

**A FAILED LAND USE LEGAL AND POLICY FRAMEWORK  
FOR THE AFRICAN COMMONS?: REVIEWING  
RANGELAND GOVERNANCE IN KENYA**

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## I. INTRODUCTION

The governance of natural resources remains a complicated task globally. The most perplexing element of this task is the reality that natural resources are finite and that there is increasing competition between resource uses and users. Government missteps regarding natural resources can thus create inequity, discrimination, poverty, and unsustainable consumptive patterns, especially when said resource is land in an area where people's livelihoods are solely dependent upon it. When regulating land use, government authorities employ public law and policy instruments, but it is where those instruments are ill devised and unsuited for a particular ecosystem that a plethora of problems emerge. Such is the case with the African commons, also known as the rangelands, where the pursuit of private property rights has dismantled systems that have managed the communal interests in these lands for generations. In Kenya's case, this Article argues that the government either failed to understand or just ignored how common property works, and as a result, Kenya's current rangeland governance system—group ranches—is a mess as many group ranches have subdivided, want to subdivide, are stuck in the subdivision process, or are trying to reconsolidate because subdivision left them worse off.

The group ranch concept was introduced in order to save rangelands from the "tragedy of the commons" metaphor, but ironically, it created one. This Article seeks to review Kenya's group ranch governance policy from Kenya's colonial days to the present and proposes a new methodology for sustainability. Part II analyzes the key concepts: property, common property, and the African commons. Part III provides an overview of rangeland governance, specifically the origins of group ranches and the rationale for their introduction. Part IV is a legal and factual deconstruction of group

ranches to examine where they stand vis-à-vis the “tragedy of the commons,” and Part V proposes reform measures to ensure sustainability in rangeland governance. The Article’s last section provides a brief conclusion.

## II. CONCEPTUALIZING THE AFRICAN COMMONS

Various terms have been used to describe the commons, and these numerous terms have often created more confusion than clarity. Fortunately, the African commons has a unique foundation that has influenced its governance over the last century or so. There are also many international environmental law instruments and principles that offer guidance on appropriate governance systems.

### *A. Property and Property Rights*

The key concept here, property, is conceptualized as a benefit, or income, stream.<sup>1</sup> “Property *is not* an object but rather a social relation that defines the property holder with respect to something of value (the benefit stream) against all others.”<sup>2</sup> This relation is exercised as a property right, and this right “may be defined as the *de jure* or *de facto* rights of individuals or groups of individuals, to a flow of benefits from assets, with at least a partial right to exclude others.”<sup>3</sup> Another dimension is the right, as a claim, to a benefit stream that some higher body—usually the state—agrees to protect through the assignment of a duty to others who may covet or somehow interfere with the benefit stream.<sup>4</sup> “The essence of property rights is [thus] a structure of duties that will give any particular benefit stream protection against adverse claims.”<sup>5</sup> Although there are many types of property rights, this Article focuses only on common property.

### *B. Common Property*

Common property is a rather “common” term. Economists use it in situations where no property rights exist, whereas historians

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1. Daniel W. Bromley, *The Commons, Common Property, and Environmental Policy*, 2 ENVTL. & RES. ECON. 1, 2 (1992).

2. *Id.*

3. R. Quentin Grafton, *Governance of the Commons: A Role for the State?*, 76 LAND ECON. 504, 504 (2000) (emphasis in original).

4. Bromley, *supra* note 1, at 2. Economists present parallel arguments, for instance, that a primary function of property rights includes guiding incentives to achieve a greater internalization of externalities. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967).

5. Bromley, *supra* note 1, at 3.

and anthropologists use it to refer to a collective property rights system.<sup>6</sup> It is also confused with public property vested in the State and held in trust for the citizens<sup>7</sup> or when the State owns property as a private landowner to the exclusion of its citizens.<sup>8</sup>

“[C]ommon property represents private property for the group (since all others are excluded from use and decision making).”<sup>9</sup> It represents jointly-owned private property without unilaterally tradable shares. Simultaneous sale by all co-owners is only permissible by vote and subject to strict internal rules.<sup>10</sup> Although rare and difficult to acquire, private-group property rights are hailed as the best option, especially for long-term occupants of an area, for protecting community-based property rights; it may require legally recognizing private-group rights for communities over the property in question.<sup>11</sup> Nevertheless, “[t]he essence of any property regime is an authority system that can assure that the expectations of rights holders are met.”<sup>12</sup> “The fundamental characteristic of . . . community-based property rights is that their primary legitimacy is drawn from the community in which they exist, and not from the nation-state in which they are located.”<sup>13</sup> Thus, if the authority and legitimacy system ever breaks down, common property degenerates into open access.

Research into common property was heavily influenced by Garrett Hardin’s controversial and now discredited “tragedy of the commons” metaphor in which common property came to embody “the [expected] degradation of the environment . . . whenever many

6. John Quiggin, *Common Property, Equality and Development*, 21 WORLD DEV. 1123, 1123 (1993). Economist Harold Demsetz talks of communal property as where the community denies to the state or to individual citizens the right to interfere with any person’s exercise of communally-owned rights. Demsetz, *supra* note 4, at 354.

7. See Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247, 251-52 (1992). As an unowned resource, public property is subject to overuse because ownership is vested in the abstract “public.” *Id.* at 252. Its manager (the government) is far removed from the resource itself and thus unable to police its use. *Id.* They also have no personal stake in the resource, so they are not motivated to protect it. *Id.* In Kenya, public property is designated as “Trust Lands.” See generally Trust Land Act, (1939) Cap. 288 (Kenya).

8. In Kenya, the state has the exclusive right to dispose of land. See, e.g. Government Lands Act, (1993) Cap. 280 § 3 (Kenya). It is currently being debated over whether to convert most of these lands into public trusts in order to curtail the state’s exclusive disposition powers.

9. Bromley, *supra* note 1, at 11. Individuals also have rights and duties in this regime.

10. McKean, *supra* note 7, at 11.

11. Owen J. Lynch, Promoting Legal Recognition of Community-Based Property Rights, Including the Commons: Some Theoretical Considerations 3 (June 7, 1999) (unpublished paper, presented at the Symposium of the International Association for the Study of Common Property and the Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, Indiana), <http://www.ciel.org/Publications/promotinglegalrecog.pdf>.

12. Bromley, *supra* note 1, at 12.

13. Lynch, *supra* note 11, at 2.

individuals use a scarce resource in common.”<sup>14</sup> According to Hardin, any rational herdsman sharing a commons will realize that the only sensible course is to add more animals to his herd.<sup>15</sup> “Each man is [then] locked into a system that compels him to increase his herd without limit,” and as a result, a commons is therefore a tragedy because it will inevitably decay and rot away.<sup>16</sup> Hardin, though, mistakenly assumed that community managed areas equate to areas free from management control, but ever since his thesis was presented, private/individual property rights have been fronted as a panacea to the problem of unsustainable resource use.<sup>17</sup>

### C. *The African Commons*

Conceptually, the African commons is a variant of common property where land and associated resources are exclusively available to specific communities, lineages, or families operating as corporate entities.<sup>18</sup> Such commons are supposed to be managed and protected by a social hierarchy in the form of an inverted pyramid: the tip representing the family; the middle, the clan and lineage; and base, the community.<sup>19</sup> Individuals and groups have access to resources based on social criteria.<sup>20</sup> The commons classically were the primary socio-economic asset for individual and community development, and they were not susceptible to inter vivos transfers outside of one’s social organization level.<sup>21</sup> Transmission of access rights to land and associated resources was done by way of intestacy to predetermined heirs based on communal rules.<sup>22</sup>

Otherwise known as rangelands, African commons are “semi-arid regions of the world that are too dry for reliable crop cultivation and hence used for livestock production of one form or another.”<sup>23</sup> “The rangelands developed over many thousands of years under climates marked by strong seasonality and high interannual

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14. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 2* (1990).

15. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968), available at <http://www.sciencemag.org/cgi/content/full/162/3859/1243>.

16. *Id.*

17. See, e.g., Patricia Kameri-Mbote, *Land Tenure, Land Use, and Sustainability in Kenya: Towards Innovative Use of Property Rights in Wildlife Management*, in *LAND USE LAW FOR SUSTAINABLE DEVELOPMENT* 132, 132 (Nathalie J. Chalifour et al. eds., 2007).

18. H.W.O. Okoth-Ogendo, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*, 1 *UNIV. NAIROBI L.J.* 107, 107 (2003).

19. *Id.* at 108.

20. *Id.*

21. *Id.*

22. *Id.* at 108-09.

23. Brian H. Walker & Marco A. Janssen, *Rangelands, Pastoralists and Governments: Interlinked Systems of People and Nature*, *PHIL. TRANSACTION ROYAL SOC’Y B: BIOLOGICAL SCI.* 719, 719 (2002).

variation in rainfall.”<sup>24</sup> They maintain about fourteen percent of the world’s cattle and twenty-one percent of the world’s sheep and goats on a land base that comprises twenty-five percent of the world’s total area of rangelands.<sup>25</sup> The number of people producing livestock in Africa is higher than anywhere else in the world; more than half of the world’s total pastoralists reside in Africa.<sup>26</sup> The Kenyan rangelands thus fittingly encompass about eight-two percent of the country’s total land mass as well as support six million people and more than fifty percent of the country’s livestock population.<sup>27</sup> Historically, a livestock-based economy has supported a large and diverse pastoral population. While this population has a growth rate only slightly below the national average of 3.8%, cattle numbers have fluctuated.<sup>28</sup> Disease and drought have checked any long term increase in cattle numbers, and the present population is close to the 1969 level of 2.8 million.<sup>29</sup> Accordingly, per capita livestock holdings have decreased, and many groups, particularly the Turkana, Samburu Somali, and Pokot pastoralists, “are no longer able to maintain a purely livestock-based economy.”<sup>30</sup>

The Kenyan rangelands have been occupied by pastoral communities for decades. Policymakers, though, have sought to protect these arid environments without concomitant attention to the socio-economic repercussions to, and capacities of, residents who use them.<sup>31</sup> Rangelands were thus seen as “wastes of space,” and policies were enacted to “fix” and/or pre-empt the degradation problems they supposedly experience.<sup>32</sup> These policy measures altered the land tenure system and re-ordered the rangelands. Policymakers, however, overlooked the fact that many social groups, including herders, have successfully countered resource degradation threats by developing and maintaining self-governing institutions.<sup>33</sup> This oversight resulted from the fundamental flaw of Har-

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24. *Id.*

25. Brent M. Swallow & Daniel W. Bromley, *Institutions, Governance and Incentives in Common Property Regimes for African Rangelands*, 6 ENVTL. & RES. ECON. 99, 99 (1995).

26. *Id.*

27. Bondi Ogolla & John Mugabe, *Land Tenure Systems and Natural Resource Management*, in IN LAND WE TRUST: ENVIRONMENTAL, PRIVATE PROPERTY AND CONSTITUTIONAL CHANGE 1996, at 85, 88 (Calestous Juma & J.B. Ojwang eds., ACTS, Environmental Policy Series No. 7, 1996).

28. Chris Southgate & David Hulme, *Environmental Management in Kenya’s Arid and Semi-Arid Lands: An Overview 2* (Inst. for Dev. Policy and Mgmt., Rural Resources Rural/Livelihoods Working Paper Series, Paper No. 2, 1996).

29. *Id.*

30. *Id.*

31. AFRICAN CONSERVATION CENTRE, *DIVERSIFYING RURAL LIVELIHOODS: PASTORALISM AND RANGELAND MANAGEMENT 5* (on file with the African Conservation Centre Library, Nairobi, Kenya) (2007).

32. *Id.*

33. See Thomas Dietz, Elinor Ostrom & Paul C. Stern, *The Struggle to Govern the Commons*, 302 SCIENCE 1907, 1908 (2003), available at <http://www.sciencemag.org/cgi/>

din's thesis in that it really describes the "tragedy of open access" and not the "tragedy of the commons."<sup>34</sup> There is a critical difference between *open access resources* and *common property resources*, which turns on the very concept of property. Property is a future benefit stream, and in an open access scheme, there is no property, only "the opportunity to use something."<sup>35</sup>

Government efforts to re-order Kenya's rangelands led to the introduction of the group ranch concept as the formal land holding and use structure for pastoral communities. However, this concept's governing structure, discussed below, has significantly contributed to environmental and resource mismanagement of the rangelands, and thus it has paradoxically created the "tragedy of the commons" it was meant to prevent.

#### *D. International Environmental Principles and Instruments*

Due to international state sovereignty principles, natural resource management is generally left to the nation-state in which the resource(s) is/are located.<sup>36</sup> However, as the principal actors of international law, states have developed environmental law principles and have entered binding agreements on the issue that limits their discretion. One major development in the effort to establish environment law principles is the 1992 Rio Declaration, which urges states to take steps to ensure sustainable natural resource and environmental management. It enjoins states to consider intergenerational equity as they develop;<sup>37</sup> recognize poverty eradication as an indispensable requirement for sustainable development;<sup>38</sup> and foster citizen participation at the local government level in environmental decisionmaking.<sup>39</sup> The Declaration shrewdly recognizes that indigenous people and local communities have a vital role in environmental management due to their knowledge and traditional practices.<sup>40</sup>

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content/abstract/302/5652/1907?ck=nck.

34. Lynch, *supra* note 11, at 1-2.

35. Bromley, *supra* note 1, at 13.

36. Article 3 of the Convention on Biological Diversity provides that "[s]tates have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies." Convention on Biological Diversity, art. 3, *opened for signature* June 5, 1992, S. TREATY DOC. NO. 130-20 (1993), 1760 U.N.T.S. 79, *available at* <http://www.cbd.int/convention/articles.shtml?a=cbd-03>; *see also* U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

37. *Id.* princ. 3.

38. *Id.* princ. 5.

39. *Id.* princ. 10.

40. *Id.* princ. 22.

Like the Rio Declaration, Agenda 21 also resulted from the concerted effort to develop guidelines for natural resource management. When managing fragile ecosystems, governments are required to “[i]ntegrate indigenous knowledge about forests, forest lands, rangeland and natural vegetation into research activities on desertification and drought.”<sup>41</sup> They must also facilitate land allocation to uses that provide the greatest sustainable benefits and promote the transition to a sustainable and integrated management of land resources.<sup>42</sup> These principles are particularly important when the government’s legal-policy instruments managing a fragile ecosystem, like rangelands, are at odds with the area’s very character and traditional property rights regime.

In the realm of binding instruments, the 2003 African Convention for the Conservation of Nature and Natural Resources<sup>43</sup> is pertinent when examining the African commons. Parties to the Convention are required to prevent land degradation and “develop long-term integrated strategies for the conservation and sustainably management of land resources, including soil, vegetation and related hydrological processes.”<sup>44</sup> Most pertinent to the African commons is the provision that requires Convention members to develop and implement land tenure policies able to facilitate the above measures by taking into account the rights of local communities.<sup>45</sup> This provision thus recognizes that proper land tenure policies are ones that consider the interests and rights of local communities.

