Protecting Rights of Minorities and Marginalised Groups in Kenya: Progress in Law Reforms

Professor Patricia K. Mbote
Dr Collins Odote

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Constitutional Context
Highlights

* 2010 Constitution and restructuring of Governance and protection of rights
* Mention of Ethnic Minorities and Marginalised Groups explicitly
  * Devolution- rationale and protection of marginalized
  * Bill of Rights and Special affirmative action policies(Art 56)
  * Requirement of Political parties to ensure their participation
**Highlights -2**

- Art 100: Affirmative Action Legislation for representation
- Art 201: Public expenditure to promote equity and pay special attention to marginalized areas
- Equalization fund and focus on basic services (health, water, roads) to marginalised areas
Land Reforms

Kenya’s History and Land Rights of Minorities - A case of Siamese Twins?

- Pre-colonial Kenya and customary arrangements for land ownership
- From IBEACO, Protectorate to Colony and the land agenda
- Struggle for independence and Communities agitation for land rights
- Post-Colonial Kenya and unsupportive legal regime ("Modern Land Tenure" versus traditional and customary tenure arrangements)

2007 Elections, Post Election Violence and the land nexus

National Land Policy and correction of past Mistreatment of customary land rights

Reversal of 1954 Swynnerton Policy on privatization

Correction of misuse of Trust Lands and Group Ranches
* Policy recognition of Community Land.
* National Land Policy Directive:
  * Definition of community,
  * Vesting of ownership of CL on defined community
  * Documenting and mapping existing forms of communal tenure
Constitutional Underpinnings

* From a past Constitution with limited land focus, 2010 Constitution robust on land
  * Recognizing property rights
  * Vesting land rights on all Kenyans
  * Clarifying tenure arrangements
  * Establishing a National Land Commission
  * Protecting Rights of women to land
  * Recognizing rights of communities and marginalized groups

* Detailed Provisions on Community Land Rights
* Community Land Shall vest in and be held by Communities identified on the basis of culture, ethnicity or similar community of interest (Art 63)

* Community land listed to include:
  * Land registered in the name of group representatives under provisions of law
  * Community forests, grazing areas or shrines
  * Ancestral lands and lands traditionally occupied by hunter-gatherer communities
  * Land held in trust by county governments
Beyond Constitutional Reforms

Å Ours By Right: Law, Politics and Realities of Community Property Rights in Kenya; FF supported, findings

Å Constitutional Directive for Community Land Law in 5 years

Å Challenges around addressing the question on Community land “Who owns, what interest in What land?”

Å Normative recognition Vs territorial demarcation of land
Despite recognition, lack of clarity on Who Indigenous people are?

Constitution only defines marginalized groups but not minorities, even then very general definition

Delay in finalizing Community Land legislation

Linking community land rights to natural resource rights
  * Renewable (Forests, fisheries, wildlife etc)
  * Non-renewable
Key Issues - 2

* Discovery of extractives on communal land and pressure for expropriation

* Benefit sharing initiatives
  * Economic, ecological and social imperatives
  * Community interests
  * Regulatory framew

* Resilience of customary and social systems
  * Past disregard amidst “resistant weed”
  * Need for recognition and application

* Balancing institutional structures with modern developments
Need for innovation in strengthening communities and the protection of their rights

Beyond law, capacity building, learning, knowledge sharing and networking

Social cartography? Lawyer?????

  Traditional…. No way

  Multidisciplinary research interactions

  Ideas, innovation and people!!!!