

Balancing of Rights in Land Law: A Key Challenge in Kenya

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Abstract:

The attempt to revive African customary law has been persistent throughout the history of legal education in Kenya. Today more than ever before the country shall have to reconsider the role and importance of studying customary law of the Kenyan people in order to strike a balance of rights for the dispensation of justice. This research aims to look at the balance between natural rights, legal rights and social rights. In the look of things more attention is now drifting towards human rights more than national legislations and this is in favor of the cultural rights or the customary rights of the minority groups when it concerns land law. However, this does not exclude what is termed as historical social injustices that Kenya has suffered from since her independence and the need to resolve them is quite urgent.

INTRODUCTION

Generally the concept of conflict appears to be understood by law practitioners, philosophers, politicians and jurists alike. Situation in which different systems of law clash or differ in their conceptualization of facts or in interpreting different and contextualized social realities there must be need to set a wise balance of rights. Law is about rights and duties. However, many conflicts arise more from rights other than duties. This discussion paper shall critically address crises emerging due to clashing of rights emanating from law. Several famous law scholars have admitted that definition of rights vary from one thinker to the other. There are many theories of rights as there are rights theorists (Rwiza, 2010:4), and therefore, it is necessary to begin by questioning the meaning of rights.

1. WHAT ARE RIGHTS?

The mainstream legal studies agree on three categories of rights that have been recognized by world well known law scholars and legal doctrines. They are natural rights (basic human rights), legal rights and social rights (customary).

1.1. Natural rights

Natural rights are inherent or birth rights that we all possess by virtue of our existence as human beings. They are absolute, universal, inherent, inalienable and inviolable (International Bill of Human Rights). They are the rights advocated for in the Universal Declaration of Human Rights and Fundamental Freedom of 1948. Natural rights are meant for the whole humanity according to the natural law theory.

1.2. Legal rights

Legal rights are instead those attributes we get from some enforced laws such as marital rights of spouses. They are the rights conferred to us by the virtue of law of marriage and divorce. They are limited and confined within the law that confers them to those who are privy to the contract. Whoever is not a party to the contract is not affected by its obligations and shall not enjoy rights given by it. This includes constitutional rights that citizens of a state enjoy. Legal rights are relative and limited in essence. They are not universal since they apply only within a specified jurisdiction. An example, if the Constitution provides that each citizen must have a source of income, then only citizens can make claim on this provisions and not non citizens.

1.3. Customary rights

Social rights are also known as customary rights. These last ones refer to every particular to a given social group and its traditions and cultural heritages. They are rights conferred to us by virtue of the traditional law or law of ancestors. Such rights are limited and qualified rights in their characteristics. They only apply to specified social group that subscribe to them and use them as law. Customary rights are not codified or written as compared to legal rights that are statutory and constitutional. Except in countries where customary law has been provided for in the constitution and statutes, rights emanating from the traditions and customs have minimal effect at law.

1.4. Conflict of rights in land law

Land law in Kenya is a corpus *juris* of several principles containing several diversities of rights that are *sui generi* very complex. Land law as a set of rules and principles governing interests in land is found in various branches or of land law in Kenya. Each branch has several rights that determine the interest in land.

Branches of land law in Kenya are comprised of the English law (English Common law and the doctrines of Equity); the constitution; Acts of Parliament in Kenya; borrowed Acts of Parliament of the United Kingdom; Tort law, Case law, Acts of Parliament of India; Customary Law (African & Hindu customary law); Trust law, Islamic Law; the general rules of international law (customary international law such as the Universal Declaration of Human Rights, International Bill of Human Rights, and the Treaty Law); and any ratified Treaty or Convention. It logically follows that since each set of law regime contains several rights relating to land, the given

multiplicity of legal regimes implies a chain of conflicts of rights that can translate into conflict of interest in land and judicial challenges (MBOTE & MIGAI, 2008, 1)¹.

