

Recognising Sacred Natural Sites and Territories in Kenya:

An Analysis of how the Kenyan Constitution, National and International Laws can Support the Recognition of Sacred Natural Sites and their Community Governance Systems

Executive Summary

Importance of Sacred Natural Sites and Territories: critical sanctuaries for biodiversity, culture and spirituality

For millennia, indigenous and local communities around the world have upheld the responsibilities of their great-great grandparents and their ancestors as the Custodians of Sacred Natural Sites and Territories. Sacred Natural Sites are critical places within ecosystems, such as forests, mountains, rivers and sources of water, which exist as a network embedded within a territory. Sacred Natural Sites are also of cultural and spiritual importance, as places where the ancestors' spirits of the community reside, and are akin to temples or churches where the Custodians carry out ceremonies and rituals. Elders within the community play a vital role in upholding the ecological knowledge and customs practiced over generations which maintain the well-being of Sacred Natural Sites, ecosystems, territories and local communities. These customary governance systems recognise Sacred Natural Sites and Territories as places where the laws of Earth can be read, and from which customs, spiritual practices and governance systems are derived to protect the territory as a whole. Therefore, Sacred Natural Sites and Territories are at the heart of ecological, spiritual and cultural practices, and governance systems of indigenous and local communities.

Despite their vital importance, Sacred Natural Sites and Territories in Kenya, and across Africa, are faced with increasing threats of destruction from economic and other developments which have also eroded the customary governance systems of their custodial communities. The failure to respect ecosystems, and the Sacred Natural Sites within them, has a direct impact on the lives and well-being of communities of present and future generations of all life.

This Report examines whether the Constitution of Kenya 2010 and the legal, policy and institutional framework in Kenya recognises and supports, or undermines, the rights and responsibilities of communities to govern and protect their Sacred Natural Sites and Territories, according to their customary governance systems and on their own terms.

Findings

Inadequate recognition of communities' customary governance systems of Sacred Natural Sites and Territories.

Certain national laws, for example the National Museums and Heritage Act 2006, Forests Act 2005, the Forests (Participation in Sustainable Forest Management) Rules 2009, the Environmental Management and Coordination Act 1999 and Environmental Management and Co-ordination (CBD) Regulations 2006 recognise and encourage community participation in protecting ecosystems and natural and cultural heritage, including Sacred Natural Sites. However, they do not go as far as recognising and supporting the rights and responsibilities of communities to *govern* and protect their Sacred Natural Sites and Territories *on their own terms*, according to their customary governance systems.

Many laws and policies are discriminatory against communities and, in practice, have been used to undermine customary governance systems of indigenous and local communities. Until recently, the majority of national laws and policies failed to recognise community land and customary land tenure, culture and spiritual-based approaches to protecting ecosystems. Further, the rights of communities to Free Prior and Informed Consent (FPIC)) – to be informed prior to potentially destructive activities to their lands, Sacred Natural Sites and Territories, and to give or withhold consent (say “no”) - have not been respected. The trust land tenure system has allowed State institutions to monopolise the governance system and facilitate individualised and misuse of land for consumptive purposes. Further, the prevailing approach of these and other institutions has not been to involve communities in decision-making; where participation has been encouraged it has often been imposed and controlled. The rights and responsibilities of communities to self-governance of their Sacred Natural Sites and Territories have not been recognised and protected.

Human-centred and reductionist legal and policy frameworks.

The need to protect Sacred Natural Sites and Territories goes deeper than legal and policy frameworks, to a question of ethics. Generally laws and policies have been founded on an erroneous belief that Earth is just a ‘resource’ to be exploited and traded. By contrast indigenous and local communities recognise Earth as a living Being and as our life support system, and have derived customary governance systems to comply with Earth’s laws. This wisdom and practice has inspired an emerging philosophy known as Earth Jurisprudence or Earth Law, which recognises Earth as the primary source of law. Human laws and governance systems are derived from and must comply with Earth’s laws which govern life in order to maintain the well-being of the whole Earth Community (plants, animals, ecosystems, Sacred Natural Sites, and all life, including humans). This is recognised by indigenous and local governance systems across the planet. The African Biodiversity Network and its partners have been supporting communities to revive their Earth Jurisprudence practices, which they have termed “*Community Ecological Governance*” over the last 10 years.

While some laws do recognise the need to protect natural heritage and certain elements of Earth, such as forests and rivers, very few take an ‘ecosystem’ and holistic approach. Recognition of the need for protection is primarily for the benefit of humans rather than as a moral obligation to the whole Earth Community and future generations. Many laws fail to prevent destruction of Kenya’s ecosystems and communities from growing exploitative threats, such as mining and tourism, and are complicit in undermining communities’ responsibilities to protect their Sacred Natural Sites and Territories. Urgent change is needed to ensure the protection of Kenya’s ecosystems and the lives, livelihoods and well-being of present and future generations.

