LAND TENURE SYSTEMS IN SUB-SAHARAN AFRICA AND ITS IMPLICATIONS FOR ACCESS AND BENEFIT-SHARING OF BIO-DIVERSITY

Introduction

The Convention on Biological Diversity (CBD) recognizes the sovereign rights of States over their natural resources and the realization of the objectives of the CBD is hinged on the twin pillars of access to resources and benefit-sharing (ABS) between sovereign States that own bio-diversity.[1] This is as a result of the reality that the wealth of the world's biodiversity is primarily located in the developing countries of the South while the capacity and the biotechnology to exploit genetic resources belong primarily to institutions of the developed countries of the North.[2] Article 15 of the CBD recognizes the sovereign rights of States over their natural resources, and that the authority to determine access to genetic resources rests with national governments, subject to national legislation. This provision refers to the long-standing sovereign rights of States over their natural resources, which is based on international law principles of territorial sovereignty.[3] The provisions of Article 15 of the CBD are aimed at ensuring that while access to bio-genetic resources is not unduly restricted by sovereign States, those States from which these resources are exploited should share the benefits of the exploitation.

Swiderska has, however, rightly noted that these provisions are very much oriented to the needs of national governments with little or no consideration for the needs of indigenous peoples and local communities.[4] This is because under the CBD, access to genetic resources is subject to the prior-informed consent (PIC) of the country providing the resources. There is no requirement for traditional and local communities (TLCs) to give their PIC for access to bio-genetic resources

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[1] Article 15 of the CBD.

[2] Jeffrey, M., "Bioprospecting: Access to Genetic Resources and Benefit-Sharing under the Convention on Biodiversity and the Bonn Guidelines" (2002) *SJICL* Vol. 6, 747 – 808, at 758

[3] Stoll, P., 'Access to GRs and Benefit Sharing - Underlying Concepts and the Idea of Justice' in Kamau, E and Winter, G. (eds), Genetic Resources, Traditional Knowledge and the Law (New York: Earthscan, 2009) pp 3 - 18, at 3.

[4] Swiderska, K., "Banishing the Biopirates: A New Approach to Protecting Traditional Knowledge." (2006) Gatekeeper Series 129, at 9. Accessed from http://pubs.iied.org/pdf. on January 25, 2015.

that they have developed and nurtured, and which originate from their territories. However, national legislation has the capacity to give insights as to how national governments in Sub-Saharan Africa view the question of ownership of land-based biodiversity resources, through the lens of the provisions prescribing the appropriate authority to give PIC for the exploitation of biodiversity within their jurisdictions. Land ownership and management regimes in the countries of the South is critical to determining whether TLCs have a role to play in either granting or withholding PIC for the exploitation of their biodiversity, and that is the underlying premise of this work.

This work focuses on Sub-Saharan Africa. This is because biopiracy in this region is such that even members of the communities are knowingly or unknowingly collaborating with third party users to engage in this act. For instance, the National Institute for Pharmaceutical Research and Development (NIPDR) in Nigeria reported to the World Intellectual Property Organization (WIPO) that it has entered into mutually beneficial agreements with traditional medicine practitioners (TMPs) to research and exploit the TK-related biodiversity of Nigerian TLCs. Also, a TMP from Senegal stated that he had obtained 3 patents for his traditional medicine preparations.[5] These TMPs received their knowledge on how to use the biodiversity in their communities to make herbal preparations for their community from their forbears. The work aims to highlight existing land law regimes in the region with a view to understanding how these affect the ability of TLCs to organise and collectively manage their land-based biodiversity. The work first examines the land law regimes in Nigeria, Ghana, Kenya and South Africa. The choice of these jurisdictions is rooted in the fact that these are the largest economies in Sub-Saharan Africa, and as such they serve as a benchmark of what obtains within the region. The work then considers cases where TLCs have successfully challenged intellectual property rights that were

[5] See Report of the WIPO Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998 - 1999) (Geneva: WIPO, 2001) 149 - 152.

obtained without the PIC of the communities whose traditional knowledge (TK)-related biodiversity had been exploited in developing pharmaceutical products by western pharmaceutical companies. This is done with a view to identifying patterns in relation to which communities are better able to effectively protect their TK-related biodiversity, and how the land tenure regime affects their ability to do so. The role of customary land tenure in this regard is also interrogated, with a view to determining whether it constitutes a viable option for the protection of the biodiversity of TLCs in a manner that allows for popular participation before PIC is either given or withheld. The work concludes with recommendations for the future.

General Overview of Land Tenure Reforms in Sub-Saharan Africa

Generally, a number of Sub-Saharan African countries have initiated land tenure reforms within the last twenty years by attempting to grant legal recognition of customary land tenure into statutory land law. In Namibia for instance, the Communal Land Reform Act, 2002 preserved customary land tenure rules, but altered customary administration structures. While traditional authorities may still make or revoke grants of customary land, such applications must be made in writing and allocations are subject to approval by the Communal land Board. Rights are granted to an individual for the duration of his natural lifetime, but the right reverts back to the traditional authority upon his death for redistribution, usually to the deceased's surviving wife and children.[6] The grant made to an individual would either be transferable or not, but it is, the prior written consent of the traditional authority that would be required to effect a transfer. Land in communal areas is vested in the State, on behalf of traditional communities.[7] In Uganda, customary land tenure was recognized under the amended constitution of 1995, with specific provisions made in that regard in the Land Act of 1998. The Ugandan Constitution vests all land in the citizens, and not in the Land Boards that were established under the relevant law. This law