### III. HISTORICAL BACKGROUND TO RANGELAND GOVERNANCE

Although the Kenyan government has continually intervened in rangeland governance, one must first distinguish the actions of Kenya’s colonial and post-independence governments.

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41. U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Agenda 21*, ¶ 12.23, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) [hereinafter *Agenda 21*], available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>.

42. *Id.* ¶ 10.5.

43. This Convention was adopted at the 2003 African Union’s Heads of States and Governments Summit in Maputo, Mozambique to replace a Convention adopted in 1968. See generally African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1001 U.N.T.S. 4.

44. African Convention on the Conservation of Nature and Natural Resources (Revised) art. VI.1, July 11, 2003, <http://www.ecolex.org/server2.php/libcat/docs/Volltext/TRE001395E.pdf> (entering into force once it is ratified by fifteen states.).

45. *Id.* art. VI.4.

*A. Colonial Government Rangeland Governance*

The colonial government established the African Land Development Organisation (ALDEV) in 1945.<sup>46</sup> The ALDEV identified a number of problems relating to tenure in different parts of Kenya. Among the pastoralist communities that owned the land they occupied, two of these identified problems were overgrazing and stock disease.<sup>47</sup> In response, the colonial administration established a private enclosure land system, where land ownership was firmly based on family holdings.<sup>48</sup> The ALDEV's two principal policy aims were to develop sound ranching techniques to replace nomadic pastoralism and encourage settled agriculture in suitable areas by all wishing to adopt it.<sup>49</sup> The ALDEV then resolved to continue the existing grazing schemes but create large ranches, up to 20,000 acres, for extended families.<sup>50</sup> Of these family ranches, the Konza and Il Kisongo grazing schemes provide both insight into the origins of group ranches and the rationale for their development.

## 1. The Konza Grazing Demonstration Scheme

Consisting of 22,000 fenced in acres that were divided into paddocks with water supplies, the Konza grazing scheme was created in 1946.<sup>51</sup> Its primary objectives were to illustrate the results of grazing management, demonstrate improvement of stock by breeding and selection, and examine ways to introduce the Masai to stable agriculture.<sup>52</sup> To fill the ranch, elders selected ten families, about ninety people in total, from amongst the least wealthy and required a verbal assurance that these families would manage their herds according to the site's rules.<sup>53</sup> However, the families found the idea of selling their surplus appalling; their subsequent refusal to sell surplus caused the government to lose interest in the project despite its success in multiplying herd size.<sup>54</sup> In 1954, families began escalating their protest to livestock sales by quickly abandoning Konza, and by 1961, all families had abandoned it due to insufficient pasture, high stock levels, or the

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46. Republic of Kenya, Sessional Paper No. 8 (1945) (on file with author).

47. NAIROBI, KENYA: MINISTRY OF AGRIC., ANIMAL HUSBANDRY, AND WATER RES., *AFRICAN LAND DEVELOPMENT IN KENYA: 1946-1962*, at 7 (1962).

48. *Id.*

49. *Id.* at 69.

50. *Id.* at 69-70.

51. *Id.* at 71.

52. *Id.*

53. *Id.* at 71.

54. *Id.* at 72-73.

drought of 1960-1961 that wiped out all the surpluses.<sup>55</sup> Despite its failings, Konza represents an early effort to reform the management of the Kenyan rangelands.

## 2. The Il Kisongo Grazing Scheme

Unlike Konza, the Il Kisongo scheme only covered about 2,030 square miles, but its boundaries fluctuated between the wet and dry seasons.<sup>56</sup> It also adopted each clans' traditional water and grazing divisions and proposed to enforce them without resorting to grazing fees.<sup>57</sup> Additionally, it had a partial stock limitation system that was enforced through land usage bylaws.<sup>58</sup> This grazing system had the support of the chief and community leaders until the 1959-1961 drought led to relaxation of the scheme's rules and eventual abandonment by the end of 1961.<sup>59</sup> Of the two schemes, Konza was the more radical because it aimed to totally replace Masai pastoralism with sedentary ranching systems, or with agriculture.

The failure of these two schemes, however, did not cause the government to abandon the group ranch concept. As seen in the report of the East African Royal Commission of 1953-1955, the government not only wanted to continue individualizing land ownership but wanted to extend it to groups such as companies, co-operatives, and customary associations for Africans.<sup>60</sup>

### *B. Independent Kenya Moves to Group Ranches*

In 1965, the government commissioned an inquiry into "Land Consolidation and Registration in Kenya."<sup>61</sup> The Inquiry report, otherwise known as the Lawrence Report, concluded that group, rather than individual, registration of land has greater relevance to range areas.<sup>62</sup> It argued that land rights in Masailand range areas are communal and that these traditional land use systems are pervaded by overstocking and its naturally consequent land deterioration.<sup>63</sup> The report also demonstrated that nomadic existence imposed by the traditional Masai system had many social

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55. *Id.* at 73.

56. *Id.* at 75.

57. *Id.*

58. *Id.*

59. *Id.*

60. See E. AFRICA ROYAL COMM'N, EAST AFRICA ROYAL COMMISSION 1953-1955 REPORT 350-51 (1955).

61. See REPUBLIC OF KENYA, REPORT OF THE MISSION ON LAND CONSOLIDATION AND REGISTRATION IN KENYA 1965-1966 (1966).

62. *Id.* at 30.

63. *Id.*

disadvantages, which the Masai were beginning to realize.<sup>64</sup> Additionally the report included findings from the previous year's development committees, which proclaimed, as their first principle, that "[t]he Masai now wish to progressively give up their nomadic way of life and to settle down to a static existence."<sup>65</sup>

While the government was pursuing strict and pure tenure individualization in the rest of Kenya, this approach was seen as improper for range areas because if Masai rangeland was divided among the total adult male population, it would yield an unsustainable parcel size average of two hundred acres per adult male.<sup>66</sup> The State argued that group ranches would better manage this difficulty and ensure the best possible use of rangelands.<sup>67</sup> For example, group ranch registration would provide greater access to external loans due to the overt security of tenure.<sup>68</sup> The report also proposed appointing group representatives to deal with the land and to enable direct adjudication of ownership rights to groups.<sup>69</sup> The government then passed the Land Adjudication Act and the Land (Group Representatives) Act in order to set up a legislative framework to define and govern the group ranches.

The Land Adjudication Act was designed to enable the ascertainment and recording of rights and interests in trust land to ensure that not only were individuals and families recorded and registered as landowners, but groups as well.<sup>70</sup> It also addressed the special needs of some parts of the country that the Land Consolidation Act<sup>71</sup> was not suitable for.<sup>72</sup> Likewise, the Land (Group Representatives) Act was designed to enable the recording of individual rights in trust land, but when consolidating holdings, it proved an inappropriate method of assigning landownership.<sup>73</sup> The law was meant to allow a few people to act on the group's behalf regarding property succession matters so that the need for express transfer of property whenever a new group of representatives was elected and registered could be avoided.<sup>74</sup>

While the memorandum of objects and reasons for these two statutes clearly captures their principal objectives, only in each statute's preamble is there some vague semblance to these objec-

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64. *Id.*

65. *Id.* (internal quotation marks omitted).

66. *Id.* at 31.

67. *Id.*

68. *Id.*

69. *Id.* at 32.

70. Land Adjudication Act (1968), KENYA GAZETTE SUPPLEMENT No. 24 [hereinafter SUPPLEMENT No. 24] (on file with author) (Memorandum of Objects and Reasons).