Voluminous, complex and contradictory legal and policy frameworks.

Laws and policies in Kenya concerning Sacred Natural Sites and Territories are many, voluminous and complicated. In particular those pertaining to land contain a variety of contradictory provisions, some of which recognise, and others of which undermine, community rights and responsibilities to govern and protect their Sacred Natural Sites and Territories. Land administration has also been highly centralised, inefficient and often lacking in transparency.

Opportunities for legal recognition of Sacred Natural Sites and the customary governance systems of their custodial communities.

The Constitution of Kenya 2010 marks a pivotal shift and significantly alters Kenya's socio-cultural, political, legal and economic spheres. The previous lack of recognition of indigenous and local communities as legal entities with their own customary governance systems has now changed. The Constitution now explicitly recognises indigenous peoples as part of minority and marginalised communities, and acknowledges and supports community self-governance and their cultural norms. It requires the Government to involve communities in conserving and 'managing' lands and ecosystems. Cultural heritage, a right to a "*clean and healthy environment*" and duties for protecting the environment are also recognised and enshrined.

The Constitution embodies a just concept of land tenure by recognising community land and community land title, stating that "*all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals*" and that "*community land*", which includes ancestral lands, "*shall vest in and be held by communities*". It opens space for deeper discussion and recognition of communities' rights and customary governance systems.

Recent land reform, particularly through the Environment and Land Court Act 2011, the Land Act 2012, the Land Registration Act 2012, and the National Land Commission Act 2012, could be used to strengthen the recognition and support for Sacred Natural Sites and the customary governance systems of their custodial communities. They enshrine principles of community participation and respect for customary and cultural practices in the protection of land. These laws also promote a more equitable, transparent, rationalised and coherent legal framework for the governance of land, which can contribute to resolving historical land injustices. Implementation of the Constitutional provision for a Community Land Act is eagerly awaited, at the time of writing this Report, in order to address critical issues, including clarity and recognition of community land tenure, title and rights, and customary governance systems on their own terms, including the Earth Jurisprudence principles underpinning them.

There are opportunities for communities and civil society to participate in the ongoing legal reform process in Kenya, including in the interpretation and implementation of the Constitution and drafting of new laws and policies to comply with the Constitution. Government and all bodies should listen to the growing voices of custodial communities of Sacred Natural Sites who are asserting their rights and responsibilities to govern their Sacred Natural Sites and Territories according to their customary governance systems.

The Report makes the following recommendations:

Recommendations

For Government:

- Recognise community rights and responsibilities to govern their Sacred Natural Sites and Territories according to their customary governance systems, and on their own terms.
- Enforce the Kenyan Constitution, review existing and draft new legislative, policy and institutional frameworks to recognise communities' customary governance systems of Sacred Natural Sites and Territories.
- Enforce international instruments to which Kenya is a party, and ratify other relevant laws.
- Increase public awareness of national, regional and international laws that support the recognition of Sacred Natural Sites and Territories and their community customary governance systems.

For Civil Society:

- Support communities to revive and strengthen their customary governance systems, regenerate their networks of Sacred Natural Sites and Territories and secure legal recognition on their own terms.
- Promote understanding of Sacred Natural Sites and Territories as part of a network, important for biodiversity, ecosystems, culture, spirituality and governance, and as such need to be recognised as No-Go areas for development or any activities which could undermine Sacred Natural Sites and Territories and their governance systems.
- Pursue opportunities to use and enforce existing national legislation to support the recognition of communities' customary governance of Sacred Natural Sites and Territories.
- Advocate for review of and new legislative and policy frameworks to strengthen recognition and support for community customary governance of Sacred Natural Sites and Territories.
- Advocate for the recognition of Earth Jurisprudence / Law principles which underpin customary governance systems of indigenous and local communities.

- Assert international laws when advocating for recognition of community rights and responsibilities to govern and protect Sacred Natural Sites and Territories, and influence negotiations to develop stronger regional and international instruments.

For Communities:

- Reclaim responsibility for reviving and strengthening their customary governance systems to protect Sacred Natural Sites and Territories.
- Assert the principles and laws underpinning their customary governance systems of Sacred Natural Sites and Territories.
- Exercise community rights and responsibilities to govern Sacred Natural Sites and Territories.
- Secure legal recognition of principles, practices, customary laws and governance systems rooted in Earth's laws, and seek to establish precedent-setting cases to contribute to the development of Earth Jurisprudence.
- Nurture new young leadership in Community Ecological Governance with guidance from elders.
- Strengthen and support an alliance of Custodians of Sacred Natural Sites in Kenya and globally.