[6] Knox, A., Giovarelli, R., Forman, M. and Shelton, M, 'Integrating Customary Land Tenure into Statutory Land Law,' p. 3. Retrieved from www.usaid.gov.
[7] Ibid., p. 4.

provides for the establishment of District Land Boards and Land Committees at sub-district levels.[8] Applications for grant may be made on an individual, family or group basis. Groups that seek to apply must be in the form of a Communal Land Association to be eligible for customary land rights. Customary rights are equal to all other forms of tenure, such as leasehold and freehold.[9]

In Tanzania, there are two pieces of legislation i.e. the Land Act and the Village Land Act. The Village Land Act creates two types of tenure i.e. the grant of rights of occupancy and customary rights of occupancy. While both of them have equal status, it is the duration of the grant that sets them apart. The former is granted for a limited period of 99 years while the latter is in perpetuity.[10] An occupant of land for a considerable number of years is entitled to a customary right of occupancy, which is registrable and certifiable. Even though certification is not necessary, it enables the holder to use the certificate as security for credit.[11] In the case of Mozambique, there is a Land Law of 1997 which embraces all forms of customary tenure. Formalization of customary tenure is only available at the community level whereby communities are at liberty to abide by their customary rules and governance structures within their collective holding. Community land comprises not only land that is occupied, but also common lands and those that are anticipated to be needed to meet the needs of future generations.[12] Rights to community land are vested in all adult members of the community. These rights are entitled to full legal protection irrespective of the fact that it is titled or not.[13]

[8] Ibid., pp. 4 - 5.
[9] Ibid., p. 5.
[10] Ibid., p. 6.
[11] Ibid.
[12] Ibid., p. 7.
[13] Ibid.

Land Tenure in Nigeria

Under the Nigerian legal system, the sources of law is pluralistic in nature. Nigerian land law is made up of the customary law of the people that constitute Nigeria, and the laws enacted by the National Assembly in that regard. Customary land law in Nigeria, like most other Sub-Saharan African countries, is diverse. However, the customary land law of the peoples of Nigeria have a lot in common. For instance, it has long been judicially recognised that from ancient time, land was customarily conceived as belonging to a community, not to an individual.[14] A community has been described as a group or collection of people, usually of the same stock, blood, clan, tribe or ethnic group that possesses or inhabits an identifiable territory, and who have a head known as Oba, Obi, Oche, Ter, or other traditional title recognised in any community.[15] Using Yoruba customary land tenure as an example, land belongs to the community, the village or the family, but never to the individual. The chief of the village or head of the family has charge of the land, and is often times referred to as the owner. The chief of the village or head of the family is a trustee and holds the land for the use of the community or the family. In either case, the chief of the village or the head of the family may not take any important decisions relating to the land without consulting the elders of the community, or the principal members of the family respectively.[16]

Land as a subject matter of legislation in Nigeria is regulated by the Land Use Act, 1978 (LUA).[17] The Land Use Act[18] was enacted with the underlying principles of, *inter alia*, reducing the increasing cost of land occasioned by the activities of land speculators, and non availability

[14] The Supreme Court of Nigeria had since taken judicial notice of this fact, and restated so in Udeze v Chidebe (1990) 1 F.W.L.R., 1.
[15] Alubo, A., Contemporary Nigerian Land Law (2nd ed.) (Jos: Innovative Communications, 2011) 13.
[16] Ibid., 14.
[17] Cap L5, Laws of the Federation of Nigeria, 2004 (Revised Edition).
[18] This legislation was originally promulgated as a Decree by the Federal Government but was later redesignated an Act of the National Assembly following the promulgation of the Constitution of the Federal Republic of Nigeria, 1979.

of land for economic development.[19] The major innovation that the Land Use Act brought into the ownership and management of land in Nigeria was the vesting of all land comprised in the territory of each State of the Federation in the Governor of that State, to be held in trust and administered for the use and common benefit of all Nigerians.[20] This provision of the Land Use Act has been described as the most controversial section of the Act, with some scholars either proclaiming the death of individual ownership of land or the entire concept of ownership of land, and their replacement with the concept of 'occupancy.'[21] Others have argued that absolutism in ownership of land suggested by the Land Use Act is false, and that the power vested in the Governor of a State is merely an administrative power to control land [within the territory of the State] as opposed to proprietary power.[22]

According to Alubo, a middle ground must be arrived at between these contending arguments, which in his view is that absolute ownership over land resides in the original title holders but the power of management resides in the Governor. This power is to renew rights of occupancy after a period of 99 years.[23] While the researcher agrees with Alubo's views on this point, it must be borne in mind that taking a holistic view of the Land Use Act, it would be discovered that the Governor's powers, in addition to being administrative, also include the power to revoke any right of occupancy and vest the same in another person. Indeed, the Governor has the power to revoke any right of occupancy over land within a State for overriding public purposes.[24] This power it must be said, however, does not extinguish the rights of customary land owners over their land. Rather, the Land Use Act created a system of dual