71. Land Consolidation Act, (1959) Cap. 283 (Kenya).

72. SUPPLEMENT No. 24, *supra* note 70.

73. *Id.*

74. *Id.*

tives.<sup>75</sup> It appears the Acts' drafters assumed the memoranda would always be available to the people, who would later be implementing these laws. This omission could have undermined their implementation because the law's objective, especially beyond group ranch incorporation, is not always clear.

#### IV. DECONSTRUCTING THE NATURE OF GROUP RANCHES: A TRAGEDY OF THE COMMONS?

Because group ranches were introduced in order to eliminate rangeland decay, the government classified all prior rangeland governance as outmoded open access pastoralism that had to be replaced with commercial ranching and sedentary agriculture. This policy and the State's subsequent actions have been questioned and criticized as to whether the group ranch concept has become the very "tragedy of the commons" it was meant to prevent. To answer this question, it is imperative to analyze certain aspects of the governing framework vis-à-vis the factual situation.

##### *A. Basic Nature of a Group Ranch*

The term "group ranch" is a generic term. The principal law, the Land (Group Representatives) Act, instead uses the term "group representatives" to refer to the people that are elected by a group adjudicated to have communal interests over certain land. The land is registered in the representative's name as trustee, and the group also elects a committee, which governs the group's daily affairs.<sup>76</sup> Additionally, the law establishes a registrar of group representatives chiefly to supervise group ranch administration.<sup>77</sup> In practice, this officer is represented in every district where there are group ranches.

##### *B. Conflicting Objectives in Legal Form of a Group Ranch*

Group ranch registration was "viewed as a compromise between individual ownership and the need for [collective] access to

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75. For instance, the Land Adjudication Act's preamble provides that it is "[a]n Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto." Land Adjudication Act, (1968) Cap. 284 pmb. (Kenya). The Land (Group Representatives) Act's preamble provides that it is "[a]n Act of Parliament to provide for the incorporation of representatives of groups who have been recorded as [landowners] under the Land Adjudication Act, and for the purposes connected therewith and purposes incidental thereto." Land (Group Representatives) Act, (1968) Cap. 287 pmb. (Kenya).

76. See Land (Group Representatives) Act § 8.

77. *Id.* § 4.

wider resources in drylands.”<sup>78</sup> It is individual tenure because land is registered to a distinctive group of people, who constitute the membership of the group ranch.<sup>79</sup> The goals of individual tenure were extolled by a 1955 Colonial Government plan to intensify African agriculture.<sup>80</sup> Similarly, the Lawrence report states:

[I]ndividualization of tenure strikes at the very root of tribal society. It marks the final passing of the concept so eloquently expressed in the often quoted saying of the Nigerian Chief[:] ‘Land belongs to a vast family of which many are dead, few are living and countless members are still unborn.’<sup>81</sup>

Thus, land is registered to a group as the private owner, who has the power to subdivide it and deal with and sell it to a willing buyer. Ideally, the private landowner is free from tribal controls and customs over land use and disposition because the land is his alone. This same land, however, is claimed and recognized under customary law as communally belonging to the group members.<sup>82</sup> Therefore, it and other property is actually vested in the group representatives who are required to act on the members’ behalf and fully and effectively consult them on group matters.<sup>83</sup>

Because the law is silent on customary law’s role in land management, it has failed to reconcile the different private and communal ownership objectives. Nevertheless, it is difficult to fuse communal interests of present and future generations with the power of disposition held by the group as a private landowner. Additionally, the legal ability of members to dissolve and sub-divide group ranches remains a major challenge to pastoralism as way of life.

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78. Ogolla & Mugabe, *supra* note 27, at 99.

79. Land Adjudication Act § 23(2).

80. It was partly intended to provide the African farmer with tenure “security through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and . . . enable him to offer it as financial collateral for loans.” See COLONY AND PROTECTORATE OF KENYA, A PLAN TO INTENSIFY THE DEVELOPMENT OF AFRICAN AGRICULTURE IN KENYA 9 (2d ed. 1955). This report is also known as the Swynnerton Plan. See EMERY ROE, NARRATIVE POLICY ANALYSIS: THEORY AND PRACTICE 173 n.28 (1994).

81. REPUBLIC OF KENYA, *supra* note 61, at 6.

82. The law defines “group” to mean “a tribe, clan section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner.” Land Adjudication Act § 2.

83. Land (Group Representatives) Act, (1959) Cap. 287 § 8(2) (Kenya).

### *C. Leadership Structure of the Group Ranch*

The law establishes two levels of group ranch leadership: group representatives and the committee.

#### 1. Group Representatives

Pursuant to the Land Adjudication Act, group representatives, upon application, are incorporated by a group advised by an adjudication officer.<sup>84</sup> The registrar must then convene a meeting at a specified time and venue for members to address three principal agenda items: (1) adoption of a constitution; (2) oversight of the election of three to ten people as the group's group representatives; and (3) supervision of the election of the group's officers in accordance with the constitution.<sup>85</sup> Once elected, group representatives should apply for a certificate of incorporation as group representatives.<sup>86</sup> This certificate confers upon them perpetual succession powers as well as the right to sue and be sued, to acquire and dispose of property, and to take loans.<sup>87</sup> Officially, group representatives hear and determine appeals from the aggrieved party from committee decisions.<sup>88</sup> They may also "issue instructions to the committee or to any other member [whenever they consider] such instructions are in the [group's] best interests."<sup>89</sup>

#### 2. The Committee

Section 5(1)(c) of the Land (Group Representatives) Act provides for the election of group ranch officers, who constitute the management committee.<sup>90</sup> The committee is comprised of a chairperson, vice-chairperson, secretary, treasurer, and three other members, at least two of whom must be group representatives; only group ranch members may be nominated to fill these positions unless the registrar approves otherwise.<sup>91</sup> In order to ensure that group members receive the maximum social and economic benefits

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84. Land Adjudication Act § 23(5)(a)-(c).

85. Land (Group Representatives) Act § 5(1)(a)-(c).

86. *Id.* § 7.

87. *Id.* § 8(1). Perpetual succession is important because it eliminates the need for express transfer of property whenever a new group of representatives is elected and registered.

88. Land (Group Representatives) (Prescribed Provisions) Order, (1970) Cap. 287 Third Schedule (Kenya) (noting that provisions are deemed to be contained in the Constitution of every Group unless specifically excluded or modified).

89. *Id.*

90. However, people convicted of a crime involving fraud or dishonesty to the office of treasurer, group representative, or any other position of trust are legally barred from holding office. Land (Group Representatives) Act § 6.

91. See Land (Group Representatives) (Prescribed Provisions) Order, Second Schedule.

from their land, the committee is required to “assist and encourage members to manage the land or graze their stock in accordance with sound principles of land use, range management, animal husbandry and commercial practice,” as well as prepare and implement a land development plan.<sup>92</sup> It may also issue instructions to members, establish the group ranch’s rules of operation, raise credit, and hold and/or use moneys for the members’ benefit.<sup>93</sup>

Because the management committee and the group representatives have designated powers and functions, the law has created two centers of power: the group representatives, who may issue instructions to the committee and hear appeals from committee decisions;<sup>94</sup> and the committee, which, while subordinated to the group representatives, is directly in charge of group affairs<sup>95</sup> and is most directly accountable to group members. Even though this governing scheme may have been intended as a check and balance system, it is nonetheless a potential conflict area. Thus, for practical reasons, some group ranches have crafted local solutions that incorporate committee members as group representatives.<sup>96</sup>

#### *D. Decision Making and Legitimacy of Group Ranch Leaders*

There are three ways in which a group ranch meeting may occur: the group holds an annual general meeting as prescribed by their constitution; a significant number of group representatives or the District Agricultural Committee petitions the committee chairman to convene a meeting; or at any given time, the registrar convenes a meeting.<sup>97</sup> All members can attend and vote at a group ranch meeting, but at least sixty percent of all registered members must attend to have a quorum.<sup>98</sup> Similarly, any resolution adopted at a meeting must be supported by sixty percent of the meeting’s voting attendees to be valid.<sup>99</sup>

Participation in group ranch meetings is the only way members can influence policy matters affecting their group, but this system is fraught with challenges that undermine its utility. For example, the group ranch law does expressly provide for women to serve on the committee or as group representatives. Due to conservatism

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92. *Id.* Third Schedule.

