



Kesenta op Ogiek

Ogiek Community Views to the Committee of experts on the Constitutional Review

**By Ogiek Elders
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OGIEK MEMORANDUM TO THE COMMITTEE OF EXPERTS ON THE CONSTITUTIONAL REVIEW PROCESS

The Ogiek is one among the few minorities found in Kenya and mainly inhabit the Highland forest of Mau Forest complex in larger Nakuru and the larger Narok Districts respectively. The Ogiek population is estimated on a progressive ratio of 20,000 to 35 million Kenyans. They represent the voices in the woods and the most neglected community in Modern day Independent Kenya.

Its is the submission of Ogiek people that the Committee of Experts should come clean on the question of minority and indigenous peoples rights in the review process. Specifically, the committee should unequivocally state its position on whether minority rights as envisaged in the Bomas Draft is an agreed issues or whether it is in contention. This clarity will pave way for our participation in the review process. We noted you published contentious issues in three areas, the executive and legislature, devolution of powers and transitional clause without any manifest of agreed issues. It in this respect we are submitting the issues that are important to us as minorities.

The Ogiek people like the Worlds minorities suffered greatly as a result of colonization by the Western civilization in the 19th century.

When Kenya became a British colony, the colonial power put the mainstream communities of Kenya in what is known today as “Reserves” to contain disquiet among the different Kenyan communities at that time. ***The Ogiek people***

Land is a thorny issue in Kenya today. During the colonial period, Ogiek were not recognized as tribal entity and therefore excluded from the National distribution of Land in 1930s. Successive Government regimes have continued to ignore and correct these historical injustices. Ogiek are now seeking justice through Courts and National Assembly. Ogiek rights are human rights

were thus never placed nor settled in any specific reserve by the colonialists but instead allowed to live in their ancestral lands within the larger Mau Forest complex. Under the circumstances the British Crown did not recognize the Ogiek land rights as in the case of other Kenyan communities. The Carter land commission of 1933 was a big blow to the Ogiek land rights when the commission recommended that the “Ogiek were a savage and barbaric people who deserved no tribal status.” The Carter commission based its findings on numbers and belligerence.

The Ogiek did not fall in any of the above hence were denied recognition as a distinct community and rights to their communal ancestral land.

The colonial powers promulgated the Forest Act Chapter 342 which Act criminalized the activities of the Ogiek within the Mau forest. It is fundamental to point out that the constitution of Kenya provides for the right to life and livelihood under Section 71. The Forest Act read with Section 71 and other sections under the Bill is **ultra-vires** the constitution. The constitution provides that, provisions of any Act which are inconsistent to the constitution of Kenya, such provisions are null and void.

When Kenya attained her independence in 1963, the Post colonial Governments carried over the colonial land policy and law and domesticated the same under the post colonial Kenya, **few Ogiek in Narok District acquired de jure land rights within the Mau Forest leaving the 90% of the Ogiek population within Nakuru Districts leave as though they are squatters in their ancestral land. The Ogiek struggle to date has not borne any significant successes, hence we believe the newly formed committee of Experts on the constitutional review process will consider the Ogiek views and other minorities and be entrenched to the Kenyan Constitution.**

The constitutional review process is a window for minorities of this country to participate effectively on the review process and their views reflected in the new chapter for Kenya in a new dispensational order. The Ogiek nation shall address its views on; **Recognition, Land, Affirmative action, Politics and Representation.**

RECOGNITION

Every Kenyan knows that there are 42 tribes that make up Kenya as a nation. ***The Ogiek like other minorities are not listed as among the community of Nations that make Kenya. The Ogiek have suffered in socio-economic and development programmes as a result of this omission.*** The welfare programmes undertaken by the Government in Kenya aimed for all Kenyans does not trickle to the Ogiek people. Kenya like many African countries, minorities have been economically and or socially disadvantaged. The fact that the Ogiek are not listed as one of the recognized tribes gives the Ogiek the feeling that they are not part of this country.

The Ogiek nation invites the commission to consider legal international elements on the protection and recognition of minorities. Kenya is a signatory to the International Covenant on civil and political rights (ICCPR). The International Covenant on Civil and Political rights (ICCPR) is the only international treaty to date that addresses the minority issues. It does so in its Article 27 by imposing on states in which there are “ethnic, religious or linguistic” minorities the duty to abstain from depriving people belonging to these minorities of the right to “enjoy their own culture, to profess and practice their own religion, or to use their own language.”