[19]Alubo, Op. Cit., 95.
[20]Section 1of the Land Use Act
[21] See Alubo, A., Op. Cit., 97 – 98 citing Omotola's view expressed in *Essays on the Land Use Act 1978* (Lagos: University Press, 1984).
[22] Ibid., 99 citing Yakubu's views expressed in *Land Law in Nigeria* (London: Macmillan, 1985).
[23] Ibid., 100
[24]See Section 28 of the Land Use Act. This power is exercisable subject to the payment of compensation to the customary or statutory owner of the land acquired. This is as provided for in Section 29 of the Land Use Act.

ownership i.e. statutory and customary rights over land, the former being rights granted by the Governor of a State to an individual for a term of years by way of a right of occupancy.[25]

Land Tenure in Ghana

In Ghana, the law relating to land consists of the customary law of the people, and legislation enacted by the parliament. Under Ghanaian customary law, land ownership is generally vested in the traditional chiefs. However, Blocher has pointed out that even though the traditional stool is central to the question of land ownership under Ghanaian customary law, the fact is that all land has multiple owners, with a chief holding the highest title and numerous other rights-holders claiming lesser rights of possession, use or transfer. According to the writer, the Law Reform Commission of Ghana identified four categories of interests in land, which were subsequently recognised in the Land Title Registration Law of 1986. They are *allodial* title, the freehold title, leaseholds, and other lesser titles.[26] Apart from the leaseholds, which is a category of land ownership that is exclusively provided for under received English law, the others are recognisable under the customary land ownership system in Ghana. On the other hand, freehold title is available both under customary law and the received English law. The *allodial* title is described as the highest interest in land under Ghanaian customary law, above which there can be no other interest. This type of interest is vested in the chief or other traditional leader who acts on behalf of the community. Although the ownership of land is vested in the chief or other authority, he holds it in trust for the benefit of members of the community; and while the *allodial* title holder carries out judicial, governance and management functions over land, he does not have the power to alienate land for his personal benefit.[27]

The freehold title is described as being superior to all interests except the *allodial* title. The customary freehold is an interest held by individuals or groups in land that is subject of

[25] Section 9 Land Use Act.
[26] Blocher, J., 'Building on Custom,' 179.
[27] Ibid., 179 - 180.

allodial title, and the customary freeholder has nearly unlimited rights to develop and cultivate the land, subject only to restrictions imposed by the *allodial* title holder. The customary freehold is perpetual in nature, and subsists for as long as the holder continues to acknowledge the higher title of the *allodial* owner.[28] Significantly, the freehold title cannot be alienated to another person or group without the consent of the *allodial* title holder. According to Blocher, while the *allodial* title remains the highest interest in land, it is at the freehold level where real control over land increasingly exercised.[29] There are other 'lesser interests' in land in Ghana, which may be created *allodial* and freehold title holders; and Blocher observes that sharecropping agreements constitute the most common forms these lesser interests.[30] It is not clear as to what other forms of lesser interests exist beyond those created by these sharecropping agreements, but the sharecropping agreements are similar to customary tenancies that exist under most of customary law regimes in Nigerian communities.

The existing regime for statutory land ownership in Ghana is the Land Title Registration Act of 1986. This statute makes provision for the registrable interests in land, and the registrable interests are those held by the *allodial* owner,[31] the freeholder,[32] a person with an interest less than that of a freeholder,[33] and a leaseholder.[34] This law recognises the land ownership rights that are available under Ghanaian customary law, and the leasehold interest under received English law. The registrable interest of the *allodial* owner consists of all those rights and interests that are exercisable by the owner under customary law, provided that the person is not under a restriction on the rights to use or any other obligations arising from such holding. In other words, the person seeking to be registered as owner of the land must not be under any limitation in terms of the

[28] Ibid., 180.
[29] Ibid.
[30] Ibid., 180 - 181.
[31] Section 19 (1) (a) of the Land Titles Registration Act.
[32] Section 19 (1) (b) of the Land Titles Registration Act.
[33] Section 19 (1) (c) of the Land Titles Registration Act.
[34] Section 19 (1) (d) of the Land Titles Registration Act.

usufructory rights over the land. However, any limitation that is imposed under any law of the Republic does not constitute a barrier to the registration of that interest in land. Under that law, land may be registered under the proprietorship of the Republic where interest in that land is vested in the Republic under any enactment,[35] or is vested in the Republic as trustee of the lands held in trust under an enactment,[36] or in respect of any lands not held by any proprietor.[37]

Under Ghanaian law, the rights of a registered proprietor of land, or a registered interest in land, is indefeasible and is held by the proprietor together with any privileges and appurtenances attaching from the land, free from any other interests and claims.[38] This gives traditional stool in Ghana capacity to control over the management of biological resources that is available on their land under a statutory land ownership regime. This is more so that the only limitations to traditional stool exercising full control over the resources embedded on communal land is in respect of minerals that are on the land, and which is not vested in the proprietor of the land,[39] and where the land is subject of compulsory acquisition, resumption, entry, search and user conferred by any other enactment.[40] Consequently, Ghanaian traditional institution can control access to the biodiversity that is on their land, and determine how the benefits from its exploitation may be shared between the commercial users and the communities. This privilege is only subject to the overriding power of the Republic to compulsorily acquire title over any land held by a TLC. However, a potential point of conflict between the traditional stool and the Republic is in the power of the latter to register lands that are considered 'un-owned', that is to say land that is not held by any other proprietor.[41] This suggests that there are parcels of land that do not fall under the ownership of any Stool, which in turn means that it is not owned by any