93. *Id.*

94. *Id.*

95. *Id.*

96. *See, e.g.*, CONSTITUTION, Art. 21(c) (2005) (Tiemamut Group Ranch, Kenya) (on file with author); CONSTITUTION, Art. 21(c) (2006) (Nkiroriti Group Ranch, Kenya) (on file with author); CONSTITUTION, Art. 21(c) (2006) (Kijabe Group Ranch, Kenya) (on file with author).

97. Land (Group Representatives) Act, (1968) Cap. 287 § 15(1)-(3) (Kenya).

98. *Id.* § 15(5)-(6).

99. *Id.* § 15(7).

and patriarchal traditions, women, with the exception of widows, are not even registered as members in many group ranches.<sup>100</sup> While women can now hold leadership positions in a few group ranches, the trend of male dominance continues unabated.<sup>101</sup> A survey of the Shompole Group Ranch showed that male elders dominate discussions as women and the youth only contribute when asked.<sup>102</sup> Similarly, a survey of the Olderkesi Group Ranch captured the minimal role of women in decisionmaking through the fact that most women, fearing they would be “answering men’s issues,” refused to even answer the survey questions.<sup>103</sup>

Another problem confronting the meeting system is general apathy about attending them. For example, Imbirikani Group Ranch members have argued their attendance makes no difference because the committee was indifferent to their previous contributions.<sup>104</sup> They have also accused the committee of patronizing members, misusing group ranch funds, lacking solidarity due to divergent political and individual clan interests, being unresponsive to the needs of members, and being biased in the membership registration process.<sup>105</sup> The Kuri Kuri group members have expressed similar apathy about meetings due to having no confidence in fraudulent chairperson(s), too many incomplete projects, contempt for the committee, unnecessary meetings, no information flow at all, and no input in the decision making process.<sup>106</sup> At the Shompole Group Ranch, meeting apathy is so strong—for reasons similar to those mentioned above—that the group’s own constitutional requirements for regular meetings is regularly ignored.<sup>107</sup>

The legitimacy of group representative and committee membership elections has also proven to be problematic. As required by

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100. Interview with John Ole Kamanga, Coordinator, South Rift Landowners Ass’n, in Nairobi, Kenya (Sept. 19, 2006) [hereinafter Kamanga Interview]. This is the case amongst the Maasai. *Id.*

101. *See, e.g.*, CONSTITUTION, Art. 22 (2006) (Kijabe Group Ranch, Kenya) (on file with author); CONSTITUTION, Art. 22 (2006) (Nkiroriti Group Ranch, Kenya) (on file with author); CONSTITUTION, Art. 22 (2005) (Tiemamut Group Ranch, Kenya) (on file with author). *But see* CONSTITUTION, Art. 22 (2005) (Imbirikani Group Ranch, Kenya) (on file with author) (ignoring women and their role in the group ranch).

102. JOHN NDUNG’U & ISAAC WARUGI, REPORT ON COMMUNITY COMMUNICATION, NETWORKING, DECISION-MAKING MECHANISM AND ASSET BUILDING TOOLS AT SHOMPOLE GROUP RANCH, KAJIADO DISTRICT 6-7 (2002) (on file with the African Conservation Centre Library, Nairobi, Kenya).

103. *Id.*

104. Proceedings of the Imbirikani Group Ranch Community Workshop at Kindu Hotel, Emali, Kenya 8 (1999) (transcript available at the African Conservation Centre Library, Nairobi, Kenya) [hereinafter Proceedings of the Imbirikani Group Ranch Community Workshop].

105. *Id.*

106. Pact Kenya, *Report on Governance and Leadership Training for Kuri Kuri Group Ranch Community 7* (Dec. 2001) (on file with the African Conservation Centre Library, Nairobi, Kenya).

107. NDUNG’U & WARUGI, *supra* note 102, at 14-16.

law, elections are conducted at meetings and supervised by the group representatives' registrar.<sup>108</sup> However, given the aforementioned attendance requirements and general apathy about meetings, elections are often delayed by years at a time due to the major quorum issues that frequently arise. At the Shompole Group Ranch for example, a survey showed that office holders sometimes stay in office beyond their constitutionally pronounced electoral term.<sup>109</sup> In quieter group ranches, like those in the Laikipia District, no elections were held between 1972 and 2004.<sup>110</sup> Similarly, the Musul Group Ranch's first committee elections were held in 1975; the next election was not held until 2005, and meanwhile, this group is still trying to adopt a constitution.<sup>111</sup> The Tiemamut group ranch also held no elections between 1972 and 2005.<sup>112</sup>

Politics also affects group ranch governance because elections are heavily influenced by money, clanism, and political clout. For instance, in 1996 at the Olgulului/Olorashi Group Ranch, there was a protracted tussle between the group ranch secretary and the area Member of Parliament (MP) over the secretary's opposition to the MP's parliamentary candidate nominations for the then-ruling KANU party.<sup>113</sup> The MP felt threatened by this opposition, and consequently, ranch operations were paralyzed.<sup>114</sup>

Confronted with such challenges, the group ranch leadership structure faces a legitimacy crisis. This crisis has directly impacted the group's actual operations and the sustainable management of available resources. It also negates any general goodwill members have towards group ranches and thus is likely a reason for the increasing popularity of subdivision.

### *E. Ecological Governance*

Most rangeland communities are pastoral livestock keepers, and thus group ranches are not only heavily dependent on natural resources, but also upon the proper and sustainable management of these resources. Ideally, a group ranch's ecological governance balances the needs of an individual member with the interests of

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108. Land (Group Representatives) Act, (1968) Cap. 287, § 5 (Kenya).

109. Proceedings of the Imbirikani Group Ranch Community Workshop, *supra* note 105.

110. This information came from a survey, which was undertaken by the author while acting as the consultant lawyer negotiating and drafting of the group's ranch constitution for the African Wildlife Foundation.

111. *Id.*

112. Interview with Tiemamut Group Ranch community in Laikipia District, Kenya (Nov. 5, 2005) (discussing the contents of the new constitution).

113. Chris Southgate & David Hulme, *Land, Water and Local Governance in a Kenyan Wetland in Dryland: The Kimana Group Ranch and Its Environs* 17 (Inst. for Dev. Policy and Mgmt., Rural Resources Rural/Livelihoods Working Paper Series, Paper No. 4, 1996).