The discussion on conflict of rights in land law has been inspired by persistent question touching on historical injustices on land most of which have not been adequately resolved. This includes land acquisition, its ownership or tenure (title or holding), transfer (law of succession), and profitable use by the public, privates and community. In other words, it is an attempt to address problems such as landlessness, corruption and illegal or irregularities in land appropriation in Kenya.

2. A FLASH-BACK INTO LAND RIGHTS

Landlessness is a real problem that is being dealt with by lawyers and non lawyers alike in different jurisdictional contexts without success. Yet landlessness transcends our modern time and reaches out to cover the far history of conflict of rights in land law. In Kenya, land was an issue even before the introduction of the formal legal system by the European Imperialists. To prove this we cannot ignore what is severally referred to as “tribal lands” or “ancestral lands” (Kenyatta, 1935:1), “customary land tenure”, or “community land” (Snell, 1954: 108). Both African and foreign authors on African customs and traditions have made important references to rights on land. Despite their diversified approaches they all concur on one subject: “Land is a real property whose ownership and possession belongs to people”. This alludes that land was an important real property for populations in the prehistoric and historic periods yet social and economic value of land was introduced by colonial settlements (Bennett, 2000:141).

¹ PROF. PATRICIA KAMERI-MBOTE & PROF. MIGAI AKECH, “Ownership and Regulation of Land Rights in Kenya: Balancing Entitlements with the Public Trust”, in *University of Nairobi Law Journal*. Nairobi: Vol. 4, Issue 1, (2008), p.1.

Besides the attraction of commercial value of land the customary rights on land were not introduced by the colonial powers. Customary law had provisions for land use, land transfer and licensing others to enjoy the fruits of land without objection.

2.1. Prehistoric period

This research cannot ignore the importance of the *anciéne régime* when it comes to conflict of rights in the land law with reference to customary rights in Kenya. Mythologists would link land ownership to supernatural beings according to their occults and belief system, whereas some believed that land ownership and use are rights that require legal concern.

Before the historic formal demarcation of lands and partition of the African Continent by the European Imperialists in 1885, Africans were existing in “state-like” social groups with rights and obligations well framed in customary law as community rights. British colonialists called such groups either as “natives” or “tribes” avoiding the term “Nation” just to distinguish white settlers from the indigenous communities.

Since the colonial conquest was in itself a violation of human rights of the local “nations” and their territories, the imperial powers could not refer to traditional societies as nations or states except some few that successfully opposed the conquest. In a White Settlement scheme prime lands were subjugated and given to the colonial settlers. In this process the locals also known as the natives had their rights on land alienated in a deplorable manner by the colonial regime. The proof to this is the causality of rebellion of 1952-3. Expropriation of the White-Highlands in Kenya by the British settlers is what provoked the natives who were coerced to live in “Native Reserves” with a home-guard ensuring that they were not posing threats to the White settlers.

Persons and families whose customary land tenure had been expunged by the White Settlers Scheme became squatters in other areas such as in the Rift Valley region where land was not as productive as in the Highlands.

2.2. Freedom of movement and acquisition of territories

Prehistoric Africa had enshrined the freedom of movement before the Europeans conquest and occupation of the African territories. As land ownership was considered differently by different social groups, its acquisition was not an issue since many Africans believed that land belonged to a Super - Being, who delegated his rights on land to a King, Chief or an Emperor. The generally accepted principle was that “God gave land to man for productive use” (Bello, 1980:19). In pre-colonial Africa land was considered a God-given resource that could not be permanently appropriated by any one person (Bennett, 2000:141).

In general perception of African tribal society, land ownership (customary land tenure) was considered sacred and raising allegations on rights to land were considered an abomination by others.

Even though such belief systems have not enjoyed full legal recognition, Bello says that *modern man retains the biological and cultural endowments of his past* and therefore customary law must be taken into consideration as a pure legal discourse (Bello, 1980:19) as opposed to mere system of beliefs.