[35] Section 19 (2) (a) of the Land Titles Registration Act.
[36] Section 19 (2) (b) of the Land Titles Registration Act.
[37] Section 19 (2) (c) of the Land Titles Registration Act.
[38] Section 43 (1) of the Land Titles Registration Act.
[39] Section 43 (4) of the Land Titles Registration Act.
[40] Section 46 (1) (d) of the Land Titles Registration Act.
[41] This is as provided for under section 19 (2) (c) of the Land Titles Registration Act.

particular community. However, under African customary law generally, the land that falls within the domain of any community is owned by that community. These provisions in Ghanaian law constitute another avenue by which the State may expropriate land otherwise belonging a TLC, mostly because the land is not in obvious use by the community and it appears not to be owned by any person as such.

Land Tenure in Kenya

The diversity of the Kenyan people ensures that there is no uniformity in customary land law in the country. The Maasai for instance are said to consist of special sociological clans, which are grouped as the Kaputiei, Matapato, Purko, Kisonko, Ildamat, Dalalekutuk, Keekonyokie, Loodokilani, Loita, Siria, Uasinkishu, and Moitanik. These clans formed the basis of land ownership and resource utilization. Land at the level of the clan was communally owned, and the senior members of the community managed it on behalf of the clan; with members of the clan enjoying equal access to the land and its resources.[42] Land within the Maasai communities could not be owned by outsiders, except with the permission of the elders, and which is granted for temporary use only. While land was considered a communal resource amongst the Maasai, family holding of small portions, which were allocated for purposes of settlement, was a feature of Maasai customary land tenure. After a family had selected an area for settlement and the land allotted to it, the land was further subdivided into individual land units.[43]

Among the Pokot, which is a Nilo-Himatic community that dwells in North Western Kena, land is generally held communally under a trust system, with the local community council responsible for the management of community land on behalf of the community. Land holding by families is recognized, but the ownership of land is defined by village elders who keep records with regards to length of use and time of purchase. Over the course of time, the

[42] Wayumba, G., 'Aspects of Customary Land Tenure Rights in Kenya' IJSRES Vol. 2 No. 7, pp 89 - 97, at 93.
[43] Ibid.

community developed a more formal means of record keeping by the maintenance of the land record book. The boundaries of family land holding are demarcated using natural landmarks; however where none exists, they are marked by stones, planted hedges or cutting in trees. Significantly, it is an offence to interfere with boundary markings.[44] In the case of the Tigania, land was owned by the community and not by an individual. However, within the community there are smaller clans and family units, and the right to use land was derived from membership of each of these units. Land disputes are settled by the community elders.[45]

In the province of statutory regime for land rights ownership, Kenya has taken arguably some of the boldest steps in the reformation of land tenure. Land tenure reforms in Kenya were the result of the well formulated National Land Policy, 2009.[46] With the commencement of the Kenyan Constitution of 2010, there came a paradigm shift in land tenure in the country in that this Constitution declared that all land in Kenya belongs to either the people, individuals or the community.[47] Series of legislation was enacted in order to realize the objectives of the National Land Policy. There is also a Land Laws (Amendment) Act 2016, which amended some of the existing land legislation enacted by Parliament after the commencement of the 2010 Constitution. The first and most significant is the Land Act, 2012 which is applicable to public land, private land and community land. The underlying values and principles by which the agents of the State were to exercise their powers under this law include, but are not limited to:

1. Equitable access to land;[48]
2. Sustainable and productive management of land resources;[49]
3. Conservation and protection of ecologically sensitive areas;[50]

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[44] Ibid.
[45] Ibid.
[46] Wily, L., 'The Community Land Act in Kenya Opportunities and Challenges for Communities,' (2018) Retrieved from www.mdpi.com/journal/land on January 19, 2019.
[47] Article 61 of the Kenyan Constitution, 2010.
[48] Section 4 (2) (a) of the Land Act (as amended).
[49] Section 4 (2) (c) of the Land Act (as amended).

4. Participation, accountability and democratic decision making within communities, the public and Government;[51]

5. Democracy, inclusiveness and participation of the people.[52]

It is quite instructive that these principles reflect the same underlying principles and objectives of the CBD, which are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[53] When there is equitable access to land, there is a corresponding access to the biological diversity that is on the land, and the sustainable and productive management of land resources ensures that the biodiversity on the land is exploited in a manner that is beneficial to both the present and future generations. All of these are expected to be done bearing in mind the need to conserve ecologically sensitive areas, while at the same time ensuring the participation of the community in decision-making process as it relates to their land. This statute prescribes that the National Land Commission may make rules and regulations for the sustainable conservation of land based natural resources,[54] which includes the forests, biodiversity and genetic resources on the land.[55] While the Land Act makes these provisions relating to land based biodiversity, it does not do so in the context of a community based management of the land and by extension, the biodiversity on the land. However, there is legislation in Kenya for the management of community land. The question is whether this legislation effectively gives the community greater role in decision-making in terms of access and benefit-sharing as it relates to biodiversity on their land?

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[50] Section 4 (2) (e) of the Land Act (as amended).
[51] Section 4 (2) (h) of the Land Act (as amended).
[52] Section 4 (2) (l) of the Land Act (as amended).
53 Article 1 of the CBD.
[54] Section 19 (1) of the Land Act, 2012.
[55] Section 260 of the Kenyan Constitution, 2010.

