

The National Constitution and Forest Dweller Land Rights in Kenya

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How the National Constitution treats minorities is a good test of a nation's maturity. How government applies their rules is a good test of the state's maturity.

New constitution-making has surged in agrarian economies since 1990, correspondent to significant political change (multi-partyism in particular) and a surge in globalisation, and of which, among other trends, the noted surge in large-scale land acquisition in agrarian states and accelerating concentration in land ownership, are often part. In Africa, 21 of 54 countries have enacted new or significantly amended national constitutions since 1990. Another ten African states have changes in draft or planned.

On the whole, new constitutions tackle land rights more fairly than in the past and particularly those that arise from customary systems of land ownership. This includes rights of communities who have retained traditional lifestyles and livelihoods, such as nomadic pastoralists and forest dwellers, and whose cultures depend profoundly until the present upon their connection to their 'ancestral lands'. It is also better recognized today that these societies offer resource use systems that are sustainable and can lead the way in saving millions of hectares of forests and fragile dry lands from degradation.²

Here I will focus on how Kenya's Constitution addresses the issue for forest communities and how far forest and land laws are adhering to the directives of this supreme law.

The Constitution 2010 follows mainstream practice in Africa by not specifying pastoralist or forest peoples as Indigenous Peoples. The grounds normally given are that all one billion Africans are indigenous to the continent inclusive of these groups. Nevertheless, the Constitution does adopt the human rights implications of the African Charter (1986) and as applied by the African Union's Commission on Human And Peoples' Rights, that marginality and discrimination including denial of cultural and spiritual attachment to land must be remedied on the continent.

The Constitution states clearly that the marginalised must be protected (Art. 10 (2) (b)). Marginalised communities include 'those who have retained and maintained a traditional lifestyle and livelihood based on a hunter-gatherer economy' (Art. 260). This includes Kenya's 34 tradition forest dweller communities and who live in five clusters: the Ogiek of the Mau Escarpment Forests, the Ogiek of Mount Elgon, the Sengwer of the Cherangany Forests, and two much smaller groups, the Yaaku of Mukogodi Forest and the Boni who traditionally occupy two coastal forests.

The only parts of their ancient territories left to forest communities today are designated as Protected Areas.³ Policies since the 1930s have swung between allowing forest dweller communities to remain in these areas and harsh evictions. Some communities have been evicted nearly 20 times. Each time they return immediately, unable and unwilling to live outside their ancient domains. Presently (2015) the Sengwer and Boni are most affected. The Sengwer have been repeatedly chased from their forests since 2013, their small huts and few possessions burnt, and some members imprisoned. On grounds that Al Shabab members could hide in the forests, Boni have been evicted from their two remaining coastal forestlands, now occupied by police units.

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² <http://www.wri.org/sites/default/files/securingrights-full-report-english.pdf>

³ Two forest communities are occupants of Council Forest Reserves while 32 others are occupants of National Forests and one forest park (Mount Elgon).

Serious questions arise as to the legality of handling of forest dweller land rights in Kenya today, as well as around the manner in which evictions are executed.

Knowing that denial of forest community rights had been practised for 100 years, the Constitution establishes in black and white that lands traditionally occupied by hunter-gatherer communities are community property, in the same way that trust lands and group ranches are community lands (Art. 63 (2) (d) (ii)).

No community has yet received title to their land. The Constitution stipulates that county councils shall not dispose of community lands in their trust until a law is enacted which sets out individual and collective rights to that land (Art. 63(4)). This most directly affects the lands of two traditional forest communities. The Community Land Bill, already before Parliament, is to provide the procedures.

A similar constraint is applied to public lands, affecting 32 forest community territories presently classified as National Forests. Article 62 (4) states that public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use. The Land Act, 2012 provides for this.

Before examining how the Community Land Bill, the Land Act, and other relevant legislation handle forest dweller land rights, other precautions of the Constitution need note.

- *First*, the Constitution establishes that public lands (i.e. including forest community lands presently in this category) are to be administered by the National Land Commission (Art.62 (4)).
- *Second*, that new body is made responsible for investigating present and historical land injustices (Art. 67 (2) (e)). It must also redress disadvantages suffered by individuals or groups because of past discrimination (Art. 27 (6)).
- *Third*, the Constitution directs that a law be enacted to regulate the manner in which any land may be converted from one category to another (Art. 68 (c) (ii)). It is relevant that community lands in the Constitution include those declared to be community land 'by an Act of Parliament or where the land is lawfully transferred to a specific community by any process of law' (Art. 63 (2) (b) & (c)). This is important as most forest community territories are presently deemed to be Forest Reserves and thence public lands, making formal transfer of these lands the likely instrument to honour constitutional commitment that hunter-gatherer lands are community lands.
- *Fourth*, the State is obliged to encourage public participation in conservation of the environment and eliminate processes and activities likely to endanger the environment (Art. 69 (1)).

