# The Constitution of Kenya and the Land Question of the Forest Indigenous Communities

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ENDANGERED COMMUNITIES: Some of the Ogiek evicted from Mau forest. The last remaining ancestral land of the Ogiek of Chepkitale in Mt Elgon classified as native land during the colonial era and as trust land at independence, was gazetted as a game reserve in 2000. The Yaaku people in the Mukogodo forests are seen as strangers in the only forests they have ever known. The Aweer people in Lamu have had their lands gazetted as the Dodori and Boni reserves. Photo/File

The constitution of Kenya 2010 was born of hard struggles. The struggle was between those in power, and those who were oppressed by the use of that power. The new constitution aimed to establish institutions that would promote aspirations of the people, based on integrity, equality, social justice, and people's democracy.

More specifically, it identified a number of communities or groups as "marginalised" for special protection. Included in this category are "an indigenous community that has retained and maintained a traditional lifestyle and livelihood basedon a hunter or gatherer economy" and "a traditional community that out of a need or desire preserve its unique culture and identity from assimilation, has remained outside the integrated socialand economic life of Kenya as a whole" (Article 260).

Both these categories cover the forest communities. Unfortunately, as was feared, the forces against the constitution are still in office and have disregarded the constitution.Consequently, indigenous forest communities, defined as "marginalised communities", have not yet benefited from the constitution.

Previous state practices of criminalising their existence instate forests and forcibly evicting them continue regardless of the fact that these forests have remained intact, precisely because of the practices of those communities. This dispossessionstarted at the advent of the colonial

administration. It was perfected by independent governments, rendering these communities completely landless. They were referred to derogatorily as“squatters” in their own lands.

The fact that these communities form an insignificant part of the population as voters means that their members will have great difficulty assuming government and politicalrepresentative positions, and their grievances are unlikely to be articulated. Where there have been attempts to resolve these problems as in the case of the Ogiek of Mau, well-establishedindividuals and neighbouring communities have taken advantage of their plight and appropriated their lands.

It must be remembered that the first official acknowledgement by the government of the existence of the forest indigenous communities (referred to as “hunter gatherers” or “forestdwelling communities”), and the question of their unresolved land question was in the CKRC draft and the draft National Land Policy of 2007. Paragraph 199 of the National Land Policyacknowledges that these communities have lost their lands through gazettement of their habitats as forests and national reserves, or their excision and allocation to individuals who subsequentlyobtained titles. Paragraph 201 of the Policy sets out how this land can be restored. However, no attempts have been made to implement it. The Kenyan constitution Article 63 (2)(d)(ii) definescommunity land to include “ancestral lands and lands traditionally occupied by hunter-gatherer communities.” These lands must include the ones that have been gazetted as state forests,national parks and game reserves.

The last remaining ancestral land of the Ogiek of Chepkitale in Mt Elgon classified as native land during the colonial era and as trust land at independence, was gazetted asa game reserve in 2000. The Yaaku people in the Mukogodo forests are seen as strangers in the only forests they have ever known. The Aweer people in Lamu have had their lands gazetted asthe Dodori and Boni reserves, and were left with narrow corridor between the two that keeps on narrowing.

The Sanye people in Lamu are a community that has been left to perish because theirlands have disappeared into other individuals’ hands as they watch. As late as January 2014, the Sengwer people of Embobut in the Cherangany Hills had their homes razed by Kenya ForestService with the support of the Kenya Police and the county commissioner.

This is a tragedy for those who have decided to live in forests, involving themselves with livelihood practices that co-exist with the forests. Behind closed doors, the “conservation” elitescall these practices “primitive” and in the open, they shout at the top of their voices to the effect that communities should be encouraged to “practice sustainable livelihood practices”. It is theepitome of conservation hypocrisy that is destroying our environment, and at the same time violating human rights leading to a “lose-lose” situation.

In Chepkitale in Mt Elgon for example, the community has developed its own sustainability bylaws that borrow heavily from its customary laws. The bylaws put together a practicalsocial and economic approach to conservation. What one expects in the spirit of the new constitution is for the conservation agencies to take such initiatives and mainstream them within theirconservation policies.

While this has worked relatively well at the local level, the main policy makers cannot believe this is possible, and keep on referring to their own rigid ways of thinking,based on destructive policies, as exemplified in the Kenya Wildlife Conservation and Management Act 2014 and the ongoing amendments to the Forest Act 2005.

There are some aspects of the situation of forest indigenous communities that should not be treated as historical land injustices. Others, however, must be addressed in the study ashistorical injustices currently being undertaken by National Land Commission task force. Another important development that would address these issues is the Community Land Bill, which isnot getting the attention it deserves.

The key argument that policy makers in conservation agencies in Kenya keep on making in relation to the rights of forest dwelling communities, is: "Yes", such communities may wellhave ancestral rights to their lands, but "No", they must be made to leave their lands for the greater good of the whole country. They argue that the environmental crisis is so desperate that itrequires a robust response, one that means that such people, regrettably, must be cleared from their land.

There are echoes here of Naomi Klein's work on the shock doctrine, on how capitalism creates and uses crises to extend its reach. This is something that is very evident in Europe atthe moment where the response to the economic crisis that was created by the financial sector has been one of 'austerity', where the cost of the crisis is born by the poorest, while the wealth ofthe richest increases phenomenally. This year, Oxfam reported that the five richest families in the UK have more wealth than the bottom 20 per cent of the population, and that the richest 85people on the planet own the same amount between them as half the world's population – 3.5 billion people.

In a global and national context where it is clear (whether in China, France, UK or Kenya) that there is enough wealth and resources to go round, the environmentalists invoke planetarycrisis to argue for forest protection. The economists on the other hand invoke economic crisis to argue for austerity. Sadly, both serve the purposes of those forces, which benefit from claimingauthority to intervene in such crises.

This sense of crisis and scarcity is the mantra of economists and environmentalists alike. It is scarcity that induces people into thinking they have tocompete with others like themselves, rather than that protecting the environment is best achieved by protecting communities' rights to sustain and be sustained by their environments.

Scientificliterature demonstrates that where forest communities have secure collective tenure of their lands, they are best able to protect their forests, and community forests that are best managed andcontrolled by indigenous peoples and forest-dependent communities use systems. One of these studies, a statistical analysis of annual deforestation rates as reported in 73 case studiesconducted in the tropics, found that deforestation is significantly lower in community-managed forests than in strict protected forests.

Another study finds that some community-managed forestsare located in areas with higher deforestation pressures than strictly protected areas. Taking this into account, they find that

community-managed forests are much more effective in reducingdeforestation than strict protected areas. They find that forest areas managed and controlled by indigenous peoples are even more effective.

A comprehensive assessment of the literature inFebruary 2014 by Seymour, Frances, Tony La Vina, and Kristen Hite concludes that: “Community tenure over forests can result in more forest cover and more species-rich forests, lessdeforestation and degradation, and fewer fires than some other approaches to protecting forests. These beneficial forest outcomes are more likely if communities are “traditional” or have a long-term relationship with their natural resources, if the forest provides them with some livelihood options, and if community forest rights are secure and enforced.”

This summarises the new conservation paradigm, which puts communities at the centre of conservation. It also negates the argument that advocates for the violation of the rights of theforest indigenous communities for the “public good”. The solution to addressing the conundrum of ancestral land issues of the forest indigenous communities and conservation concerns lies inrecognising the fundamental rights of these communities to their lands with government conservation agencies’ support and oversight on conservation matters. This is the win-win solution.

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