Under Kenyan law, community land is that land that is held by communities identified on the basis of ethnicity, culture and or similar community of interest.[56] It consists, amongst others, of land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities, or land lawfully held as trust land by county governments.[57] The Community Land Act, 2016 was enacted to provide for the recognition, protection and registration of community land rights. By this legislation, customary land rights are recognized and documented for purposes of registration, and these rights, including those held in common, have equal force and effect in law with freehold and leasehold rights acquired through allocation, registration or transfer.[58] The County governments are required to hold any unregistered community land in trust on behalf of the communities for which they are held.[59] This law allows for greater participation of members of the community in matters concerning the management of communal land. For instance, it requires that all members of the community with some interest in communal land be invited to meeting for purposes of electing the members of the community land management committee.[60] In another instance, the members of the community may by resolution reserve a portion of the community land for communal purposes.[61]

The extent of the powers of the community in dealing with the biodiversity on community land is measurable by the functions of the land management committees, which are as follows:

1. Responsibility for the day to day running of the functions of the community;
2. Managing and administering registered community land on behalf of the community;

[56] Section 63 (1) of the Kenyan Constitution, 2010.
[57] Section 63 (2) (d) of the Kenyan Constitution, 2010.
[58] Section 5 (2) and (3) of the Community Land Act, 2016.
[59] Section 5 (6) of the Community Land Act, 2016.
[60] Section 7 (2) of the Community Land Act, 2016.
[61] Section 13 (1) of the Community Land Act, 2016.

3. Coordinating the development of community land use plans in collaboration with the relevant authorities;
4. Promoting the co-operation and participation among members of the community in dealing with matters pertaining to the community land; and
5. Prescribing rules and regulations, to be ratified by the community assembly, to govern operations of the community.[62]

From the foregoing, there is no express power vested in the land management committees to enter into agreements with other persons, such as commercial users of biodiversity, in respect of the resources on community land. However, this power may be implied from provisions in the same law to the effect that any decision of the community to dispose of, or otherwise alienate community land shall be binding if it is supported by at least two thirds of the registered adult members of the community.[63] This is because a commercial user of land-based biodiversity may acquire an interest in the community land through leasehold or transfer rights, which are forms of disposition or alienation.

This view is reinforced by subsequent provisions of the statute regarding sustainable conservation of land based natural resources within community land, where it is stipulated that communities establish procedures for the involvement of communities and stakeholders in the management utilization of land-based natural resources in community land.[64] The commercial users of biodiversity, especially pharmaceutical companies, come within the non-governmental sector under the CBD framework, as they are stakeholders in meeting the health needs of the growing world population. These provisions therefore ensure that the objective of the CBD in relation to access to biodiversity is realized. Coupled with specific provisions regarding equitable

[62] Section 15 (4) of the Community Land Act, 2016.
[63] Section 15 (5) of the Community Land Act, 2016.
[64] Section 20 (2) (e) of the Community Land Act, 2016.

sharing of accruing benefits,[65] it is to be concluded that the overall objectives of the CBD, i.e. access and benefits-sharing is realizable under the land tenure system in Kenya.

Land Tenure in South Africa

The South African Constitution of 1994 recognizes customary law as a part of the South African legal system. The customary land law of the indigenous people of South Africa therefore forms part of South African law. South Africa, in the context of the indigenous peoples, is ethnically diverse. Generally, however, the customary land law principles amongst the indigenous South Africans is the same. Land tenure amongst the South African people is communal in regard to grazing land, but individual in respect of arable and residential land. The chief of the community owns the land, but holds it as "trustee for and with the tribe."[66] Land was allotted to individuals, who exercised the right to use the land. The land allotted to an individual could be alienated gratuitously to relatives or friends or who were already members of the community, while outsiders had to obtain an allotment from the chief.[67]

Within the statutory framework, there are two legislation that are critical to the ownership rights of indigenous communities. These are the Restitution of Land Rights Act, 1994 (as amended), the Communal Property Association Act, 1996 (as amended) and the Communal Land Rights Act, 2004. The former was enacted to provide for the restitution of rights in land to persons or communities that were dispossessed of such rights after June 19, 1913 as a result of past racially discriminatory laws and practices. Under the Restitution of Land Rights Act (RLRA), a person is entitled to restitution of a right in land if he or she is a person, or community that was dispossessed of a right in land after June 19, 1913 as a result of past racially discriminatory laws and practices, and the claim for restitution is lodged not later than December

[65] Sections 35 and 36 (1) of the Community Land Act, 2016.
[66] Glavovic, P., 'Traditional Rights to the Land and Wilderness in South Africa,' (1999) CWRJIL, Vol. 23 No. 2, pp 281 - 322, at 283 - 284.
[67] Ibid., 283.

