

**Women's Land Rights Considerations for Kenya's Draft Community  
Lands Bill:  
Review and Recommendations  
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**Prepared by  
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## EXECUTIVE SUMMARY

This memorandum provides a review of Kenya's Draft Community Lands Bill, 2013<sup>1</sup> from a women's land rights perspective. Community lands make up an estimated 65-70% of Kenya's territory<sup>2</sup> and were for the first time given equal status with privately held land in Kenya's Constitution of 2010. Within community-based land tenure systems, women and men are treated differently and more often than not, women's land rights are inferior to, reliant on, or secondary to those of men. Experience around the world shows that, while secure land tenure for women leads to tangible gains for households and communities, women will either not benefit from, or be made worse off by, land tenure reforms that are not gender-sensitive. To help ensure positive outcomes for women and men, the following amendments to the Kenyan Draft Bill are recommended and argued below.

### **Ensure that the definition of a "member" of a community cannot *in fact* exclude women.**

1. Legislate that membership cannot be defined in a way that excludes women, who use the land, no matter her marital status, no matter whether she has or does not have children.
2. Legally define membership in the law in a way that includes all those who at the time of incorporation are in fact using or residing on community land and those who return to the land and use or reside on it for a period of time.
3. Legislate that decisions defining community membership which either *de jure* or *de facto* excludes any woman who is using or residing on land within the community is prohibited, and makes the incorporation of the community as well as land transactions null and void.
4. Legally define and protect the rights of individuals within a marriage, a household, and community.

### **Ensure *meaningful* participation of women in community land governance.**

1. Legislate a quota on number of votes from women to create a quorum that would be needed to reach a critical mass, rather than just a quota on women's representation in institutions.
2. Mandate that implementing regulations require Committee meetings be held at a time and in a place that is accessible to both women and men, and respects their other familial duties.
3. Mandate that implementing regulations or procedures provide for education and training for all new Committee members, with a focus on rights, gender sensitization, obligations, and skills training to assist with assertiveness and consensus building for women.
4. Provide for a process to appeal decisions -of the Committee and Board which have not adequately involved women.

### **Ensure greater procedural fairness protections to both women and men.**

1. Mandate a form of notice that is equally accessible and available to men and women.
2. Require that opportunities for comment on communal land governance decisions are equally available and accessible to men and women in the community, require that comments by men and women are equally accounted for in decision-making processes, and allow for appeal of decisions that appear to have been made without consideration of comments from both men and women.
3. Require a venue that enables women to meet and discuss land governance issues both with men and separate from men.
4. Legislate the parameters and procedures for appeal of decisions on community lands so as to ensure that they are equally accessible (physically, socially, geographically) to men and women.

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<sup>1</sup> Republic of Kenya, Ministry of Lands, Housing and Urban Development, Taskforce on Formulation of Community Lands and Evictions and Resettlement Bills, The Community Lands Bill, 2013 "Draft" 12<sup>th</sup> November 2013 (hereinafter "the Draft Bill" or "CLB").

<sup>2</sup> See USAID, Kenya - Property Rights and Resource Governance Profile, available at [http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID\\_Land\\_Tenure\\_Kenya\\_Profile.pdf](http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Kenya_Profile.pdf)

## BACKGROUND

This memorandum provides a review of Kenya's Draft Community Lands Bill, 2013 (12<sup>th</sup> November, 2013) from a women's land rights perspective. Community lands make up an estimated 65-70% of Kenya's land mass. In Kenya's progressive Constitution of 2010, community lands were recognized for the first time, ostensibly to allow customary communities to govern their own lands and to help ensure that customary tenure would be have the same legal status as with private land held in freehold or leasehold tenure. Recognizing community (or customary) land tenure systems in statutory law - a legal trend - is intended to legitimize indigenous land tenure systems, and is an important policy goal that has the potential to provide land tenure security to a large number of rural poor in Africa. The shift toward titling and registering customary land rights is an attempt to assist with land transactions and access to credit, because traditionally community lands provide limited access to formal credit and input markets and to sales outside the group;<sup>3</sup> it also helps protect customary lands from loss or encroachment by outsiders, and helps ensure that those communities on customary land can benefit from its efficient and productive use.

Within customary land tenure systems, women and men are treated differently and more often than not, women's land rights are inferior to, reliant on, or secondary to those of men. That being so, recognizing an indigenous land tenure system may also unintentionally conflict with constitutional provisions or laws which protect against gender discrimination or provide for gender equality.

