



KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)

CONSULTATION WITH:

**MR. AHMED SHAHEED, THE UNITED NATIONS (UN) SPECIAL RAPPORTEUR
ON FREEDOM OF RELIGION OR BELIEF**

ON:

**INDIGENOUS PEOPLES AND THE RIGHT TO FREEDOM OF RELIGION OR
BELIEF**

7TH JUNE 2022

Introduction

The Kenya National Commission on Human Rights is a National Human Rights Institution established under Article 59 of the Constitution and made operational by the Kenya National Commission on Human Rights Act 2011 (revised 2012).

The Commission has a broad mandate to promote the respect and a culture of human rights in the Republic of Kenya. The Commission has the mandate of ensuring compliance with obligations under treaties and convention relating to human rights. The Commission pursues its mandate through various strategies including advocacy, lobbying, public education and training, outreach, public interest litigation, alternative dispute resolution, receiving complaints, investigations, issuing advisories and publication.

The Commission is an accredited 'A' status national human rights institution and enjoys affiliate status before the African Commission on Human and Peoples Rights.

1) How would you describe the spiritual beliefs and practices of Indigenous peoples in Africa? How do you see the “freedom of religion or belief” framework as it pertains to your lived experiences? Can you also provide a gendered lens for these experiences?

In African traditional societies, communities had their own various forms of worship to their gods, for instance - the Kikuyu would pray facing mount Kenya, communities had designated shrines (such as certain trees, forests, caves and in some cases, animals set apart for worship and sacrifices, ritual ceremonies etc). There were highly organised and respected rules that governed the manner and form of worship.

For Indigenous People in Africa the spiritual beliefs and practices comprise their culture and way of live. Indigenous People are so connected to their lands that occupation and access to their lands are imperative for exercise of their rights to culture and religion. The African Charter on Human and Peoples Rights appreciates the communal nature of rights and freedoms including the freedom of religion and belief. Breathing life to the provisions of the charter, the African Commission on Human and Peoples Rights as well as the African Court on Human and Peoples Rights have equally emphasized, in their interpretations in the Endorois and Ogiek cases respectively, the interconnectedness of indigenous people's lands to their cultural and religious rights.¹ In the Ogiek case, the court observed as follows:-

...in the context of traditional societies where formal religious institutions do not exist, the practice and profession of religion are usually inextricably linked with land and the environment. In indigenous societies in particular, the freedom to worship and to engage in religious ceremonies depends on access to land and the natural environment. Any impediments to, or interference with accessing the natural environment,

¹ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (African Commission on Human and Peoples Rights Communication 276/2003) and African Commission on Human and Peoples Rights v Republic of Kenya (African Court on Human and Peoples Rights Application No 006/2012) respectively.

including land, severely constrains their ability to conduct or engage in religious rituals with considerable repercussion on their freedom of worship.²

In terms of gender lens, most African cultures are/were patriarchal in nature and women's role was diminished as dictated by culture /subjugation of women. This also defined the extent of participation in cultural rights and religious ceremonies. In some communities, only Men offered sacrifices/accessed the shrines. This is however also evident in modern religion with few women leaders in churches/synagogues/mosques.

Relevant Legal and Policy Framework on the freedom of religion or belief as it concerns Indigenous People

In Kenya's 2011 State report to the Human Rights Committee,³ Kenya recognized the existence of ethnic, linguistic and religious minorities within its territory. The Kenyan Constitution under **Article 260** further appreciates the existence of indigenous communities. The Constitution defines 'marginalised community' as including a community that, due to its relatively small population has been unable to fully participate in the integrated social and economic life of Kenya; a traditional community that has segregated itself for the sole purpose of preserving its unique culture and identity; an indigenous community that has retained and maintained a traditional lifestyle and pastoral persons and communities.