The possession and exercise of these rights rests on two basic principles contained in the Universal Declaration of Human Rights (UDHR):- That people are born free and equal in dignity and in rights (Art 1) and that everyone can enjoy these rights and liberties regardless of “race, colour, sex,

language, religion, political or other opinion, national or social origin, property or other status (Art.2).

When thus addressing the inequality and non-recognition of some communities in Kenya, we should borrow from other countries how constitutional matters pertaining to minorities have been undertaken and implemented. ***Post apartheid South Africa was the first Africa Country to recognize the rights of the San people of South Africa and made provisions in the constitution on the protection of the San language their lands and territories. Namibia took cue and addressed the issue of San people in the Namibias constitution.***

There are many countries in the world that have recognized the rights of minorities as provided for by the international legal instruments. India, the largest democracy has special provisions for protection of the Dalits and tribal people in its constitution. The other notable jurisdictions are Canada, Fiji, Cyprus, New Zealand etc.

In light of the aforementioned, ***the Kenyan Government should recognize the Ogiek nation with antecedent consequences based on both international persuasions together with the constitution of the Republic of Kenya.***

LAND AND PROPERTY

The land question is perhaps the most difficult issue that the Government of independent Kenya has had to deal with. At the time of independence close to 90% of the country's population derived their means of subsistence in one form or another from the land, thus many have a lot to gain or loose from any new dispensation.

Despite the affirmation than Ogiek "should receive special protection of their land rights" contained in various Government documents, Ogiek are arguably worse off today than they were before independence vis-à-vis land, since only a small number of them, specifically those living in

Narok District retain de jure rights to land. Whereas the majority of Kenyans can claim at least partial and absolute land rights in terms of common and or customary law, most Ogiek outside Narok district cannot. This is not to say that the Ogiek are unable to gain de jure rights to land in these areas, but just that these rights are in no way guaranteed or automatic. **The critical point here is that the Ogiek land rights in Kenya are contingent on the goodwill of others not their ancestral right, their land issue is still pending either in courts or in the hands of government. Many times Ogiek people have been evicted in their birth land without due consideration of violation of their land rights and their ecosystem.**

The colonial conquest in Africa affected all Africans. The question that begs answers in the Ogiek land rights is, did the conquest extinguish the Ogiek ancestral land rights to their traditional territories? *If the answer is yes, then that applies too to all other Kenyans, if not, then the Ogiek are entitled to their ancestral lands and territories.* Due to the absence of a unified land law regime and policy, the land issue in Kenya remains an emotive issue and thus calls for an indigenous framework geared towards addressing the inequality and landlessness among minorities and other Kenyans.

Notwithstanding the complexity of land claims, if a land restitution programme were run on the basis of aboriginal title, Ogiek would be entitled to claim much of Kenya and the Mau Forest to boot. Given present realities, such a course of action is neither desirable nor realistic. It would also verge on the impossible to delineate the boundaries of ancestral claims given the fluid and multiple forms of tenure arrangements negotiated in pre-colonial Kenya. Ogiek request for recognition and land should not be viewed in terms of restitution of traditional lands or compensation for past injustices, but rather as an attempt to effect a more equitable present, taking cognizance of these matters. Ogiek calls for greater access to land are neither unrealistic nor unreasonable since they are bound up in present socio-

economic concerns and needs. The issue here is not whether the Ogiek wish to re-tribalise the country but rather that they see themselves as entitled to have access to land to make a living, that is to lead a decent life, be socially integrated and participate in the development of the common good. Ogiek attempt to get land are not motivated by sentimentality but rather by a desire to secure a more certain future for themselves. For the Ogiek, secure land access is both critical to future development and a crucial first step in the process of alleviating the immediate causes of poverty.

The Ogiek people envisage that the ongoing constitution review process should endeavor to address in principle the Ogiek land question. It is our humble petition that we invite the commission to address itself to chapter eleven of the BOMAS DRAFT Sections 78 (I) (II) and 80 (c) (e) and (f).