Experience around the world shows that, while secure land tenure for women leads to tangible gains (such as improved agricultural productivity, food security, and economic development) for households and communities, women will either not benefit from, or be made worse off by, land tenure reforms that are not gender-sensitive. The different needs, obligations, rights, opportunities, and situation of women and men must be understood if the envisioned reforms are to achieve not just equitable outcomes for women and men, but also other important development goals. "For law and policy to influence gender relations in the tenure realm, there is need to deconstruct, reconstruct, and reconceptualize customary law notions around the issues of access, control, and ownership. The view should be to intervene at points that make the most difference for women. In determining tenure to land, rights should be earned or deduced from an entity's relationship to the land. Rights should be anchored on use and subjected to greater public good resident in the trusteeship over land for posterity. Given women's roles in land management and husbandry, such an approach will identify them as loci for rights' grants and thus address the skewed gender and land relations under customary law that have been further entrenched by statutory laws."<sup>4</sup>

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<sup>3</sup> Mwangi, Esther (ed). 2006. Land Rights for African Development, From Knowledge to Collective Action, CAPRI Policy Briefs, Collective Action on Property Rights, United Nations Development Program, and International Land Coalition, Washington DC, 2006, at 4. Available at [http://www.capri.cgiar.org/wp/..%5Cpdf%5Cbrief\\_land.pdf](http://www.capri.cgiar.org/wp/..%5Cpdf%5Cbrief_land.pdf)

<sup>4</sup> Kameri-Mbote, Patricia "Gender Issues and Land Tenure under Customary Law" in Mwangi, Esther (ed). 2006. Land Rights for African Development, From Knowledge to Collective Action, CAPRI Policy Briefs, Collective Action on Property Rights, United Nations Development Program, and International Land Coalition, Washington DC, 2006, at 13. Available at [http://www.capri.cgiar.org/wp/..%5Cpdf%5Cbrief\\_land.pdf](http://www.capri.cgiar.org/wp/..%5Cpdf%5Cbrief_land.pdf)

## THE DRAFT COMMUNITY LANDS BILL AND WOMEN

The Draft Community Lands Bill (hereinafter “Draft Bill”) seeks to give effect to Article 63 (5) of the Constitution providing for the recognition, protection and registration of community land rights. In a number of provisions, the Draft Bill attempts to also protect women’s interests either directly or indirectly. For instance, the Draft Bill:

- Defines “customary land rights” as those that derive from customary law, provided that such rights are not inconsistent with the Constitution (CLB PART I); and the Constitution provides for equal treatment and equal opportunities of men and women (Const. Art 27 (3)) and prohibits discrimination by the state based on sex and marital status (Const. Art 27(4)).
- Provides that every person dealing with community lands must be guided by the principles of “affording equal rights to all members of the community” and “elimination of all forms of discrimination” (CLB Art 4).
- Establishes a community lands Committee which must make decisions with regard to the “equality of all persons” and commit to “non-discrimination” in its decision-making (CLB Art. 10(4))
- Provides that every member of the community has the right to equally benefit from the land, including full and equal enjoyment of rights of use and access; equal treatment for men and women in all dealings in community land; and prohibits a Committee from directly or indirectly discriminating against any member of the community on the grounds of their gender or marital status (CLB Art. 47).
- Requires that women and men are represented on Community Land Management Committees (CLB Art 20).

All of these provisions show a laudable intention to equally protect men and women, to avoid sex discrimination, and to guide behavior and decision-making around community lands in way that enshrines the spirit and intent of the Kenyan Constitution in this regard.

However, good intentions in law are often inadequate in the face of strongly-held cultural norms and practices which treat the needs of women as secondary to those of men and that exclude women from meaningful participation in governance of resources that have a direct bearing on their livelihoods. As argued elsewhere, to ensure that all community members, men and women, benefit from land tenure reforms, “rights should be earned or deduced from an entity’s relationship to the land”<sup>5</sup> rather than from exclusionary rules which may serve to further solidify the power of a limited group within the community. The following broad areas highlight provisions which, if improved, could do much to help ensure that the good intent expressed in the law have a real impact on the lives of women and men both who live on community land in Kenya.