114. *Id.* at 36.

the whole group. However, the substantive provisions of the Land (Group Representatives) Act, sections 5 and 12, do not refer to natural resource governance and management.<sup>115</sup> Respectively, they only provide for the adoption of a constitution and empower individual groups to regulate matters left out of the model constitution.<sup>116</sup> Nevertheless, they are important to the administration of the groups' affairs. These provisions are therefore the only way for groups to regulate natural resource use and ecological development. The Act's Third Schedule also requires the committee to assist and encourage members to manage land or graze their stock in accordance with sound land use, range management, animal husbandry, and commercial practice principles.<sup>117</sup> These provisions, however, are not binding and can be expressly excluded from or modified by a group ranch's constitution.<sup>118</sup> Additionally, the language of these provisions is vague thus providing no substantive guidance to eco-friendly group ranch officials to help them shape official policy.<sup>119</sup> The development of a group ranch natural resources governance system therefore depends on each group's internal rules, and consequently many group ranches have collapsed from the inherent inadequacies of this governing structure, particularly the lack of any coercive measures to determine stock control.

Given the centrality of the above-mentioned issue to one's basic livelihood, members have tried to resolve it through various types of amendments to their respective group ranch constitutions. One common method involved zoning the ranch into several sectors, such as conservation, grazing, and settlement zones.<sup>120</sup> While this approach can be lauded as a step towards prescribing binding and acceptable natural resource management rules, uncontrolled stock levels have undermined its success. The stock control issue is enormously difficult to address; the author could not even broach the subject with the Tiemamut, Kijabe, Musul, and Nkiroriti group ranches, as they simply refused to discuss even the idea of rules limiting the amount of livestock they could own.

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115. Land (Group Representatives) Act, (1968) Cap. 287 §§ 5, 12 (Kenya).

116. *See id.*

117. *See id.* Third Schedule.

118. *Id.* These provisions are contained in the third part of the Third Schedule which comprises optional model regulations that each group ranch is free not to adopt for internal use, instead developing its own rules.

119. *Id.* Third Schedule.

120. CONSTITUTION, Arts. 17, 19 (2005) (Tiemamut Group Ranch, Kenya) (copy on file with author). This constitution provides for the zoning of the ranch into three sectors, establishes a committee to consult with the general membership in general meetings regarding the nature of zoning and acceptable land uses, and binds all members to act in accordance with zoning arrangements without exception. *Id.* It also prescribes penalties for the violation of the zoning arrangement, the minimum being a warning to a maximum of five thousand shillings. *Id.*

*F. Subdivision*

The subdivision of Kenya's group ranches is probably the greatest tragedy of all because it basically entails dividing a group's land parcel—ideally on an equal basis—among its members. However, the law is silent on how group ranches should be subdivided; the law only describes group ranch dissolution with token guidance as to what should happen afterwards.<sup>121</sup> Without a legislative foundation or a clear government implementation policy, the subdivision process has been left to members, with the supervision of the group representatives' registrar. Consequently, it is a very controversial process.

The current fervor surrounding subdivision is somewhat surprising because it is unclear what initially sparked it. Issues such as those mentioned above as well as poor management, lack of accountability at group and government levels, increasing group ranch populations, discord between age-sets, unregulated livestock quotas, financial misappropriation, and an ambivalent state bureaucracy have been cited as causes.<sup>122</sup> However, it was former President Daniel Toroitich Arap Moi who blew the final whistle for large-scale subdivision in 1989 when he ordered a survey team to the Kajiado District to demarcate land so that the group ranches there could be subdivided and each member given a title deed.<sup>123</sup> Accompanying Moi's order was his proclamation that "the issue of having group ranches will create problems in the future."<sup>124</sup> This statement was viewed as the long overdue government policy direction sanctioning subdivision.

The Kajiado District is one area that has been greatly affected by group ranch subdivision. Of the initial fifty-one incorporated group ranches there, forty-six have been subdivided.<sup>125</sup> Research, however, shows that the problems plaguing group ranches, such as gender bias, have infiltrated the subdivision process. According to

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121. Land (Group Representatives) Act, (1968) Cap. 287 § 13(1)-(2) (Kenya). Section 13(1) requires group representatives to seek the registrar's consent to dissolve. *Id.* § 13(1) The application should be made in writing, signed by a majority of the group representatives and supported by a copy of the meeting's minutes at which the dissolution resolution was passed. *Id.* As per section 13(2), this application must be submitted within fourteen days of passing of the resolution. *Id.* § 13(2).

122. Shauna BurnSilver & Esther Mwangi, *Beyond Group Ranch Subdivision: Collective Action for Livestock Mobility, Ecological Viability, and Livelihoods* 7 (CGIAR Statewide Program on Collective Action & Prop. Rights [CAPRI], Working Paper No. 66, 2007).

123. DEP'T FOR INT'L DEV., *REALIZING THE ECONOMIC DEVELOPMENT AND POVERTY ALLEVIATION POTENTIAL OF NATURE IN MAGADI: A STUDY OF OL DONYO NYOIKE, OL KERI, OL KIRAMATIAN AND SHOMPOLE GROUP RANCHES* 72 (2002) (on file with the African Conservation Centre Library, Nairobi, Kenya).

124. *DAILY NATION* (Nairobi, Kenya), Apr. 15, 1989.

125. Interview with Registrar of Group Representatives, in Nairobi, Kenya (Aug. 11, 2006).

a survey, women, though crucial resource users, have no role in the subdivision process, and moreover they believe “land is a man’s affair and they need not be consulted on the process.”<sup>126</sup> Just as group ranches have their indifferent governing committees, the subdivision process is controlled by distant parties—surveyors who exploit the ignorance of community members and subdivide land without considering resource distribution within ranches or the land’s slope gradient.<sup>127</sup> Land divisions have also not been equal. A survey of the Enkaroni, Meto, and Nentanai group ranches revealed that two-thirds or more of the registered members received below average parcels, while nine percent of their registered members received more than twenty-five percent of the land.<sup>128</sup> As a result of these problems, there is growing anxiety over subdivision. For example, Imbirikani Group Ranch members have indicated they will petition for a general meeting to give the surveyors’ absolute powers back to the group ranch committee.<sup>129</sup>

The government has a paradoxical role in the subdivision process in that it merely gives its consent to the land control board and mitigates conflicts that arise from the subdivision and leadership struggles.<sup>130</sup> Likewise, land adjudication officers—the assistant group representatives’ registrars—have had their role reduced to attending Annual General Meetings, supervising elections, and updating group ranch registers.<sup>131</sup> The process hence lacks equity and transparency in many group ranches, and consequently subdivision has not resulted in equal parcel allotment to individual members, nor has it always benefited the potential or intended beneficiaries. More often, the system has unduly benefited the well-connected because they have been able to connive with management committees and private surveyors to manipulate the subdivision process to their advantage at the expense of less fortunate.<sup>132</sup> Additionally, this system appears to have severely undermined the cultural constraints that ordinarily would have limited individual self-interest for the common good.<sup>133</sup>

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126. *Id.*

127. *Id.*

128. Esther Mwangi, *Pitfalls for Privatization: Fingers on the Hand are Not Equal*, PERC REP., June 2004, at 12, 13 (2004), available at <http://www.perc.org/pdf/june04.pdf>.

129. P. Ntiati, *Group Ranch Subdivision Study in Loitokitok Division of Kajiado District, Kenya 7* (Land Use Change Impacts and Dynamics, Working Paper No. 7, 2002).

130. *Id.* at 6.

131. *Id.*

132. See Mwangi, *supra* note 128, at 13-14.

133. *Id.*

## V. TOWARD A SUSTAINABLE LAND USE LEGAL-POLICY FRAMEWORK FOR THE KENYAN RANGELANDS

The group ranch system needs to be modified or, perhaps, completely overhauled. Current land tenure and use is exposing entire communities to poverty. A concerted effort is necessary to devise a framework that promulgates sustainable land use and management practices, and there are two ways to create this framework. One way is for the State to undertake a series of legal and policy interventions, and the other is for rangeland communities to take adaptive measures to overcome the challenges they face.