Besides the notion that land belonged to a Super Being, it is also proved that land was owned by communities in terms of clans, families and members of the clan or family but not by individual

as was the case in the Western civilizations. Rights to own it in certain Kingdoms belonged to a Monarchy or Crown. Clans, families and community members will enjoy the rights of usufruct but not ownership since it was never considered a personal property.

2.3. Land acquisition rights through battles

Books of history state that land was a basic need or real property and populations would fight fierce battles against the already occupants in order to acquire rights over such land (Kenyatta, 1935:13). Tribes or ancestors needed security that only land would provide. This is justified by several rivalries and armed conflicts over territory due to its economic, social, political and cultural value (Bello, 1980:22). Such would be causality of several historical armed conflicts perceived as ideal mechanisms for self-defense, protection, security against external intruders. This is justified by several circumstances in which some politically organized and armed ethnic groups resisted the European conquest in the early stages.

2.4. Socio-economic factors

In reality land was possessed by different communities according to their actual lifestyle and socio-economic demands. Some tribes would be more attached to fertile lands around highlands and hilly areas with potential agricultural viabilities. Others would prefer plain lands with plenty of grazing lands because of their pastoralist lifestyle. The dictating factor on this was in cattle that were basic economic assets. Others would be attached to territories with water sources such as rivers and lakes in the inland where they would practice fishing and small scale farming whenever there were necessities (Kenya Year Book, 2010:12). In Kenya, tribal territories originated from free migration styles at the time and land was usually conquered through battles.

3. CHANGE OF PARADIGM

On August 27th, 1897 Kenya became *de jure* British East African subjected to the British Crown. The whole territory belonged to the Crown by *colonial rights* whose laws were imposed on the native populations through battle and persuasions. At the same time Europeans introduced their legal system, English Common Law and the Doctrines of Equity as it was in the United Kingdom. Principles on land rights in Kenya have been derived from Property Act, Sale of Goods Act, law of Contract, and Equity. Colonial legacy has had a great impact on the conflict of rights in land law in the Republic of Kenya since the time Kenya became part of the British foreign territory.

3.1. Independence

Considering the pre-colonial time, colonization, and the independence so much has changed in the concept of land law in Kenya. British colonial power shares a portion of blame on the historical injustices related to rights on land. The evidence to this is attributed to the struggle for freedom that was motivated by claim for land rights (Ndung'u Report). *Land grabbing has its genesis in pre-independence Kenya when a small group of white settlers were allocated 20 percent of Kenya's landmass consisting of the best agricultural land* (Ndung'u Report).

In Kenya, Mau-Mau protests were based on their grievance about their ancestral lands that had been abducted by the White settlers during the colonial patronage process.

The causality for this national outcry was based on the right to self-determination of the people and the birth of a “Nation”. Nation refers to multiple number of ethnic groups or tribes having their own traditional legal systems who accepted in a social contract process to found a “nation” that would be independent from the British Imperialism. The “statehood” emerged at the same time with the nation through “nation-building” campaigns by African nationalists. Yet in reality, decolonization that marked the independence did not sufficiently address the question of rights regarding land and ancestral territories. The British left Kenya but their law remained as it was introduced – that is, English Common and rules of Equity.

3.2. The Constitution

First and foremost, the first Lancaster Constitution adopted in 1963 the time Kenya received its independence, and in 1964 its Self-government, determined the fate of justice related to land in the post colonial Kenya. The defunct Constitution gave too much power to the President. Rights on Public land and Trust land were the prerogative of the President in Kenya. The hope in what was celebrated as the remedy to historical injustices in Kenya just changed formula. Rules enacted by the *Crown Lands Ordinance* did not consider the rights on land and the Constitution was severally amended to fit the interest of powerful and well connected politicians, religious and business communities. The President had sovereign authority over rights related to land and corresponding agrarian reforms thereto that jeopardized the wheel of justice.