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<sup>5</sup> *Id.*

**1. Ensure that the definition of “membership” in a community cannot in fact exclude women living in the community even if they were not born in the community**

In the Kenyan Community Lands Bill, many benefits accrue to those who are defined as “members” of a community. For instance, every member has the right to equally benefit from the land (CLB Art 47); members may be allocated land for exclusive use and occupation (CLB Art. 44); all members of the community make up the community Assembly (CLB First Schedule, 1) and the community Assembly is empowered to advise and ratify Committee decisions, evaluate and codify customary law and evaluate traditions and practices which are socially harmful (CLB Art 17).

Importantly, only community members may be represented on the Committee (CLB Art 19), which has broad powers to manage and administer registered community land (CLB Art 22). The Committee also has control over dealings in land, can determine the criteria for acquiring membership in the community, determine uses of community lands, and allocate rights to community land (CLB Art 22(3)).

Thus, membership in a community opens the door to benefitting from and participating in decision-making related to community lands. Yet, by its terms, the law is circular and presupposes that membership in a community is known because it provides that membership is defined by the Community Assembly (CLB SECOND Schedule (4)) an institution which is made up of “members” (CLB FIRST SCHEDULE, 1).

Being a member of a community is therefore the entry point to the benefits that come from formalizing community land rights in Kenya. However, by allowing the community to define membership, the Bill runs the risk of disenfranchising those who are already vulnerable.

- a. *The Draft Bill's provisions permitting a community to define membership can have the unintended effect of excluding women because community membership is typically defined by customary rules of lineage that exclude women.*

Across Kenya, lineage is determined by the male blood line, a woman who is not a child of a lineage member cannot be considered part of that lineage. This is evidenced by land rights customs of many communities in Kenya where if a man dies leaving behind only daughters, his estate is treated as if he was never married and had no children; his estate is inherited by his father, if still alive, or by his paternal uncles or nephews.<sup>6</sup> Likewise, while a woman may live with her husband and his family, bears his children, and uses lineage land, she will never be considered part of his lineage and is only accorded certain rights while her relationship to a lineage member lasts. To illustrate this point, certain cultures in Kenya practice *levirate* where widows are inherited by a surviving lineage member, ostensibly to assure her access to the lineage's productive resources to provide for their shared children which she otherwise would lose because of her husband's death.<sup>7</sup>

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<sup>6</sup> Harrington, Andrew. 2008. “Women's Access to Land and Property Rights. A Review of Literature” World Bank, Justice for the Poor/ Kenya, Washington D.C., at 24. Available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/02/15/000334955\\_20100215030410/Rendered/PDF/530010WPOP111010Box345586B01PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/02/15/000334955_20100215030410/Rendered/PDF/530010WPOP111010Box345586B01PUBLIC1.pdf)

<sup>7</sup> Human Rights Watch. 2003. “Double Standards: Women's Property Rights Violations in Kenya.” Human Rights Watch, Vol 15, No. 5, (A)- March 2003, New York, at 12. Available at <http://www.hrw.org/reports/2003/kenya0303/kenya0303.pdf>; Andrew Harrington and Tanja

Similarly, a woman is not fully considered a member of her birth family's lineage. Most marriage practices across Kenya are patrilocal, whereby a woman leaves her birth family at the time of marriage to reside with her husband's family and is thereby considered *in transition* or temporary while living in her birth home.<sup>8</sup> Also, her transitional, non-member status is supplemented by the payment of bride price paid to her family who effectively receive payment for her departure, and relinquishes their responsibility for her.

*b. Comparative experience shows when communities have discretion to define community membership, women are likely to be excluded or marginalized.*

Women may be marginalized because they hold less power than men in their communities. For example, like the Kenyan Draft Bill, the Papua New Guinean Land Groups Incorporation Act (1974) requires that the community constitution determines rules for membership.<sup>9</sup> Analysis of the application of that law in practice has found that women have been marginalized and have largely been excluded from the economic benefits that have accrued to communities which have formalized their land interests.<sup>10</sup> Because the law does not specify the rights of individual members of a group, even if a woman or man is defined as a member, more powerful members of the family dominate weaker members who then have no recourse.<sup>11</sup>

Similarly, women may be marginalized because they hold less power than men in their households. To illustrate: the Communal Property Associations Act (1996) of South Africa requires that membership in a communal property association is determined by agreement of the community. Like the Kenyan Draft Bill, the South African Law also prohibits direct or indirect discrimination, and permits membership to be held by individuals, families or households.<sup>12</sup> However, by permitting households to be members of community property associations in practice, membership benefits have vested with the household head, who is most often a man. While this preserves elements of custom, which is important for social legitimacy and cohesion, it also has in practice undermined women's rights to their important productive resource.<sup>13</sup>