The Constitution, in its **preamble** states that the people of Kenya are "proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation." Further **Article 32** of the Constitution of Kenya, recognizes the right of every person to freedom of conscience, religion, thought, belief and opinion. It further provides that every person has a right, either individually or in community with others, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.⁴

Article 8 of the Constitution provides that, 'there shall be no state religion'. A provision that has been interpreted to mean that no religion shall have prevalence over any other and no particular one should be seen as prescribed/the one each citizen is obligated to follow including on the observance of a day of worship. **Article 11** of the Constitution, further recognises culture as "the foundation of the nation" and as the cumulative civilization of the Kenyan people and nation. It goes further obligates the State to promote all forms of cultural expression as well as protection of indigenous knowledge, technologies.

Article 44 of the Constitution guarantees every person including minorities (Indigenous People) the right to use language and participate in the cultural life of their choice. The Constitution further protects the rights of persons belonging to cultural or linguistic

² Ibid, at Paragraph 164

³ Human Rights committee 'Consideration of reports submitted by States Parties under article 40 of the Covenant' Third periodic reports submitted by States parties Kenya CCPR/C/KEN/3 (13 January 2011)

⁴ Article 32, Constitution of Kenya, 2010 available at <http://kenyalaw.org/kl/index.php?id=398>

community together with other members of that community the rights to enjoy the person's culture and use the person's language or to form, join and maintain cultural and linguistic associations and other organs.

International Law is applicable in Kenya by virtue of **Article 2(5) and (6)** of the Kenyan Constitution, which incorporates into Kenyan Law the general rules of international law as well as treaties and conventions that Kenya has ratified.

Kenya is a state Party to various regional and international human rights instruments among them the African Charter on Human and People's Rights, the International Convention on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights (ICCPR), Article 18 of the ICCPR guarantees and protects the freedom of religion or belief by providing that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The ICCPR further provides that "*no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice*"

This secures both individual and communal freedom of religion or belief. Article 27 specifically protects the rights of ethnic, religious or linguistic minorities who "*shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*".⁵

Special Protection/Affirmative Action for Minorities and Marginalized Communities

The Constitution makes strong provisions for minorities to ensure that they are not left behind and steps must be taken to bring them to par with the rest of the population. The Constitution provides special protection/affirmative action specific to minorities and marginalised groups to ameliorate their past marginalization. Article 56 of the Constitution obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups are able to participate and be represented in governance sphere; are provided special opportunities in educational and economic field; provided special opportunities for access to employment and are able to develop their cultural values, languages and practices and have reasonable access to water, health services and infrastructure.

With a progressive bill of rights in the Constitution, minorities and marginalized persons/communities in Kenya are (at least from a legal perspective) not only protected on an equal basis with the rest of the population (discrimination is prohibited)⁶ but are also offered greater safeguards. The Constitution makes it a the fundamental duty of the State and

⁵ Article 27 International Convention on Civil and Political Rights.

⁶ Article 27 of the Constitution of Kenya

every State organ to observe, respect, protect and fulfil the rights and fundamental freedom in the Bill of Rights.⁷ The State has the explicit duty to protect the needs of vulnerable groups within society including minority and marginalised communities.⁸ Article 10(2)(b) of the Constitution provides for the national values and principles of governance that expressly include 'protection of the marginalised' as one of the core values/principles. Article 63 of the Constitution of Kenya further guarantees the rights of communities to their ancestral lands and territories.

2) What human rights challenges are Indigenous peoples facing when it comes to enjoying and exercising their spiritual beliefs and practices? Are there any trends regarding their experiences of hostility, violence or discrimination, at least in part because of their religion or belief identity? Or based on other identifying factors instead?

Kenya's Constitution is a progressive document that aims to address legal, political and economic failing created by earlier colonial and post-colonial regimes that alienated minority groups in the country. The progressive constitutional and legal frameworks offering protection to minority groups notwithstanding,

Indigenous People in Kenya continue to suffer discrimination in political and economic spheres of life in the country. Whereas the Constitution is an important gain for minority groups including Indigenous People, legislative and administrative implementation remains a challenge.

