Between Compulsory Acquisition and Compensating Landowners: Applying the Endorois Land Rights Case under the new Kenyan Constitution

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In the recent landmark case of *Centre for Minority Rights Development (on behalf of) the Endorois Community v Kenya,* Communication 276/2003 (unreported) the African Commission of Human and Peoples' Rights recognized group rights under the 1981 African Charter of Human and Peoples' Rights, arising from the impracticality of each member of a pastoral community in Kenya of nearly 60,000 individuals to successfully articulate their land rights as individuals. The African Commission ignored and thus effectively rejected historical evidence in David Anderson's book *Eroding the Commons: Politics of Ecology in Baringo: 1890-1963* (James Currey, Oxford, 1995) which suggests that Rift Valley real estate was legitimately acquired by white settlers in furtherance of agrarian interests. The Commission's decision instead privileges the Endorois community's land claim against the Kenyan government. Was that Endorois claim supported by scientific anthropological evidence rather than soft scientific artistic evidence? Anderson's position is that the Commission's decision was not based upon any sound scientific evidence.

Yet based on that contentious decision–institutions established pursuant to the new Kenyan Constitution–are likely to favour indigenous or group claims to native land rights over individual rights to private property. First, Article 67 of the new Constitution establishes a National Land Commission *inter alia* " (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress." Second, under Article 65 (1) a person who is not a citizen may hold leasehold land for a period not exceeding ninety-nine years. Ultimately, Article 40 (1) enshrines protection of right to property subject to Article 65 citizenship. Thus 999-year leases and freehold titles acquired during colonialism for large-scale farming are automatically extinguished to accommodate population pressures. By comparison, Australian and Canadian courts have recognized native land rights claims selectively. On one hand, evidence of historians is sometimes preferred by certain judges who desire to elevate soft science historical evidence of settlers who recorded their purchases of indigenous land thus extinguishing native claims. On the other, judges occasionally invoke hard science anthropological evidence to support claims by descendants who claim to inherit traditions of their predecessors including a nexus to land. In Kenya, various conflicting land uses arise from competing land claims between three categories of persons–sizable ethnic minorities, indigenous communities and immigrants. Can selective reliance upon forensic evidence sustain an equitable equilibrium between compulsory land acquisition and compensating landowners?