## Recommendations

To avoid marginalizing or undermining women's rights to community lands in Kenya and to ensure that benefits embodied in the Draft Bill are equitably shared between women and men, the following amendments are recommended:

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Chopra. 2010. "Arguing Traditions: Denying Kenyan Women Access to Land Rights" World Bank Justice for The Poor, Washington DC, at 22. Available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/01/15/000333038\\_20100115005527/Rendered/PDF/526740WPOP11101on1Harrington1Chopra.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/01/15/000333038_20100115005527/Rendered/PDF/526740WPOP11101on1Harrington1Chopra.pdf)

<sup>8</sup> Kameri-Mbote, Patricia. 2006. "Women, Land Rights and the Environment: The Kenyan Experience" in *Development* 49, 43-48, at 44.

<sup>9</sup> Independent State of Papua New Guinea, Land Groups Incorporation Act (1974), Section 8(b).

<sup>10</sup> See Hedditch, Susan and Clare Manuel. 2010. "Papua New Guinea: Gender and Investment Climate Reform Assessment," Washington D.C. International Finance Corporation, at x-xi.

<sup>11</sup> See *id* at 62

<sup>12</sup> Jacobs, Petrus Jacobus 2011. "Tenure Security Under the Communal Property Associations Act 28 of 1996: An Analysis of Establishment and Management Procedures with Comparative Reference to the Sectional Titles Act 95 of 1986," L.L.M Thesis, University of Stellenbosch, at 71

<sup>13</sup> *Id* at 79.

- (1) Legislate that membership cannot be defined in a way that excludes women, who use the land, no matter her marital status, no matter whether she has or does not have children.
- (2) Legally define membership in the law in a way that includes all those who at the time of incorporation are in fact using or residing on community land, and those who return to the land and use or reside on it for a period of time.
- (3) Legislate that any decisions or rules defining community membership which either *de jure* or *de facto* excludes any woman who is using or residing on the land is prohibited, and makes the incorporation of the community null and void.
- (4) Legally define and protect the rights of individuals within a marriage, a household, and community by defining community membership in a way that recognizes individual rights.

## ***2. Ensure meaningful participation in governance of community land for women***

The Draft Bill envisions new mechanisms for governing community lands in Kenya. For instance, it provides for incorporation of communities (CLB Arts. 15), defines and gives powers to Community Assemblies (CLB Arts. 16-17), to Community Land Management Committees (CLB Art 18-27), and to Community Land Boards (CLB Arts. 28-32).

The Draft Bill rightfully considers the composition of such groups in an attempt to ensure that they are gender-balanced; for instance, it provides that not more than two thirds of a Committee can be composed of any one gender (CLB Art. 20(3)). However, while the Draft Bill addresses the gender composition of the Committee it is silent on the gender composition of Boards (*see* CLB Art 28(3)).

The gender balanced quota in the Draft Bill is a good step for women and men in terms of representation, however, alone it may not be sufficient to ensure meaningful participation. Women's participation is also impacted by other inequalities at the household and community levels which limit their bargaining power such as: norms for female seclusion and the unequal division of household labor, social preferences that give more weight to men's than women's participation, entrenched power that men may be unwilling to relinquish, greater personal endowments (land and social networks) and household endowments (social and economic position) for men that prevent women from having influence.

- a. Lessons learned from other community governed resources (such as forests) suggest that a quota alone is insufficient to ensure women's participation in governing bodies.*

A good analogous examples comes from community forestry in Nepal. Analysis of a large community forest management project in Nepal found that quotas for women in management were ineffective alone because women do not have the same information as men to participate in meetings, they may not be able to attend meetings because of household duties, they may lack the self-confidence to speak up in a public forum, because they are viewed as having secondary status in the community, when they do speak up, their input may not be as valued as their male counterparts.<sup>14</sup>

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<sup>14</sup> Adhikari, Jay Ram. 2001. "Community Based Natural Resource Management in Nepal with Reference to Community Forestry: A Gender Perspective" in *A Journal of the Environment*, Vol 6, No. 7, 2001, at 19.