Such were the constitutional challenges that made it difficult for the Land Reform Commission to discharge its duty properly. Improper distribution and re-distribution of land was experienced both in the colonial in appropriation of land rights and that of the succeeding post-colonial

regimes. History repeated itself and the Constitution of 1963 did not survive claim of its legitimacy on 27th August 2010 when it was officially repealed.

3.3. The regimes had vested interest in land

Post colonial Kenya embraced English law and borrowed Acts of Parliament from the United Kingdom especially to tame the disputes over White Highlands that at the independence were sold applying – *willing seller – willing buyer* principle. Whoever had money would lawfully purchase the portions of “White Highlands” from the White settlers. The post colonial government of Jomo Kenyatta used the land formerly held by settlers for patronage purposes-to solidify support and build alliances (Ndung’u Land Report). Yet this transaction did not take into account other rights such as those emanating from customary law system, international and others.

The adaptation of foreign laws to regulate land ownership deliberately ignored the role of African customary law, or that of minority communities and denied them their legal recognition.

3.4. Conflict with indigenous rights

Likewise, adoption of the English Common Law in Kenya had its impacts on land law and policies in the independent Kenya. English doctrines on land introduced the principle that says *If there be any waste or barren land within our dominions, that also is to be given to strangers, at their request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed a property.* (NEOCLEOUS, 2012: internet).

This is the same notion observed by the Imperialists who argued that they had legal rights to occupy wastelands in Africa and turn them into potential productive use. Waste land should be

given to others including aliens that would utilize it. The same imperial rule was applied in India leaving many populations landless. Those who were considered lazy or whose lands were lying unutilized would lose their rights of possession and titles to such lands.

The main *animus intendi* of the colonial powers was to justify their unlawful right over the defunct historical occupation. In exchange for their free services to the Africans, the *Non-Self-Governing* territories had to surrender their fertile lands (White Highlands) and offer loyalty to the British Crown through fiduciary principles provided for in the Crown Lands Ordinance without respect to the customary rights of the local populations over land entitlement.

To avoid more questions, the British Colonial Power introduced willing seller willing buyer policy to justify the legality of land acquisition as opposed to Communal African traditional land ownership (NEOCLEOUS, 2012: internet sources). The lands purchased through this rule have not gone unchallenged by those who feel that their rights have been violated either referring to customary international law principles or the guides of customary law regime.

4. INTERNATIONAL LAW: UNIVERSAL RIGHTS

Decolonization process started during the League of Nations in 1919. The period culminated by the Peace of Versailles in France was the beginning of the end of colonization when the Covenant of the League made a provision of Trusteeship Council to deal with quick transfer of the colonized territories to the people. The breakthrough was only achieved by the adoption of the United Nations Charter that terminated the Second World War in 1945 and the Trusteeship of the colonial territories were to be passed through independence in a peaceful manner.

Major emphasis on human rights and fundamental freedoms of the people inspired rapid withdrawal of the British Crown from its foreign territories under the right of self-determination of the people principle (Bennett, 1995:385) with the first territory to gain independence was British Togoland in 1957.

In Kenya the struggle for freedom of land rights emerged with the uprising of Mau Mau guerrilla warfare against the British White Settlers that illegally occupied their customary lands. The conflict marked the protest against occupation of foreigners. The foreigners imposed on the indigenous their laws and legal rights to own the White Highland. This was inconsistent with the native rights, or customary rights over land ownership. The use of force to displace the indigenous and make them live as squatters in the “Reserves” known in South Africa as *Bantustans*, was also an abuse to their human rights (Kenyatta, 1935:27).

4.1. NEW FRAMEWORK

Human rights are what we referred to as natural rights or basic rights that are absolute. They are inalienable, inherent, inseparable and cannot be delegated. Nobody should be deprived of his birthright in any way as stated in the most celebrated Universal Declaration of Human Rights and International Bills of Human Rights.