Freedom of religion or belief entails the freedom to hold and manifest (pertaining to the external acts of giving expression of) a religion or belief of one's choice in among others worship, observance, practice and teaching. Whereas the Constitution and international law protects the entitlement to hold belief (which is considered absolute in nature and cannot be subjected to limitations or suspensions) the act of manifesting the freedom is met with challenges. Some of the notable challenges in the exercise of freedom of religion or belief (for indigenous people) include:

i) lack of secure land tenure

Noting that the cultural and spiritual identity of indigenous peoples is greatly linked to their traditional lands, indigenous peoples in Kenya have faced numerous violations of their right to traditional lands through forceful evictions; denial of access to essential sacred sites; failure of authorities to protect religious sites within indigenous lands; destruction of indigenous lands for economic development or for environmental conservation; and harassment and arrests of indigenous peoples whenever they attempt to access their ancestral lands for

⁷ Article 21 (1) Constitution of Kenya, 2010

⁸ Article 21 (3) Constitution of Kenya, 2010

religious or cultural purposes and practices. Some communities members have been arrested and arraigned in court charged with among others trespass into protected areas.

Article 12 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) guarantees protections not only for the manifestation and practice of religious and spiritual traditions—which echoes that of the more conventional concept of religious freedom—but also for access to and maintenance of religious and cultural sites, ceremonial objects, and repatriation. Without security of land tenure – indigenous people’s freedom of religion and belief remains in serious jeopardy.

The continuing violations of Indigenous Peoples’ ancestral land rights have a catastrophic effect on the protection of spiritual rights of these communities. Indigenous Peoples have a spiritual relationship with their lands, which are intertwined and interrelated. As such; land deprivation, grabbing, and devastation directly undermine the exercise of the Indigenous rights to identity, religions, spiritual relationship with their lands, and traditional customs.

The Kenyan Constitution at Article 63(2)(d) classifies as community land, “ancestral lands and lands traditionally occupied by hunter-gatherer communities.” However, these lands are in legislation often classified as public land (especially for the water catchment areas and gazetted public forests).

This apparent “overlap” presents a situation that puts the Indigenous Forest dwelling communities such as the Ogiek, Yaaku, Sengwer and Boni in conflict with the state. The lack of security of tenure has seen communities repeatedly evicted from lands they lay ancestral ownership claims to.

ii) Forced Evictions

One of the most common challenges facing minority and indigenous communities is land grievances and forced evictions. In Kenya, Indigenous communities that have been evicted from their ancestral lands have sought judicial intervention at both domestic and regional human rights mechanisms primarily at the African Commission on Human and Peoples Rights (in relation to the Endorois)⁹ and the African Court on Human and Peoples Rights (in relation to the Ogiek).¹⁰ The judgments recognize the indigenous peoples’ rights over traditionally owned land and their right to culture and religion as provided for under Article 8 of the African Charter on Human and Peoples Rights. In both cases the Endorois Community and Ogiek Community had been subject to forced eviction by the government

⁹ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (African Commission on Human and Peoples Rights Communication 276/2003) available at

http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf

¹⁰ African Commission on Human and Peoples Rights v Republic of Kenya (African Court on Human and Peoples Rights Application No 006/2012) available at <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf>

from their ancestral land due to establishment of game parks and forest conservation efforts respectively.

The evictions had been carried out without consultation of the communities and had negative impact on their traditional lifestyles including their freedom of religion and belief.

On the freedom of belief and religion, the African Court was particularly emphatic that “*given the link between indigenous populations and their land for purposes of practicing their religion, the evictions of the Ogiek from the Mau forest rendered it impossible for the community to continue its religious practices and is an unjustifiable interference with the freedom of religion of the Ogiek.*”¹¹

In the Endorois case, the African Commission observed that “*the Endorois’ forced eviction from their ancestral lands by the Respondent State interfered with the Endorois’ right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the community to maintain religious practices central to their culture and religion.*”¹²

The KNCHR has also documented the forced evictions against members of the Ogiek and Sengwer communities from their ancestral lands in Embobut and Mau forests respectively. The evictions have been pursued ostensibly for purposes of forest conservation. In this respect, the Commission conducted various investigation missions including a high level fact finding mission to ascertain the allegations and seek redress on behalf of the community. The forced evictions have resulted in destruction of property, loss of life and made it impractical for the community to exercise its freedom of religion and belief.¹³