A similar case has been made by the World Bank in its review of gender and natural resource management.<sup>15</sup> Overall, the World Bank found that women are still absent from natural resource-related decision-making processes at all levels and that equal participation in community-based decision making remains a complex and difficult goal to achieve, especially in the contexts of highly unequal gender and class relations. At the local level, more natural resource projects and interventions emphasize community-level participation. Yet, community level participation often leaves women's voices and concerns unacknowledged. Even when women attend meetings or events, they may not feel free to voice their opinions, or their opinions and needs may not be taken seriously. In addition, community participation often favors local elites, usually men, but sometimes elite women's concerns directly conflict with and override poor women's access to resources such as fuel and water.<sup>16</sup>

### **Recommendations**

To truly benefit from women's participation in community land management and governance, ensuring that women's presence is not just a token gesture, and learning from the experience of community natural resource management, the Draft Bill should consider provisions which go beyond a quota for women's involvement in communal land governance, and towards meaningful participation by women. This will entail legislating steps that affirmatively address women's discrimination and lack of access and capacity, to help level the playing field and address prevailing social, cultural and political barriers. With this in mind, it is recommended that the Draft Community Lands Bill be amended to:

- (1) Legislate a gender-balanced Board, in a similar manner to that required of Committees.
- (2) Legislate a quota on percentage of votes from women to create a quorum that would be needed to reach a critical mass, in addition to a quota on women's representation in institutions.
- (3) Mandate that implementing regulations require Committee meetings be held at a time and in a place that is accessible to both women and men, and respects their other familial duties.
- (4) Mandate that implementing regulations or procedures provide for education and training for all new Committee members, with a focus on rights, gender sensitivity, obligations, and skills training to assist with assertiveness and consensus building for women.
- (5) Provide for a process of review and appeal of Committee and Board decision-making, on the grounds that the decision did not adequately involve women.

### ***3. Broaden provisions regarding procedural fairness and ensure that procedure are equally accessible to women and men***

The Draft Bill contains a number of provisions related to procedural fairness. For instance, there are many provisions requiring notice (for demarcation and adjudication in Art. 11, for registration Art. 13, and for meetings of decision-making bodies). However, the Draft Bill provides little to ensure that community members are given the opportunity to be heard in response to such notice, and little guidance on the rights, processes and principles that would be applied for appeals of decisions.

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<sup>15</sup> See The World Bank, 2009. Gender and Agriculture Sourcebook, Module 10: Gender and Natural Resources Management. The World Bank, Food and Agriculture Organization, and International Fund for Agricultural Development, available at <http://siteresources.worldbank.org/INTGENAGRLIVSOUBOOK/Resources/Module10.pdf>

<sup>16</sup> *Id.*



## Recommendations

The omission of important elements of procedural fairness will impact both men and women, but they are likely to be felt more strongly by women who face other inequalities which limit their power and influence over decisions that impact them. That said, it is recommended that the Draft Bill be amended to:

- (1) Mandate a form of notice that is equally accessible and available to men and women.
- (2) Require that opportunities for comment on communal land governance decisions are equally available and accessible to men and women in the community, require that comments by men and women to be equally accounted for in decision-making processes, and allow for appeal of decisions that appear to have been made without consideration of comments from both men and women.
- (3) Legislate the parameters and procedures for appeal of decisions on community lands ensuring that they are equally accessible (physically, socially, geographically) to men and women.

## CONCLUSION

The Kenyan Draft Community Lands Bill shows a laudable intention to both legitimize and protect indigenous land tenure in Kenya while also equally protecting men and women, avoiding sex discrimination, and to guide behavior and decision-making around community lands in way that enshrines the spirit and intent of the Kenyan Constitution. However, good intentions in law are often inadequate in the face of strongly-held cultural norms and practices which treat the needs of women as secondary to those of men and that exclude women from meaningful participation in governance of resources that have a direct bearing on their livelihoods.

As is stands, the Draft Community Lands Bill inadvertently runs the risk of enabling the continued disenfranchisement of women in land matters because it does not directly address the underlying social, political, and cultural exclusion of women. By leaving much to the discretion of the community, by not legislating specific provisions that will ensure women meaningfully participate in the governance of community lands, and by not ensuring procedural protections, the Draft Bill could have the unintended consequence of worsening women's land tenure security on community lands.

The recommendations in this report, if adopted, could do much to help ensure that the good intent expressed in the law have a real impact on the lives of women and men both who live on community land in Kenya.