International Bill of Human Rights are considered a tsunami in so far as balancing of rights in land law is concerned. The natural rights are seen to overrule other rights such as legal and customary rights whenever they are found inconsistent – reference is made to *jus cogens* norms in the customary international law.

Under the Aborigine Title (Indigenous Right), rights that appertain to a culture of people are to be respected, protected and promoted by Constitutions and legislations.

This rule is contemplated in the letter and spirit of the Constitution (2010) of Kenya, in the preamble – *proud of our ethnic, cultural and religious diversity*.

African Charter of Human and People's Rights is another important legal instrument that we should contemplate in this research. The document has opened another window through which we can analyze the conflict of rights on land law in Kenya.

From the African Human and People's Rights in Arusha we can refer to a ruling that recognized the right of the Minority in Nigeria (Lexisnexis, 2012: internet): More attention to community or minority rights.

Another important precedent for local communities' action to counteract the harmful impact of foreign investments is the 2001 case of Social and Economic Rights Action (SERAC) v. Nigeria, where the African Commission on Human and Peoples' Rights affirmed its jurisdiction to hear a complaint that foreign oil and gas investments were causing serious health and environmental harm to the Ogoni people in the Niger delta. The Commission found that no effective remedies had been made available to the complainants by the Nigerian authorities, and held that the oil exploration and production activities by foreign investors had caused an intolerable level of pollution, severe environmental degradation, and serious health damage so as to threaten the very existence of the Ogoni people. These precedents attest that when remedies are available under human rights treaties, investors' rights do not stand in the way of the recognition of individuals' and groups' right of access to justice. But since access by individuals and groups to

international mechanisms of human rights protection remains dependent on specific treaty regimes, this option is of limited use, and mostly available at regional level for the purpose of providing a forum for remedying abuses or wrongful damage caused by the investor to the local population.

Another case to justify the keen attention on cultural rights is of the *Endroi* minority group in Kenya: (www.hrw.org/news: 2013), (“A ruling by the African Commission on Human and People's Rights condemning the expulsion of the *Endorois* people from their land in Kenya is a major victory for indigenous peoples across Africa, Human Rights Watch, WITNESS, and the *Endorois'* lawyers said today. The Commission ruled on February 4, 2010 that the *Endorois'* eviction from their traditional land for tourism development violated their human rights”. African Commission affirming that the eviction of the people from their traditional land is a violation of their human rights brings us closer to the question of traditional land ownership. Traditional land is what in Kenya is referred to as tribal lands or in other terms, the community lands.

5. ACHIEVEMENTS OBTAINED SINCE 1963

Since independence Kenya has modified and re-modified its policies and rules on land to render them more legitimate. Public land, trust land, private land, and community land have been key concepts to define land in Kenya. The Constitution of 2010 managed to provide only for three types of lands in Kenya: Public land, Community land and Private land. The same Constitution has availed a provision for Environment and Land Court whose level and rank in the judicature should be the same as that of the High Court. The Court is supposed to hear all land disputes and determine the cases according to the law. The same Constitution has a provision for National

Land Commission whose mandate shall be on land rights considering the existing written laws and customary law. The same National Land Commission is mandated with the duty to find the solution to the historical injustices pertinent to land disputes.

Hard task is not related to public land or private land as such but community land. The community land is what is creating recurring conflicts of rights. The areas that were known as trust lands and family lands are now place under one name – community land. It will be within the jurisdiction and duty of the Court to interpret the law and provide proper definition of the community land.

6. HANGING TASKS

Conflicts of rights are vast and immense in the Kenyan legal system. Land law is creating a lot of expectations in the people as interests in land are many, diversified and conflicting. Referring to all kinds of norms ruling over land in Kenya it is evident that there are several conflicts that must be solved expeditiously by the judiciary and the legislature. The following are some of the key rights:

- i) Land tenure – freehold and lease hold rights
- ii) Full rights and limited rights over community land
- iii) Customary rights especially on legendary tribal territories
- iv) Trust lands rights
- v) Property rights
- vi) Succession rights
- vii) Cultural rights

7. DEMYSIFYING LAND RIGHTS

What has rendered land reform in Kenya slow and cumbersome is the concept of “tribal or ancestral land” in Kenya. It is clear that customary rights on land are not absolute, nor qualified, but limited rights. They are only meaningful and binding on the communities that believe in them in exclusion of the State policies and law. They are not binding on all members even from within the same community. Yet tribal lands still exist as mystiques that only linger in legendary books and narrations whose fate cannot be sustained in law.