With the expulsion of indigenous communities from their ancestral lands, access to their cultural and religious sites and by extension their freedom of religion and belief are denied.¹⁴

iii) Lack of Specific / dedicated Legislation on Indigenous Peoples in Kenya

Kenya has no specific legislation governing indigenous peoples. Kenya has also not ratified the United Nations Declaration on the Rights of Indigenous People. There is need to have a specific legislation to operationalize among others the freedom of religion and belief for indigenous communities and their ancestral land rights, Free Prior and Informed Consent among other provisions.

iv) State centric approaches to conservation

¹¹ Ibid, at Paragraph 169

¹² Ibid, at Paragraph 173

¹³ See Kenya National Commission on Human Rights ‘The Report of the High Level Independent Fact-Finding Mission to Embobut Forest in Elgeyo Marakwet Community’ available at <http://www.knchr.org/portals/0/group/rightsreports/KNCHR-Fact-Finding-Mission-to-Embobut-Forest.pdf>

¹⁴ See also Paragraphs 157 and 251 of the African Commission on Human and Peoples Rights in the Endorois decision, *Supra*

The state has, in pursuit of conservation evicted indigenous people especially forest dwelling communities thus making it impossible for them to access their religious and cultural sites.

2) What is the relationship between Indigenous peoples and dominant religious or belief systems in the region like today?

Dominant religious systems today such as Christianity, Islam, Hindu enjoy more national recognition compared to the indigenous ones. Whereas there is no state religion, in most national events, indigenous people are rarely called upon to pray (in recent times they have however gained recognition). See composition of Power of Mercy Advisory Committee (POMAC).¹⁵

Dominant religions also sponsor/support education centres with their religious practises being the most prominent. The prevailing Jurisprudence affirms the authority of schools to enforce their rules including having activities/classes on Saturdays a fact that offends members of the Seventh Day Adventist. There is also pending litigation on the wearing of Hijabs by members of the Islamic faith in schools.¹⁶

3) Is there any good practice when it comes to promoting and protecting Indigenous beliefs and practices?

Recommendations/Proposed Best Practices

(i) *Demarcation and issuance of Title Deeds to Community Lands*

Protection of communal dimensions of tenure includes an obligation of State parties to demarcate the boundaries to ancestral communal lands and issuance of legal titles to such community lands. This is in line with ILO Convention 169 that requires Governments to take the necessary steps to identify indigenous peoples' traditional lands and to "protect their rights of ownership and possession".¹⁷ The demarcation and issuance of titles should be done with the participation of the affected and neighbouring communities. The intention is to secure the land tenure and attendant bundle of rights for the Indigenous People.

(ii) *Infusion of the Human Rights Based Approach to forest conservation*

Pursuant to its mandate to monitor, report and issue advisories on the human rights situation in the country and the mandate to receive, investigate and seek redress for human rights violation, the Commission has been engaging with indigenous forest dwelling communities on alleged human rights violations arising out of forced evictions from their ancestral homes

¹⁵ See S8 (3) on Composition of the Religious Council established under Section 8 (2)(g). The Council shall consist of: the Supreme Council of Kenya Muslims, the Kenya Episcopal Conference, the National Council of Churches of Kenya, the Evangelical Fellowship of Kenya and the Hindu Council of Kenya.

¹⁶ See for instance Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2014]eKLR available at: <http://kenyalaw.org/caselaw/cases/view/93354/>

¹⁷ Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 14 (2), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

in pursuance of forest conservation. The Commission has participated in the process of developing a training manual to guide in conservation under the REDD+ project that primarily targets areas occupied by indigenous people.

(iii) *Enactment of Specific / dedicated legislation on the Rights of Indigenous People*

The legislation should among others put in place mechanisms to ensure meaningful participation of indigenous people in all decisions affecting them and especially the lands they occupy through Free Prior and Informed Consent.

- (iv) *Sustained advocacy for the recognition and protection of the rights of indigenous people including the ratification of UNDRIPs and ILO Convention 169.*
- (v) *Regular country visits and bilateral discussions with state agencies*
- (vi) *Recognition and religious tolerance of diverse religions / cultures / beliefs*