31, 1998.[68] The Communal Property Association Act (the CPA) is a framework that allows for the registration of communities as property holding associations, and it applies to specified communities. First, to communities that the Land Claims Court has adjudged to be entitled to restitution under the Restitution of Land Rights Act, where the court has ordered that restitution be made to the community on the condition that an association is formed under the Act.[69] It also applies to communities entitled to, or that are receiving property or other assistance from the State, under terms of any agreement or law,[70] or communities to which any property has been either donated, sold or otherwise disposed of,[71] in either case on the condition that an association be formed in accordance with the CPA. Lastly, the law applies to a community, which is a group acquiring land or rights to land, and desires to form an association under the CPA.[72] In view of the rights to land that had been lost under apartheid-era land laws, and the subsequent restitution made under the RLRA, the communities contemplated under the CPA are not necessarily homogenous in terms of ethnic nationality. However, they must have a shared history that brings them together under one platform. For instance, they may have been descendants of persons who were displaced from their lands under apartheid-era laws, but who are being resettled on land either donated by the State, or land that is subject of restitution post-apartheid.

The third piece of legislation makes provision for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land, to communities, among other things. Under the law, upon registration of its rules, a community acquires juristic personality with perpetual succession regardless of changes to its membership.[73] With its juristic personality, a community is permitted to acquire and hold rights and incur obligations, and own, encumber by

[68] Section 1 (1) of the Restitution of Land Rights Act, 1994 (as amended).
[69] Section 2 (1) (a) of the Communal Property Act, 1996 (as amended).
[70] Section 2 (1) (b) of the Communal Property Act, 1996 (as amended).
[71] Section 2 (1) (c) of the Communal Property Act, 1996 (as amended).
[72] Section 2 (1) (d) of the Communal Property Act, 1996 (as amended).
[73] Section 3 of the Communal Land Rights Act, 2004.

mortgage, servitude or otherwise deal with such property subject to any title or other conditions.[74] Going by the definition of a community under this law,[75] it includes a traditional/indigenous or local community that shares a common heritage and rules i.e. customary law that makes prescriptions on how members of the community gain access to land. The law requires the registration of communal land[76] in the name of the community that is entitled to such land, in terms of the law and the relevant customary law of the community.[77] This explains the provision for registration of communal land in the name of either a person, a traditional leader/traditional leadership (whether recognized in terms of law or not) or a communal property association contemplated in the Communal Property Associations Act.[78]

The Communal Land Rights Act requires a community whose land is intended for registration to make and adopt its community rules, and have them registered.[79] In view of the fact that customary law forms part of the country's legal system, these community rules may be influenced by the customary law that is applicable to the community seeking registration of its land. Most importantly, though, is that these community rules are required to regulate the administration and use of communal land by the community, but this must be done having regard to the framework of law governing spatial planning and local government.[80] In addition to registering its rules, a community is required to establish a land administration committee,[81] and if the community has a recognized traditional council, the powers and duties of the land administration committee of that community may be exercised by the that council.[82] In which

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[74] Ibid.
[75] Section 1 of the law defines a community as "a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group."
[76] Communal land is defined in section 1 of the Communal Land Rights Act as "land...which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community."
[77] Section 5 (1) of the Communal Land Rights Act, 2004.
[78] Section 5 (2) of the Communal Land Rights Act, 2004.
[79] Section 19 (1) of the Communal Land Rights Act, 2004.
[80] Section 19 (2) of the Communal Land Rights Act, 2004.
[81] Section 21 (1) of the Communal Land Rights Act, 2004.
[82] Section 21 (2) of the Communal Land Rights Act, 2004.

case, the composition of the committee must include a member who represents the interests of vulnerable members of the community, including women, children and the youth, the elderly and the disabled. This is in addition to other non-voting members who represent government authorities and agencies.[83] The law emphasises that where the traditional council operates as a land administration committee, its functional area of competence is the administration of land affairs and not traditional leadership as contemplated in the Constitution.[84]

The combined effect of the three laws applicable in South Africa is to ensure that ownership and possession of communal land that was hitherto confiscated from indigenous/traditional and local communities pursuant to apartheid-era laws, are given back to such communities, while allowing them control the management of these communal lands in any manner that is preferable to them. These laws give powers of decision-making to the communities, and they can decide on matters relating to access to any biodiversity on their communal land, and determine how the benefits of the utilization of the biodiversity on the land is shared. This in turn enhances the economic development of the communities and their people. Generally speaking, the existence of a legal framework that allows communities to own and control access to their land for research purposes, and the exploitation of their biodiversity by commercial users allows for the effective realization of the twin pillars upon which the CBD is founded. Two cases on the point are used to validate this assertion, and they are the *Hoodia Gordonii* Cactus and the Masakhane *Pelargonium* cases.

The *Hoodia* Cactus Case

This case is in relation to a plant (referred to as '*Hoodia gordonii*') that had been known to the San people, which is an indigenous tribe living in the Kalahari Desert in South Africa for

[83] Sections 21 (3) and 22 (4) and (5) of the Communal Land Rights Act, 2004.
[84] Section 21 (4) of the Communal Land Rights Act, 2004.

thousands of years. The San people ate the plant to suppress hunger and thirst while hunting.[85] The Council of Scientific and Industrial Research (CSIR), a South African research institution, observed this and began research into the appetite-suppressing properties of the plant and finally discovered and isolated the active ingredient in the Hoodia. It gained a patent for the extraction procedure registered as molecule P57 in 1996 and licensed the same to Phytopharm, a UK pharmaceutical company. Phytopharm developed a cure for obesity on the basis of P57 and obtained a patent for the application of the molecule, which was then licensed to Pfizer for US$21 million.[86] It was not until 2001 that the San became aware of the CSIR's patent as well as the attention that the drug received in the media. With the assistance of several non-governmental organizations (NGOs), the San threatened legal proceedings against CSIR for the use and spread of their indigenous knowledge without obtaining Prior Informed Consent or negotiating a Benefit Sharing Agreement with the community.[87]

