, 2005 was enacted. The Forest Act, provides for the establishment, control and regulation of Central Forests, forests and forest areas on unalienated Government land. The Act defines unalienated Government land to mean land for the time being vested in the Government which

- (a) is not subject to any conveyance, lease or occupation license from the Government;
- (b) has not been dedicated or set aside for the use of the public;
- (c) has not been declared to be a Central Forest or a forest area.

Section 4 gives the Minister power to declare any unalienated Government land to be a forest area and to declare that a forest area shall cease to be a forest area. The Minister may also declare a forest area or a Central Forest to be a nature reserve for the purposes of preserving its natural amenities and the flora and fauna within it. In a nature reserve, no cutting, grazing, removal of forest produce or disturbance of the flora shall be allowed except with the permission of the Director of Forestry, and permission shall only be given with the object of conserving the natural flora and the amenities of the reserve.

Section 8 states that, unless licensed to do so, no person shall, in a forest area or Central Forest: fell, cut, take burn injure, or remove any forest produce; be or remain therein between the hours of 9 pm and 6 am; erect any building or cattle enclosure; set fire to any grass or undergrowth or any forest produce; smoke; or kindle, carry or throw down any fire; or allow cattle to be therein; clear, cultivate or break up any land for cultivation or any other purpose; capture or kill any animal, set or be in possession of any trap; construct any road or path; or collect honey or beeswax. Carrying out any of these

activities without a license from the Director is a criminal offence under the Act.

With regard to ownership of forests, the Forest Act 2005 continues in the same vein as the Water Act, 2002. Section 25 declares that “all forests in Kenya, other than private and local authority forests, are vested in the State.” Power to declare forests to be ‘state forests’ is vested in the Minister. Whereas the 2005 Act recognizes “private forests”, it defines these to mean “a forest owned privately by an individual, institution or body corporate.” It is unlikely that indigenous communities, such as the Endorois, would be qualified to own forests as, under the prevailing law, such communities are not considered to be corporate bodies as envisaged by this section.

The Forest Act marginalizes the Endorois community in just the same way as does the Water Act. As already discussed above, this community depends, to a large extent, on forests for the purposes of harvesting medicinal plants, grazing their animals and harvesting raw materials intended for construction and the creation of curios. The Forest Act makes it more complicated for them because of the permit that an individual needs in order to access these resources. One also has to keep in mind the added difficulty that these forest resources are traditionally used by the the Endorois community as a whole, not as individuals.

The Kenyan Constitution emphasises the sanctity/primacy of private property rights. Even the Government cannot acquire or take possession of another’s property without due process of the law. However the Constitution also lays down a framework for trust or public property. Chapter IX of the Kenyan Constitution makes provision regarding Trust Lands and states that the same are to be vested in the County Councils in whose jurisdiction they are to be found.⁴⁰ The County Council is required to hold the land on trust for the communities ordinarily resident in these lands and to give into effect their rights, interests and benefits as may be vested on them under the customary law for the time being in force or applicable thereto.

⁴⁰ The Constitution of Kenya section 114 & 115, provide that trust land is vested in the county council

However, while the Constitution recognizes the rights, interests and benefits of the persons ordinarily resident in these lands, it places restrictions in the manner in which these rights, benefits and interests are to be exercised. Under section 117 Parliament may empower the County Council to set apart Trust Land for use and occupation by a public body or authority for public purposes. This provision excludes the operation of customary laws and it has been utilized to establish national parks and reserves. Overall supervision of these lands is vested in the Government. Where the customary rights, benefits and interests claimed are inconsistent with any written law, they are null and void. In other words, the Constitution often excludes or restricts the operation of customary land rights (section 115(2)).

The Constitution does not lay down a clear basis for the protection of community rights. It merely stops after creating Trust Lands which are to be managed ostensibly for the benefit of the ordinary residents of that land. It does not lay down a basis for regulating the trust that has been vested on the local authorities. Major decision-making powers are vested on the local councils and the people have no recourse if the trust relationship is breached. The result is that the councils treat the trust lands in their care as though they were their own property. That is why the County Council of Baringo was able to usurp with impunity the rights of the Endorois in respect of the land within LBNR and even evicted them without notice or compensation.