Delivery of constitutional commitments in land and resource laws is poor to mixed.

The Land Act, 2012, does not directly address community land rights, referring only to the Community Land Bill (s. 37).

Indirectly however, it confirms the existence and protection of these rights by declaring that customary rights, where consistent with the Constitution are to be equally recognized and enforced along with freehold and leasehold tenure (s. 5). Customary rights derive from community-based systems, and the law notes, 'refer to right conferred by or derived from Kenyan customary law whether formally recognized by legislation or not' (s. 2). A community may acquire a registered entitlement for its property in the form of a freehold, leasehold or customary right, and through allocation, prescription, a settlement programme, or by transfer (s.7).

The Land Act reiterates that public or private land may be converted to community land, and vice versa (s. 9). The National Land Commission may, on behalf of the National or county governments, allocate public lands, including to 'a targeted group of persons or groups in order to ameliorate their disadvantaged position' (s. 12 (1) (b)). The Commission also has power to make regulations 'to secure the land rights of minority communities to access resources' (s. 160 (2) (a)). Occupation of public land is declared to

be lawful if the person has a right under customary law (s. 1551(1)). This is helpful for countering evictions.

Less helpful for forest dweller communities, the Land Act prevents the allocation of public lands to communities or other persons where these fall within forest and wildlife reserves or are along watersheds, or reserved due to their natural value (s.12 (2)). Drafters of both the Constitution and the Land Act and the lawmakers appear to have been unaware of the fact that the forests they declare with one hand are the community property of forest hunter-gatherers are also declared immutable public property on the other.

This contradiction dramatically limits the opportunity for forest dweller communities to have their ancient territories returned to them, and despite evidence that such communities are likely to be better conservators than public land authorities such as the Forest Service; and that such communities could easily be bound to act accordingly, grant of title being made conditional to sustaining forested parts of their territories intact and rehabilitating degraded areas. This allows the interests of conservation and those of traditional forest dwellers themselves to be pragmatically enjoined, a rare opportunity for win-win. However, this and other provisions in the Land Act further the traditional approach of the Government of Kenya which favours resettlement of affected communities and permitting their access to forest resources rather than recognition of their ownership in the interests of conservation (s. 134 (2), s. 135 (3)), 19 (2) [c], 160 (2) (e)).

This is also the position adopted by the Forest Conservation and Management Bill, 2015. Contrary to earlier versions, the final draft submitted to Parliament in August 2015 enables communities to own and manage forests as their own property (s. 34). In accordance with the Constitution, the bill explicitly includes forests on ancestral lands and lands traditionally occupied by hunter-gatherer communities as registrable community owned forests (s.29 (3) (d)).

However, all forests occupied by such communities are listed as public forests vested in the Kenya Forest Service (s. 30 (1)). The bill is silent where it should have provision for affected forests to be subject to case-by-case review to allow for transfers to communities on rigorous conditions to ensure these remained (or recover) as Protected Areas. In this instance, drafters of the Forest Bill are highly unlikely to have been unaware of the fact that ancestral forestlands are also presently public lands as Protected Areas.

Instead of unpacking and addressing this overlapping tenure status, the bill proposes that affected communities only have rights to negotiate access, through (expensively) forming Community Forest Associations to assist the Service to manage their own ancestral forestlands. In this manner, the Bill not only fails its most likely forest conservators among the citizenry but also fails to adopt a modern devolutionary approach to conservation. This is urgently needed given the state of these forests under Service management and ignores increasingly heated demands from these citizens and the implications of constitutional stipulations.

Meantime, proposed amendments to the three new land laws of 2012 including the Land Act shut other doors for affected forest dweller communities. Among other revisionist proposals, the Land Laws (Amendment) Bill, 2015 dismisses two drafted laws; one was intended to remedy historical land injustices in a timely and fair manner as directed by the Constitution. The other would have brought eviction procedures up to international standards. The Land Laws (Amendment) Bill replaces these with provisions that are so truncated that they cannot be adjudged constitutionally permissible.

The critical Community Land Bill, 2015 has also suffered major revisions in its finally gazetted version. Broadly, should the revisions be adopted, all rural communities holding customary rights to land whether in areas currently held in trust by national or county bodies will find it difficult to secure formal entitlement. This is due to the onerous and centrally controlled procedures planned. Communities of all ilk will also be vulnerable to land losses through softened sanctions against disposal of their lands by county councils, a demise in requirements that decision-making is inclusive of all members, and removal of stipulation in earlier drafts of the Community Land Bill that communities approve proposed plans by government or local elites to lease or sell their lands to

investors (s. 7, 8, 22, 35 (2), 37, 39, 46 (2)). The Schedule specifying which coastal lands in the first instance should be transferred to community lands is simply dropped. Again, doubts are being expressed as to the constitutionality of many provisions.⁴ How far Parliament will respond to these challenges is not yet known.