The *Hoodia* case has been described as a success story because it was one of the first agreements in the world that gave traditional knowledge holders a share of royalties from the development and sale of a drug from their TK, and it involved a marginalized community, that is the San people, coming to an agreement with a powerful institution of the State, such as the CSIR.[88] This assertion assumes, first, that the San people were willing to share their TK with the outside world in the first instance, and second, that they obtained the best terms from the CSIR than they would have, if PIC was sought for before CSIR began to research into the active ingredient of the *Hoodia gordonii*. It is to be noted that at the time CSIR began research into the active ingredient of the *Hoodia* plant, the San were not organized as a community that had recognizable rights that could be protected by an agreement with the CSIR. Rather, their

[85] Honds, p. 3.
[86] Ibid., p. 4.
[87] Msomi, Z., 'The Protection of Indigenous Knowledge Within the Current Intellectual Property Rights Regime.' An unpublished thesis for the award of M.A. Pol. Sci. at Rhodes University, Grahamstown, 2013, p. 50.
[88] Ibid., p. 52.

organization was a reaction to the events that had already occurred, whereby a patent had been obtained and a drug developed from the molecule of the active ingredient in the plant, which basic knowledge was derived from their use of the plant on their communal land. In any event, the San people had to rely on assistance from NGOs to protect their rights to the benefits of the utilization of their biodiversity in an economic context. This would have been avoided if the San people had the capacity to register their communal land, and determine who gained access to their land for research or other purposes. This right only came with the enactment of the Communal Land Rights Act and the Communal Property Act.

The Masakhane *Pelargonium* Case

The background to the case is the use of Pelargonium by a Sotho traditional healer who treated and cured one Charles Henry Stevens, an Englishman, of tuberculosis in 1897. After his cure, Stevens took both the plant and the knowledge regarding its use as a cure for respiratory infections to England, where he created his own remedy known as 'Umckaloaba.' This was a combination of two Zulu words which mean cough and chest pain.[89] Steven's son eventually sold his company and the healing properties of the plant were later tested and verified by JSO Werks Regensburg, which began importing *Pelargonium* to produce and sell their own cough remedy known by the name given to it by Stevens. In 1987, JSO Werks Regensburg became part of Schwabe Pharmaceuticals, which took over the production and sale of the product. Schwabe Pharmaceuticals collected *Pelargonium* from land belonging to Imingcangathelo Xhosa (which already had a Benefit-Sharing Agreement with Schwabe Pharmaceuticals) and the Masakhane communities through Gower Enterprises, which acts as an agent of Parceval in the Eastern Cape of South Africa.[90]

[89] Ibid., p. 61.
[90] Ibid., pp. 61 - 62.

This case began when a community member and Chairperson of the Masakhane Community Property Association (MCPA) became aware of the increased harvesting of Pelargonium from the community. Concerned about the future availability of the plant for use by the community, and the paltry amount paid to the community members who harvested the plant by the collectors, the community decided that it wished to halt further collection of Pelargonium on Masakhane land by external parties. It also indicated its willingness to institute proceedings against Schwabe Pharmaceuticals.[91] With assistance from the African Centre for Bio-safety,[92] the community challenged two patents[93] held by Schwabe Pharmaceuticals. After the first patent was successfully challenged, the company withdrew the second patent and several other *Pelargonium* patents that were not listed in the case.[94]

Trends in Land Tenure Reform in Sub-Saharan Africa and Implications for Access and Benefit-Sharing

Looking at the number of Sub-Saharan African countries that have initiated land reforms in the last ten years, it is clear to that a greater number in Southern Africa have enacted legislation giving communities power to hold statutorily recognized titles over their communal land, as well as the power to manage their land and the biodiversity that is on the land. The countries in West Africa have not enacted legislation in that direction. There are clear contrasts between the countries where there is legislation on communal land ownership, and those without such legislation.

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[91] Ibid., pp. 72 - 74.

[92] This is a South African NGO that has amongst its aims, the protection of South Africa indigenous resources and TK.

[93] The first patent i.e. EP 1 429 795 was granted on June 13, 2007. It patents the method of producing extracts of the *Pelargonium sidoides* and or *Pelargonium reniforme* using aqueous-ethanol solvent. This patent gave Schwabe Pharmaceuticals the exclusive right to make, sell or import/export the active ingredients of the *Pelargonium* extracted by water and alcohol in any country that is party to the European Patent Convention. The second patent i.e. EP 1 651 244 was granted on August 29, 2007. This right patents the use of the extracts from roots of *Pelargonium* for the manufacture of a medicament for the treatment of AIDS and associated infections, including a vast number of bacterial, viral and parasitic infections and inflammations such as tuberculosis, all respiratory tract infections, sexually transmitted diseases, etc. See Msomi, Op. Cit., 74 - 75.

[94] Ibid., p. 75.