The Trust Lands Act, Cap 288, is perhaps the single most devastating piece of legislation to community-based property rights. The Constitution envisages that Trust Lands are to be held by local authorities on behalf of local residents and their rights, benefits and interests are to be given effect to as they are vested in them under the customary law applicable thereto.

One would have expected the next logical step to have been for Parliament to pass a law that would lay down a scheme of administration of Trust Lands by local authorities, authorizing them to pursue the objectives of the Constitution, namely, to give effect to the rights, interests and benefits vested in the people ordinarily resident in that area. Instead, section 65 of the Act sets out the composition and appointment of persons who advise the

District Commissioner in the assessment of compensation claims for setting apart Trust Lands. Trust Lands seem to be important only for the purpose of fulfilling the objectives of Government and not the local communities who ordinarily inhabit them.

Far too many people are involved with the administration of Trust Lands. It is this “administrative meddling” in land matters that has proved to be the biggest obstacle to the attainment of a long-term solution to the Endorois land problem. Administrators abuse the powers conferred upon them by the law to allocate land to themselves and their cronies. This also explains why the issue of revenue sharing from Lake Bogoria has become complicated.

The core principle of the Wildlife (Management and Conservation) Act, Cap 376 is the separation of wildlife resources and people. In achieving this goal, the Minister responsible is empowered to declare any area of land to be a national park. He is not required to seek the views of people who are likely to be affected by his decision. The effect of such a declaration requires the inhabitants of the national park to vacate it. In other words, they are dispossessed of their land. Unfortunately, the Act makes no reference to the issue of compensation for such dispossession. In the case of the Endorois, they were never consulted before their eviction nor compensated for the land they lost as a result of creation of the LBNR.

Furthermore, the Act does not provide for the sharing with the dispossessed of any future revenue generated from a national reserve. This right should be protected considering that these people have lost the right to access a resource base that defined their very livelihood. For example, as a result of their eviction from the land which now falls within the LBNR, the Endorois can no longer graze their cattle within it nor access its salt licks. As a result, their animals are not as productive as they used to be which means that they can no longer depend upon pastoralism as a means of livelihood. This, combined with the lack of any right to share in the revenues generated from the LBNR, the Endorois have been reduced to a dispossessed, poor, under-nourished and illiterate

people. This is a national tragedy. After all, for generations, the Endorois people had proved themselves the best stewards of the land and, therefore, the most deserving of its benefits.

THE ENDOROIS CASE

This section discusses how the Endorois case has been handled in relation to the provisions of the laws in Kenya.

Time and time again, local communities have attempted to assert their rights of ownership and access to these natural resources through the courts, but to no avail. *Kemai & Others v The Attorney General & Others*⁴¹ is a case in point. The court dismissed the Ogieks' claim. It held that the area had been declared a nature reserve and that the activities that the plaintiffs admitted to being carried constituted criminal offences.

The experience of the Endorois community in courts has been the same.⁴² As a result of the creation of the Lake Bogoria Game Reserve, the government of Kenya determined that the Endorois would be required to leave their historic lands *en masse*. Evictions from the Lake Bogoria Game Reserve began in the mid-1970s, with the final evictions taking place in 1986. Some Endorois attempted to re-occupy their 1974 farms in Mochongoi Forest. As a result, many Endorois were beaten, their houses burnt, and eviction from the area were accompanied by numerous arrests and charges for trespassing.

The Endorois began legal action against Baringo and Koibatek County Councils, but on 19 April 2002 the court dismissed the application. While the High Court recognized that Lake Bogoria had been Trust Land for the Endorois, it stated that the Endorois had effectively lost any legal claim as a result of the designation of the land as a Game Reserve in 1973 and in 1974. According to the court:

“It goes without saying therefore that no individual or individuals have a direct right to the management of the Game Reserve or revenue collected there from.” The Court also stated that it could not address the issue of a Community's collective right to property, stating that “there is no proper identity of the people who were affected by the setting aside of the land ... that has been shown to the court”.

⁴¹ High Court of Kenya at Nairobi, Civil Case No. 238 of 1999, reported in *Compendium of Judicial Decisions on Matters Related to Environment, National Decisions, Volume III*, UNEP 2001 at page 238.

⁴² *William Yatich Sitetalia, William Arap Ngasia et al. v. Baringo Country Council*, High Court Unreported Judgment of 19 April 2002, Civil Case No. 183 of 2000, p. 6.