### *A. Legal and Policy Level Interventions by the State*

To ensure sustainable rangeland management for the benefit of concerned communities and posterity, the State can institute far-reaching reforms to restructure the current system. Several interventions are possible.

#### 1. Development and Implementation of an Integrated Policy for Rangeland Administration

A major problem facing group ranch and general rangeland management is the absence of any guidance from the government pertaining to the implementation, and later review, of legislation. Two possible remedies exist. The first is adding into the Draft National Land Policy,<sup>134</sup> which is currently being debated, an integrated policy statement establishing mechanisms for effective rangeland (especially group ranch), administrative, and natural resource governance. This policy statement should also address post-group ranch activities in the rangelands and provide a framework for any subsequent legislative reforms that are necessary in order to implement its recommendations. The second remedy is to develop a separate rangeland policy but anchor it into the main land policy for harmonization. A process to develop an arid and a semi-arid land policy (ASAL) was recently undertaken.<sup>135</sup> However, the current ASAL draft wrongfully gives land governance a wide berth and suggests that further subdivision of communal lands is acceptable.<sup>136</sup>

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134. See MINISTRY OF LANDS, NATIONAL LAND POLICY (May 2007), available at <http://www.ardhi.go.ke/onflydocuments/nlp/draftlandpolicy.pdf>.

135. See REPUBLIC OF KENYA, DRAFT NATIONAL POLICY FOR THE SUSTAINABLE DEVELOPMENT OF ARID AND SEMI ARID LANDS OF KENYA 10 (2004) (on file with author). This first draft was generated in 2004, but no further progress seems to have been made.

136. *Id.* at 7.

Regardless of which remedy is chosen, the general policy aim must be towards establishing a governing system that is economically efficient and enhances benefit accruals for members. The policy should further social equity by dismantling patriarchy so that all members can participate in rangeland affairs. More specifically, it should recognize women's roles in rangeland communities and how lack of access to land rights or participation in decisionmaking hinders women's performance of their roles.<sup>137</sup> Thus any policy and accompanying legal reform should focus on the issues discussed in the following sections.

*a. Disbanding the Group Representatives System*

When dealing with African communities, the main error that most property theorists, like Hardin, and government policymakers have consistently made is that they assume communities *qua* communities do not have a juridical persona and thus cannot hold property rights in land directly.<sup>138</sup> Communities, though, have a certain commons bonds of kinship from marriage and blood relations, as well as through clans and the like. In fact, most group ranch members are related by belonging to similar clans.<sup>139</sup> Thus, the law should be amended to grant different community groups the ability to own property directly by recognizing them as legal corporate personas. This amendment would vest land title with the community allowing it to be managed according to communal rules. Decisionmaking would then occur at the community group's base thus involving most of the group's members and instilling in them a sense of responsibility to protect their individual land as a group. It will also ensure a level of inter- and intragenerational equity and secure commons ownership because each member will be responsible for his own and the group's collective destiny.

As an African commons, land would only be open for *mortis causa* transmissions to members of the community group.<sup>140</sup> The legal impairment regarding one's ability to subdivide or sell land to a non-communal person is thus removed.<sup>141</sup> This change would ensure that more open rangelands are supporting pastoralism and other activities, such as wildlife conservation for tourism purposes. Neighbors of the commons would also be impacted thus propagat-

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137. *Id.* at 10.

138. See Okoth-Ogendo, *supra* note 18, at 107.

139. See Land Adjudication Act, (1968) Cap. 284 § 2 (Kenya) (defining a "group" to mean "a tribe, clan section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner").

140. See *generally* Okoth-Ogendo, *supra* note 18, at 108-09.

141. *Id.*

ing the concept of open rangelands to ensure ecological sustainability. Once several commonly owned community lands neighbor one another, pastoralism would be vibrantly enhanced as well as the mobility of people and livestock in search of pasture and water year-round.

*b. Territorial Definition*

Since the proposed transformation involves already existing groups, land should be clearly defined in order to protect community interests and secure each group's tenure in the commons against land grabbing. A number of legal steps are therefore required. For instance, changes are needed to secure communal land interests through registration, especially when land is owned by different communities within their recognized clan or other names.

*c. General Governance*

Many measures have been proposed to further general governance of the commons such as recognizing the centrality of customary law to rangeland administration. Accordingly, with the exception of those promulgating patriarchy and inequity, different customary laws should be codified so that they are no longer subordinate to other statutory laws. Members would also need to set up internal rules setting out membership duties and responsibilities.

As evidenced by communities using elected committees to manage water dams and nursery schools, elective leadership is now widely preferred.<sup>142</sup> In order to ensure that elections remain the preferred method of filling leadership positions, legislation should be passed to protect the people's elective voice from unconscionable influences and help overcome issues like illiteracy. At a minimum, legislation must mandate that all group ranch elections be conducted by secret ballot. It should also require a number of literate elders, who have been sworn to confidentiality using their traditional/religious communal practices, to work alongside the registrar in overseeing voting processes. These elders would anonymously record the electoral preferences of illiterate members and immediately submit the ballots to the registrar for counting.

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142. Both the Kijape and Nkiroriti group ranches have elected committees in charge of the local nursery schools. *See supra* note 110. At the Morupusi group ranch, there is an elected committee in charge of sand mining on the members' behalf. *Id.* Also, fifty individuals of the Meto and Enkaroni ranches indicated that an elected committee is charged with overseeing maintenance as well as collecting money to finance maintenance activities. *See generally* Mwangi, *supra* note 128.

Finally, measures must be taken to address the actions by officials who exceed their electoral term in office. The State should have the power to nullify their decisions. If the above recommendations are not adopted, rangeland governance will be condemned to complete disarray and unsustainability.

## 2. Implementing Rangeland Physical Planning

The Physical Planning Act regulates Kenya's physical development.<sup>143</sup> Regional development plans for rural areas, like rangelands, may provide for "planning, replanning, or reconstructing the whole or part of the area comprised in the plan, and for controlling the order, nature and direction of development."<sup>144</sup> Local authorities are responsible for implementing these plans in ways most suited to their needs.<sup>145</sup> This Act is an important instrument in harmonizing rangeland management planning with other land uses. However, despite the current legal framework being in place since 1996, this is little evidence of physical planning implementation.

### *B. Adaptive Measures*

Rangeland communities have taken steps to cope with group ranch decay, and they have many more legal options available to them.

#### 1. Preempting Group Ranch Subdivision

Faced with a crippling legal system, economic woes and erratic weather, rangeland communities have had to be innovative in order to thwart efforts to subdivide. While some communities are struggling to revise their subdivision, others are taking or have taken measures to preempt theirs. For example, all thirteen group ranches in the Laikipia District have formed a trust, Naibung's conservancy, in order to better swap pasture land and develop projects across ranch boundaries.<sup>146</sup> Similarly, the Shompole and Ol Kiramatian group ranches have prevented subdivision by capitalizing on their lands' scenic beauty and charging tourists viewing fees to help raise communal funds.<sup>147</sup> These groups have also incorporated some elements of privatization into their reform efforts in that each member has been granted a land parcel for cultiva-

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143. Physical Planning Act, (1996) Cap. 6 (Kenya).

144. *Id.* § 16.

145. *Id.* § 29.