Access to Biodiversity

The cases where communities have successfully challenged patents held by external parties are all from Southern Africa where communities are encouraged to organize and hold statutorily recognized titles over communal land. In those countries, the communities are able to effectively control access to their communal land, and by extension, control access to biodiversity on their land by external parties. This ensures that external parties seek the PIC of local communities before they enter their communal land for research and other purposes. The *Masakhane* case demonstrates how communities are better protected from exploitation by external parties when they are organized. This is because each member of the community as a stakeholder is under obligation to protect the resources of the community. Both the *Hoodia* and *Masakhane* cases prove that communities that are organized are better equipped to enforce the requirement for their PIC to be obtained before exploitation of their biodiversity by external parties, otherwise any intellectual property rights obtained using their TK and biodiversity without their PIC is liable to nullification. This is in contrast to West Africa where there is no known case that a community has successfully challenged a patent obtained by external parties, whereas, it is not that there is no instance of the improper exploitation of biodiversity derived from local communities in that part of Sub-Saharan Africa.

Benefit-Sharing of Results of Utilization of Biodiversity

Both the *Hoodia* and *Masakhane* cases demonstrate that where communities are able to organize under a socio-cultural platform, they are better able to ensure external parties do not exploit their biodiversity without agreements that ensure that the communities are adequately compensated for sharing their TK and biodiversity. By being organized, these communities are able to enter into benefit-sharing agreements with companies and other researchers who enter their land for purposes of investigating about the active ingredients of the biodiversity that is on

their land. Even where their biodiversity was exploited by external parties without such agreements first being in place, by being organized, they were in a position to successfully challenge the patents that were obtained by these companies over materials obtained from biodiversity on their communal land and derive compensation for the unlawful use of these resources.

All Inclusive Land Administration

More significantly, these cases demonstrate that land tenure reform is more effective and beneficial to the community as a whole when it is not a direct adaptation and codification of the customary law of the people of the community. This is because the customary land law of the majority of Sub-Saharan African communities vests the ownership and control of community land in the traditional institution. Consequently, in the event that land laws are enacted, which provide that communal land should be administered in line with the customary law of the people, a greater part of the community would be excluded from the management of communal land. This is to be contrasted with countries like Kenya and South Africa where the laws allowing communities to hold statutorily recognized titles over their communal land, expressly make provision ensuring that there is collective participation in land administration at that level, and an inclusiveness that allows broad participation in the administration of communal land by vulnerable group such as women and the youth.

Ownership of Biodiversity in Sub-Saharan Africa

The current statutory regime of land ownership and management in Nigeria places ownership over biodiversity in the people, even though this right is held in trust by the State, and this poses a challenge to the realisation of the requirement of PIC of the communities in which these resources are located, before they can be accessed by commercial users. This is because the right of the TLCs to deal with their land (including all the biological resources that are on it or

beneath the land) is subject to approval of the Governor of the State within which that community is situated.[95] The implication of the trusteeship of the Governor of the State is that he is the authority that determines the question of access and benefit-sharing over the land-based biodiversity within the territory of the State. In other words, ownership of land by the people is inchoate, and pyrrhic in nature. In a related manner, TLCs are in no position to prevent any person from exploiting the biological or genetic resources on their land, after such a person has obtained the requisite right of occupancy from the Governor of the State.

This may be contrasted with the state of the law in Ghana where TLCs can protect their communal land through registration with State authorities, and the traditional institution is given some measure of recognition and control over community land, under the statutory law. Consequently, Ghanaian traditional institution can control access to the biodiversity that is on their land by giving or withholding PIC, and determine how the benefits from its exploitation may be shared between the commercial users and the communities. This privilege is only subject to the overriding power of the Republic to compulsorily acquire title over any land held by a TLC. The only limitation with the state of the law in Ghana is that community participation is not encouraged in the process leading up to giving or withholding PIC. This is because the recognition of customary land law structure of ownership under the relevant statute reinforces the ownership of communal land by the Stool, rather than the people. This does not, therefore, allow for the community participation in the decision-making process leading up to either giving or withholding PIC.

On the other hand, it can be concluded that the countries in the East and South of Sub-Saharan Africa view ownership of biodiversity on the land belonging to TLCs as vesting in the communities, rather than the State, provided that the community has registered its interest in the land. These countries have succeeded in enacting legislation that strikes a balance between the

[95] Sections 21 and 22 of the Land Use Act.

recognition of the customary land tenure of the TLCs, which also vest the ownership of communal land in the traditional institutions, and the need to make decision-making regarding such land by way of popular participation. What these countries have been able to achieve in this regard is significant because it addresses the problems associated with the centralization of decision-making in terms of PIC required by commercial users of their biodiversity, such as resistance by the TLCs, while at the same time empowering the TLCs economically.

Conclusion

There has been significant land tenure reforms in Sub-Saharan Africa over the past twenty years. Many of the countries in Southern Africa have incorporated customary law rules as a major part of the land tenure regime in their jurisdictions. Sub-Saharan African customary law generally vests ownership of customary land in the traditional institution, and this does not allow for management of communal land by popular participation. In another breath, many Sub-Saharan African countries have recognized community ownership of land, which is registrable and is managed by committees set up under the relevant laws. Traditional and local communities in countries that allow for the registration of communal land have a greater propensity to effectively protect their biodiversity from biopiracy. Consequently, it is advocated that Sub-Saharan African countries that have not reformed their land tenure systems allowing for registration of communal land, such as Nigeria, to vigorously pursue reforms in this direction. It is advisable that this is achieved without necessarily making customary law the basis of the reforms as was partly done in Ghana where customary law was adapted in the land legislation and communal land may be registered under the ownership of the traditional stool.