Further, the court stated that it did not believe Kenyan law should address any special protection to a people's land based on historic occupation and cultural rights:

“What is in issue is a National natural resource. The law does not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource.”

Almost every country in the world experiences the protracted struggles of indigenous communities to reclaim their heritage, particularly over land and associated community-based natural resources. Typically, the ultimate objective of these struggles is to secure restitution of expropriated community-based property resources.

Following the rejection of their claim in the Kenyan courts, as discussed earlier, the Endorois Community have filed a claim against the Government in the African Commission on Human and Peoples Rights claiming, *inter alia*, restitution of its historic land, with legal title and clear demarcation.⁴³

⁴³ Cemiride (on behalf of the Endorois Community) v Republic of Kenya, African Commission on Human and Peoples Rights, Communication 276/2003.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

This chapter deals with the conclusion and the recommendations that are suggested arising from this case study. I have already discussed some recommendations in the findings chapter.

The Endorois agro-pastoralist way of life has come under severe pressure in recent decades. This is mainly due to the historical injustices and inappropriate land policies and development strategies. This has led to serious violations of the Endorois' economic, social, and cultural rights and as well as persistent abuse of their civil and political rights. Pastoralism has erroneously been considered an obstacle to Kenya economic development. It is for this reason that the Endorois were forcefully evicted from the Lake Bogoria region. It was due to misguided conservation policies that have, to a great extent, contributed to their progressive impoverishment.

The research has also highlighted that indigenous women and, in this case, the Endorois women, are victims of serious human rights violations as a result of: the discriminatory manner in which they are sometimes treated under customary law; their lack of access to social services and decision-making processes; and harmful traditional practices, such as female genital mutilation, which are practiced against them. Difficulties in achieving gender equality within the indigenous community will require special measures within an overall approach of affirmative action and culturally-appropriate policies toward these communities.

In summary, the research confirms that through the gazetting of the LBNR and all its attendant consequences, the Government of Kenya violated and continues to violate the indigenous rights of the Endorois people which are meant to be protected by the country's Constitution, its national laws and the numerous international instruments which are binding upon Kenya.

As discussed in the literature review section of this study, most states vehemently resist granting restitution of community lands and associated natural property resources to their original indigenous peoples. The attitude of the Kenyan Government is no different toward the Endorois people. I have shown that the objectives of environmental conservation and the sustainable utilization of natural resources can be better realized through the collaborative efforts of both states and community groups. Therefore, the institutionalization of “joint or co-management” should become a major objective of environmental and natural resources management policy reform in Kenya. “Joint or co-management” refers to the management of natural resources by the sharing of benefits, responsibilities, control and decision-making authority between the local natural resource users and relevant government agencies. At the core of co-management is a philosophy which provides for a clear allocation of power and responsibility between the local users of the resource and governmental regulatory authorities.⁴⁴

Co-management does not involve either a complete removal of the state’s responsibilities to manage its natural resources, or a complete restoration of community-based property rights to their original communities. Rather, it retains the formal ownership of natural resources in the state, but secures rights of access by communities to the benefits of those same natural resources. At times, it grants them preferential rights of access. This model, thus, aims to improve environmental and natural resources management by giving communities an incentive to participate in the management of the resources. It has the added advantage of minimizing the antagonism between resource users and regulatory agencies.⁴⁵

Recognition of certain kinds of community based property rights by state agencies gives communities the incentive to participate in environmental conservation and the management of natural resources upon whose utilization they derive benefits. At the same time the participation by communities in environmental conservation and the

⁴⁴ Pimbert, M.P., & Pretty J.N., “Parks, People and Professionals: Putting Participation Into Protected Area Management,” United Nations Research Institute for Social development Discussion Paper DP 57 UNRISD, IIED, WWF February 1995.

⁴⁵ Ibid.

management of natural resources relieves the state of part of the burden of enforcing the environmental and sustainable natural resources utilization laws.

RECOMMENDATIONS

In view of the findings, the following recommendations may be useful to the different actors and structures within the Endorois community. Also this case study has given rise to a number of different emerging issues that need specific consideration in order to be solved.