We invite the commission to further consider international instruments such as conventions, treaties, declarations and constitutions of other jurisdictions. Kenya is a member of the United Nations and signatory to several United Nations Conventions including that of the protection of the child. ILO convention 169 has not been ratified by Kenya but this convention should persuade the commission to consider the rights of minorities and tribal peoples in light of resolving historical injustices.

The recently adopted United Nations Declaration on the rights of indigenous peoples is another solace milestone for minorities to assert their rights within our national discourse. The United Nations passed unanimously the Declaration on the rights of indigenous peoples on the 13th September 2007. Though Kenya abstained from voting, that is no excuse for the commission to overlook the general guiding principles and spirit of the United Nations Declarations. The Declaration strongly calls for nation states to uphold and protect the rights of indigenous peoples to their lands and territories and that indigenous peoples shall not be moved from their lands and territories without their prior, free, and

informed consent. The commission is hereby called to review minority land issues and entrench the same in the envisaged new constitution.

POLITICS AND REPRESENTATION

Ogiek remains poorly represented if not entirely unrepresented in Kenya's various Government structures. ***Since independence, no single Ogiek has ever been in the Kenya National Assembly except a few nominated to the local councils and none occupy senior or management positions in the civil service.***

The lack of Ogiek representation in National and local elected bodies is tied to their disorganization at grassroots level and their relative inability to access or exploit mainstream political networks. Consequently, the Ogiek remains muted if not entirely absent in many important national forums and Ogiek typically characterize their political status as one of the exclusion from the mainstream.

Under representation of Ogiek in Government structures is a clear reflection of the extent of their historical marginalization and must be understood as a continuation of this. This political marginalization of Ogiek by both white colonialists and blacks in Kenya prior to independence meant that by 2008 no Ogiek occupied senior or influential positions in any of the major contending political organizations and networks.

DEVOLVED GOVERNMENT

The Ogiek in the on going constitutional review process ***will support devolution as proposed in chapter fourteen of the Bomas Draft.***

Outside the council of Traditional leaders, Ogiek are poorly represented in national and regional politics and many feel alienated from mainstream political processes. Moreover, no Ogiek occupy important positions within the Grand coalition Government structures at all levels. Should the Ogiek

remain isolated from the Government structures, it is likely that they will remain alienated from the state as a whole.

AFFIRMATIVE ACTION

In spite of strong opposition to the singling out of any social category for special treatment, the need for positive discrimination in certain context is practiced in Kenya as in the case of women and people with disabilities.

The Ogiek call for reservations of seats in Parliament and the Senate and in all Government institutions including parastatals, commissions etc . By so doing, minorities will be able to be feel that they are part and parcel of the Kenyan nation.

Nevertheless, the gap between Ogiek and others in Kenya is so clear cut that there are strong grounds for arguing that they are entitled to affirmative action will be necessary to effect any meaningful change in the Ogiek status. Taking into account Kenya's nation building priorities, a non-ethnic policy of affirmative action that is aimed at the extremely poor in general but which still take cognisance of the "ethnic" dimensions of social poverty could be the most appropriate course of action. Such a policy would enable the Government to address Ogiek needs without antagonizing or excluding others in need of similar attention.

SUMMARY OF OGIEK PROPOSALS AND RECOMMENDATIONS

1. The recognition of the Ogiek people as a distinct ethnic community incorporated in the Kenyan Laws.
2. The recognition and restitution of Ogiek ancestral lands in Kenya within the larger Mau forest complex as contained in the Bomas Draft chapters seven and eight.
3. Inclusion of Ogiek people in Governance and in Government Institution through affirmative action.
4. The implementation of a devolved Government as contained in Chapter fourteen of the Bomas Draft.
5. The implementation of the provisions of the Bomas Draft as provided for under sections 122 - 127.
6. Further, implementation of Chapter Six in its entirety of the Bomas Draft.

This is the humble petition of the Ogiek people and hope that the committee of experts shall consider the Ogiek views and other minorities and effect their views.

Signed on behalf of Ogiek Community:

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2. Charles Saina Sena
3. Francis Kakwetin
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6. Retired Chief Lesingo Lembigus
7. Benson Ombigi
8. Philip Kosgey
9. Jane Machani

10. Peter Cheruiyot
11. Joseph Bargetuny
12. Victor Prengei
13. Christopher Kipkones
14. Patrick Kuresoi
15. Martin Lelei
16. James Rana
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