Through all these shortfalls, the Constitution stands somewhat denuded in the matter of traditional forest dweller rights. As with so many other of its elements, there is a rising tide of public complaint, commentary and query as to how far the Kenyan Government and the legislature are departing from the Constitution in both stipulations and spirit. The courts are clogged with appeals on one or other matter.

So too on this issue. The Constitution 2010 provided the first legal encouragement forest dwellers have seen relating to their land rights. This has prompted them to yet more actively defend their rights. Unlawful and unjust evictions from their ancestral lands are being challenged in local courts as well as in the African Court.⁵ Mau Ogiek have demanded implementation of the ruling of the Environment and Land Court at Nairobi (Civil Suit No. 821 of 2012) relating to wrongful allocation of their lands to non-Ogiek. Supporting civil society bodies obtained early public acknowledgement from the National Land Commission that Sengwer forest dwellers, for example have a constitutional right to the Forest Reserves they inhabit (The Standard Newspaper, April 11, 2014).

Representatives of the different clusters now also meet more regularly for solidarity in recent years. They have petitioned the National Land Commission to act on its constitutional responsibilities, to hear their historical and present grievances, and to cease issuing title deeds to the Kenya Forest Service for their lands. Two forest clusters have engaged the Commission in pilot investigations in selected Forest Reserves designed to lead ultimately to recognition of those critical national forest reserves as their property, and under their management jointly with the Service. All groups of forest dwellers in Kenya are today actively embarked upon identifying discrete community land areas upon which basis they will seek community land entitlement.

Representatives have also made presentations to the Task Forces charged with drafting laws for community lands and for redress of historical injustices, to civil society and state bodies, and to the parliamentary committee now reviewing proposed new forest law. With the help of the Forest Peoples Programme (FPP) in UK, representatives successfully demanded that the World Bank in 2014-15 review its funding of Kenya Forest Service activities in Embobut forests where evictions were being carried out; this was contrary to the Bank's own operational guidelines, although its own project was not directly culpable. Embobut communities are similarly challenging IUCN and the Finnish Government to ensure their funding for forest conservation through the Kenya Forest Service includes actions to end forest dweller dispossession.

Forest dwellers have also met in good faith with the Ministry of Environment, attending two major meetings in 2014 and 2015 meant to resolve their grievances. They have offered in writing rigorous conservation conditions which they are prepared to be legally bound to upon restitution of their forest lands to their ownership and to fulfil custodianship of their valuable forests for the nation with the technical oversight of the state Forest and Wildlife Services. They draw strength in the knowledge that forest communities elsewhere, including in the region (Tanzania, and in a less developed way in DRC) are legally permitted to own Protected Areas and serve as conservators of resources important to them and the nation as a whole. Globally, as forest scientists show, the results of community owner-conservator forest management for conservation are excellent.⁶

⁴ 'Land Sector Non-State Actors Joint Petition to Parliament on the Land Laws (Amendment) Bill, 2015 and the Community Land Bill, 2015', The Standard Newspaper, November 4 2015, pages 18-19.

⁵ <http://minorityrights.org/law-and-legal-cases/the-ogiek-case/> and <http://www.forestpeoples.org/tags/illegal-and-forceful-evictions-sengwer-indigenous-people-their-ancestral-lands-cherangany-hills>

⁶ <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0022722> and <http://www.umich.edu/~ifri/Publications/IFRI-Review-IFRI-Wollenberg%20et%20al%202007.pdf>

Still, five years after the new Constitution came into force, Kenya's forest communities have seen no delivery on their land rights.

Lack of political will and administrative conservatism are to blame. Bravado characterises official responses, whether from the Attorney-General's office in response to Mau Ogiek requests for amicable settlement of their land rights or from the odd public servant known to have sworn that over his or her dead body will forest communities see restitution of their ancestral forest lands. Intimidation of assisting international actors has been known.

Running through these responses is a more general dangerous determination to retrench on one of the strongest themes of Kenya's new Constitution, towards more devolved and inclusive governance and empowerment of citizens and their rights, as essential foundations for a truly modern state. How far Parliament toes the line by enacting out-dated and discriminatory land and forest legislation will be answered in 2016. Much more certain is that traditional forest communities will no longer tolerate denial of their right to own, rehabilitate, and protect their ancestral forest lands, for themselves and for the nation.