Tribal factionism is a persisting historical reality in the present Republic of Kenya is political and not legal. In line of order one would consider of himself as a member of an ethnic language group, a clan then finally, as a Kenyan when it comes to customary rights. This is a big challenge to the gains of independence and statehood since citizens take themselves to be people belonging to small tribal communities. Nation building efforts have disappeared and tribalism of the pre-colonial time is still haunting Kenyan politics rendering the justice system slow.

This disseminated idea makes non ethnic group members feel more unsafe in such imaginary ancestral lands coined in the name “tribal lands” by the colonial regimes. Within this imagination of tribal land members live more in form of clans making the sense of belonging to a State more remote in the minds and thoughts of people.

The clusters of clans and families that share the same legend known as tribe and share cultural traits identify themselves as ethnic group with cultural rights. In this context there are still spaces known as “Luoland”, “Masai land”, “Kikuyu land”, “Kamba land”, “Luhya land”, “Abagusii land”, “Kuria land”, “Nandi land”, “Kipsigis land”, “Digo land”, “Turkana land” which exist in the imagination of people. These abstract conceptions exist also in reality making reference to repeated land disputes and clashes based on ancestral lands.

A similar use of the tribal land is traced in South Africa in terms of the Zulu land, in India, in the United States of America, Native Tribal lands and across Africa purporting that tribal land concept was frequently in use during the colonial time. In the US the use of tribe is in reference to the indigenous Indian tribe whose land hold is regulated by law as trust land. The use of tribe land is restricted and limited by law. In the British former colonies such as Kenya, the use of tribe land is not limited to some groups but to all citizens who still identify themselves with their tribes of origin in what is alleged as “tribalism” in Kenya. The use of the word has since been changed to read “negative ethnicity” to avoid the use of the word tribe which was adopted from the British.

Despite the amendment to the terminology used, the concept of tribe in the English meaning is still a problem. It is predictable that the newly appointed National Land Commission will have to tackle the question of such tribal territories so that the ownership, possession and entitlement of land shall never be pegged on the historical legends but on facts that can be prosecuted by the law.

Rights have been used by politicians to drive their personal or political interests through. In Kenya politicians have manipulated the conflict of rights and interests to ascend to power. Such beliefs as “tribal territory or ancestral lands” will continue serving the interest of politicians in Kenya despite the problems they may cause to the judicial system.

8. LEGAL PREDICAMENT

Since law is part of the vast world cultural heritage it is necessary to draw close attention to cultural relativism or contextualization in the domain of law (Onyango, 2010:2ff). As much as

we insist that we all have different cultural beliefs on land disputes and issues, it is necessary to see the diversity in unity under the principles of justice. Equality principle must be considered whenever we are looking at the minority rights or customary collective rights of people without yielding to conflicts. Equality principle is the main benchmark of international human rights law and cannot be ignored.

The justification of cultural relativism is linked to the recognition of the African Charter on Human and People's Rights. Who are the people in this context? The document is focusing mainly on the minority rights or group rights that should not be overruled by national legislations or focusing only on principles borrowed from other countries (Rwiza, 2010:160-161). African contribution is on human values and civilization of the African people which should not be viewed as contrary to basic human rights which are universal.

The African contribution reflects more on the protection of family, collective rights as linked to individual rights. The protection and safeguard of African cultural values which reflect African communitarianism (Rwiza, 2010:163) highlights the need to address culture and traditions of the people under minority rule. Community land concept is linked to the perception that we exist collectively therefore we also have collective rights as opposed to individual rights.