146. A copy of the trust deed is on file with the author.

147. AFRICAN CONSERVATION CENTRE, *supra* note 31, at 12.

tion; members are then free to either use or lease their land to non-Maasai for an annual fee.<sup>148</sup>

This overall approach towards preempting subdivision now has popular support amongst people who are struggling to secure a basic livelihood. Most of these innovations, if not all, have been supported by non-governmental organizations and hence have operated outside of official policy channels.<sup>149</sup> Questions regarding the sustainability of these efforts have therefore arisen, but the involvement of private investors in tourism projects appears to have alleviated these concerns.<sup>150</sup>

## 2. Post-Group Ranch Subdivision Arrangements

Pastoral producers in Kenya face the dilemma of “being caught between new land tenure rules associated with the dissolution of group ranches and subdivision of communal rangelands, and the *unchanged* ecological exigencies of their dryland systems.”<sup>151</sup> A survey conducted in group ranches at various subdivision stages provides strong evidence that herders are not only attempting to diversify and intensify their production strategies but are also trying to increase their spatial access to resources through pasture sharing and swapping mechanisms. These emergent strategies represent examples of sustained collective action, which was theoretically unexpected after the dissolution of group ranches and the creation of subdivided property assignments.<sup>152</sup> However, this survey also showed that many post-subdivision mechanisms have emerged—specifically in the subdivided Nentanai, Meto, and Enkaroni group ranches—that act to further household foraging beyond one’s private land parcels.<sup>153</sup> Households do so by redistributing their herds and swapping/sharing their pastures between extended family members and friends.<sup>154</sup> Such exchanges reflect

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148. *Id.* at 31.

149. Such organizations include the African Wildlife Foundation (AWF) operating in the Laikipia, Samburu, Isiolo, and Kajiado districts and the African Conservation Centre (ACC) operating in the Kajiado, Narok, and Samburu districts. *See* African Wildlife Foundation, [www.awf.org](http://www.awf.org) (last visited June 13, 2009); African Conservation Centre, [www.conservationafrica.org](http://www.conservationafrica.org) (last visited June 13, 2009).

150. The AWF, for instance, has involved private investors in the construction and management of an eco-lodge in the Kijabe group ranch. Kijabe Trust, [http://www.awf.org/section/engaging\\_you/kijabetrust](http://www.awf.org/section/engaging_you/kijabetrust) (last visited June 13, 2009). Meanwhile, the ACC has been working with Art of Ventures Group on a similar project in the Shompole group ranch. Shompole Ecotourism Development Project, <http://www.conservationafrica.org/conservationprojects/project-details.php?pid=11> (last visited June 13, 2009); The Art of Ventures, [http://www.atta.travel/member\\_detail.aspx?AT\\_ID=350](http://www.atta.travel/member_detail.aspx?AT_ID=350) (last visited June 13, 2009).

151. Mwangi & BurnSilver, *supra* note 122, at 2 (emphasis in original).

152. *Id.* at 8.

153. *Id.* at 20.

154. *Id.*

efforts to implement rotational grazing at a shared price, and they occur with the understanding that they are based on need and will be reciprocated in time. Some leasing arrangements also occur based on monetary or property (animal) exchanges as payment for pasture, but these purely economic arrangements are rare.<sup>155</sup> At the time of this survey, thirty-nine percent of the interviewed individuals from Nentanai, Meto, and Enkaroni indicated that some of their livestock wholly resided on another's land parcel.<sup>156</sup> Of the fifty-three individuals without livestock on their land, they indicated that fifty-seven percent of their animals went to family and members of the same group ranch, twenty-two percent went to friends of the same group ranch, and eighteen percent had merely been moved to different land parcels they owned.<sup>157</sup> Only a small proportion, about four percent, indicated that some of their livestock were in other locations, such as the Elangata Wuas Group Ranch and in Tanzania.<sup>158</sup> Pasture leasing was also used to redistribute animals. Eleven of the surveyed individuals indicated they were leasing and/or buying pasture access at fees ranging from 500 to 1500 KSHs per month; of these eleven households, three were pure leases and eight were either a mix of leasing and pasture sharing or leasing additional pastures with no sharing arrangement.<sup>159</sup> Legislation, however, needs to be passed to ensure these flexible associations between individual landowners are subject to regulation by the commons.

### 3. Flexible Legal Options

Communities have many legal options to help them cope with subdivision's aftermath or enhance open rangeland access within the group ranch framework. One option is to go to court and get an environmental easement.<sup>160</sup> Courts should only issue these easements to further environmental management principles by imposing obligations on the burdened land in perpetuity, for a term of years, or for an equivalent interest under customary law. These easements may also exist in gross: that is, their validity should not be dependent upon the benefited land parcel's vicinity.

Managers of individually owned communal lands also have the option of land trusts. This option normally involves setting up an irrevocable trust via a trust deed. These trusts set up loose lan-

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155. *See id.* at 27.

156. *Id.* at 21.

157. *Id.*

158. *Id.*

159. *Id.*

160. Environmental Management and Co-ordination Act, (1999) Cap. 8, § 112 (Kenya).

downer associations, such as the South Rift Association of Land Owners (SORALO) which brings together thirteen of the Kajiado District's group ranches.<sup>161</sup> The SORALO is structured so that each group ranch can nominate a trustee, and it aims to open the South Rift as a tourist destination by linking the Masai Mara National Reserve and Amboseli National Park.<sup>162</sup> This goal is to be achieved by maintaining the entire area as open rangeland, which involves stemming subdivision or convincing individual landowners—by promising commensurate compensation/benefits—to forgo land to wildlife and open range livestock keeping.<sup>163</sup> It also involves preparing joint land use plans, establishing security modalities, laying the needed infrastructure, and strengthening the livestock based economy which is most compatible with the ideal open rangeland.<sup>164</sup>

## VI. CONCLUSION

Rangeland management is complex; the climate is harsh, and the low rainfall level makes them unsuitable for sedentary lifestyles like large-scale agriculture. Group ranch subdivision has only reduced the amount of land available for pastoralism and forced communities to develop innovative post-subdivision associations.

The group ranch concept was founded on the incorrect assumption that Kenyan rangelands were devoid of any management control. Over the years, however, group ranches have paradoxically decayed, fallen apart, and even been subdivided. In essence, what was set up to avoid Hardin's "tragedy of the commons" scenario ended up being one. So far, legislation has failed to correct this unexpected "tragedy" for various reasons, and group ranches have failed to either originate or facilitate any meaningful sustainable development for their members. The question, then, is whether group ranches should be left to their own devices and possibly collapse or, alternatively, be subdivided and have the communities sorted out by natural selection. Collectively though, group ranches constitute the Kenyan rangeland ecosystem. The only suitable use for these lands is pastoralism, eco-tourism, and wildlife preservation. These land uses cannot be performed when land has been subdivided and fenced in.

The current group representatives system, however, is not viable because it allows for subdivision and has inherent structural

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161. The South Rift Association of Land Owners (SORALO) Trust, <http://www.tourisme-solidaire.org/projet/pdf/C3KenyaSORALO.pdf> (last visited June 13, 2009).

162. Kamanga Interview, *supra* note 100.

163. *Id.*

164. *Id.*

weaknesses. It must therefore be converted into an “African commons” communal ownership system, where land and its attendant resources are managed by a recognized community. Such a change requires radical legislative and policy reforms that vest land title and decisionmaking authority—except for title appropriation which is vested to the entire community in trust for future generations—to the lower levels of the community. Any reforms must also introduce intragenerational, gender, and leadership equity with regard to sharing benefits and responsibilities. Until the Kenyan rangelands’ landholding and use structure is reformed, sustainability cannot be achieved.