Recommendations to the Government

Legal recognition and political participation

1. The rights of indigenous pastoralist communities to their lands and resources, effective political participation and distinct cultural identity should be constitutionally recognized. The rest of Kenya's legislation should be amended to support this change and, where necessary, affirmative action should be enforced.
2. The Government should take all the necessary steps, in consultation with indigenous peoples in the country, to ensure the prompt ratification of ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries. It should also promote the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly and, through Parliament, ensure the incorporation into domestic law of these instruments.

Land and resource rights

1. The Government should fully give its full attention to the rights of indigenous and other marginalized communities to their lands and natural resources. The draft National Land Policy should be adopted, confirming and fully implementing the land rights of pastoralists and hunter-gatherers.
2. Indigenous communities should be consulted prior to the exploration for and exploitation of natural resources on their traditional lands, and should receive an equitable share of benefits obtained from such activities through participatory

- resource management. They should be fully compensated for any adverse environmental impact on their land, resources and traditional livelihoods resulting from development projects and other economic activities.
3. Efficient mechanisms should be established to address historical injustices and settle current land and natural resource disputes resulting from the dispossession of lands traditionally owned by pastoralists. These mechanisms should include the possibility of revocation and rectification of irregular titles, as well as the restitution of lands and/or effective compensation to the affected communities.
 4. The Government's Arid and Semi Arid Land Policy should include measures to restore the environment and prevent further degradation in pastoralist areas.
 5. Existing legislation should be amended to ensure the rights of local indigenous communities to access the natural resources in protected areas in their traditional territories.
 6. Pastoralist and hunter-gatherer communities should be involved in decisions concerning the management of and benefits derived from protected areas, game reserves and national parks. They should also be compensated for any loss incurred from the creation of such areas, including any human and material losses suffered as a result of wildlife activities in the vicinities of these areas.
 7. The Government should aim to reach a friendly settlement with the Edois in their case pending before the African Commission on Human Peoples Right, as one of the first steps toward the establishment of a system of co-management between the authorities and the local communities in the Lake Bogoria Game Reserve.
 8. Affirmative action should be applied to promote education for indigenous children at all levels, particularly for indigenous girls. Free boarding and mobile schools should be an integral part of the free universal primary education programme. More appropriate educational curricula should be devised, taking into account indigenous peoples' distinct ways of life.
 9. Indigenous peoples, particularly indigenous women and girls, should be guaranteed access to adequate health services. The system of mobile clinics in

- pastoralist areas should be improved, and the use of traditional medicine and health-related knowledge should be encouraged and legally recognized.
10. The Government should review and abolish, where necessary, existing discriminatory laws and regulations affecting the property rights of indigenous women.

Recommendations to indigenous communities and organizations

1. Existing customary laws and practices should be revised to eliminate discrimination against women, especially with regard to their property rights and harmful traditional practices, and ensure their full participation in decision-making at the community and national levels.
2. Indigenous communities and organizations should renew efforts to find constructive solutions to existing conflicts with other communities, taking into account customary practices, the principles of transitional justice and respect for human rights.
3. Indigenous peoples' organizations are encouraged to develop concrete strategies for data collection, research and documentation to support their advocacy work both at the national and international levels.

Recommendations to civil society and political parties

1. Political parties should take a stand in favour of the recognition of indigenous peoples' communities and their rights in the constitutional review, legislative reform and policymaking fora.
2. Members of the Pastoralist Parliamentary Group are encouraged to revitalize their activities in order to build a common agenda and strategy in favour of pastoralist and other indigenous communities.
3. NGOs and donors should strengthen their relations with indigenous communities, support their development initiatives and promote a better understanding of their demands and aspirations within Kenyan society.

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Appendix 1:METHODS AND THE NUMBER OF PEOPLE INTERVIEWED

METHOD	FEMALE	MALE	COMMENTS(Age groups of all the people interviewed ranged from 18- 89)
Focus group discussion	10	8	These were members of the Endorois welfare council. Lake Bogoria lands office officials
Group discussion	23	14	Chelaba women group, teachers from schools and , officials from lake Bogoria dry land centre and Netbon camping and picnic site World vision
Interviews with Key informants	10	9	Interviews with Centre for minority group staff members Kenya land alliance World wide fund for nature and Kenya wildlife service officials Members of tugen cultural centre
Random interviews with respondents	12	15	Interviews were conducted at the market place with community members and also during civic education meetings organized by the electoral commission Workers at lake Bogoria hotel
In-depth interviews	10	10	Community members of different age groups
Total	147		