Cultural relativism is not a contradiction of universalism but part of the universal rights. African historical customary rights to acquire territories can be justified under this argument.

Since law is about justice and order in the present human society it should not be seen to create the contrary, that is, injustice and disorder at the same time. As much as we appreciate and embrace our group rights there is much need to pay attention to what puts us together not only as

portioned social groups but a larger community known as “nation”. Nationhood is pegged on the forces that put us together as Kenyans and no law should divide us². This is justified under Section 2(4)- *any law, including customary law, that is inconsistent with this Constitution is void to extent of inconsistency, and any act or omission in contravention of this Constitution is invalid.*

Law plays the role of pulling all different forces to the centre “nationhood” unitary State. Rights tend to pull in different directions emphasizing on group and individual rights. So it is the craft of lawyers, legislators and jurists to ensure that law fulfills its obligations in the society by striking a balance of conflict of rights in an equitable manner. So far, the application of the doctrine of Equity in our legal system is filling the gap created between legal, natural and customary rights.

9. PREDICTIVE INSIGHTS

After discussing various rights attached to land law and eventual conflicts I would say that customary law can predictably play an important role in making justice system capable of striking a balance of rights in a land reform process. Customary rights are known to be lose and not easy to enforce in the modern legal system, however, what they add to the jurisprudence on land is great and indispensable.

Minority rights for instance, are part of customary international law as contemplated also in the African Charter of Human and People’s Rights. Kenyans cannot assume the contribution by African customary law institutions in the search for a balance of rights in land law. South Africa

² BWAYA BULUMA & MAHAT MURSAT, “The Case for the Supremacy of Customary Law in Kenya”, in the *University of Nairobi Law Journal*. Nairobi, Vol. 4, Issue 1, 2008, p. 61.

in its Constitution (1993) recognized the value of customary law and raised its status to that of Common Law (Bennett, 2000:11): *Demands expressed abroad for recognition of native social and legal institutions are bound to have an effect on the enforcement of customary law in South Africa. Bennett says that like minority cultural groups in foreign jurisdictions, Africans here may appeal to both international and constitutional law to win respect for their culture* (Bennett, 2000:11). South Africa has broken the silence on cultural rights and eventually recognized the African customary law in her Constitution and Statutes allowing the formal Courts to make reference to them whenever deemed necessary.

Minority protection rule, self-determination principle, adverse possession rule and Aboriginal title are grounds to believe that customary or social rights must enjoy full constitutional recognition and balancing of legal rights in land law in order to solve the on-going conundrum in land law agency such as the constitutional National Land Commission. Kenya can not estrange herself from the customary law belonging to the diverse range of cultures within her jurisdiction.

State agencies including those ones determining the education of law shall have to re-evaluate the position of African jurisprudence in the legal education and public awareness about customary rights. This is one of the most viable means to expeditiously achieve legitimate justice, peace and dire need for reconciliation across the national and ethnic divide in the new Republic of Kenya.

Conclusion

Setting a balance in land rights is disturbing both political elite and lawyers alike. In Kenya lots of land have been poorly managed and unfairly distributed despite the constitutional and

statutory provisions in force. It is a fact that the post-colonial Governments failed to come up with clear land policies and right directions that would have made the balancing of rights easier for the people. Jurisprudence on land in Kenya has deliberately ignored the customary rights of the people and instead has upheld the administrative principles borrowed from the British legal system.

As so long as we uphold the rule of law principle and constitutionalism in Kenya, we cannot ignore the role and importance of customary law in understanding all rights and striking a balance that will yield to law and order. The statutory rights of land tenure and others such as adverse possessor rules must be taken into consideration while designing land law and policies. Most significantly, this process of balancing of rights shall have to consider the role of customary law and pay attention to the predicted sovereignty of the people, in particular the minority groups and the poor.

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