
The rights of indigenous peoples in Africa

It is difficult to analyse the question of indigenous rights in Africa without engaging with the question of statehood, and it is impossible to address the latter without considering its dubious origins. The colonial enterprise in Africa, marked by domination and annexation of territory, was masterminded by Leopold, the Belgian monarch, and Bismarck, the German chancellor. It reached its peak in the Berlin conference of 1884, which was convened ostensibly to regulate trading relations between European powers but ended by legislating for the partition of Africa. The result was the dismemberment of the continent into 53 multi-ethnic and odd states with no basis in scientific or social rationality save that of resolving territorial disputes between the colonisers. This certainly lends credence to the fledgling movement for the unification of Africa.

Colonialism was based on the ethnocentric belief that the morals and values of the European coloniser were superior to those of the colonised African. It involved egregious racial discrimination linked to pseudo-scientific theories that were buttressed by the Christian religious zealotry of the 17th and 18th centuries.

The post-colonial state in Africa, emerging from this colonial artifice, is fraught with weaknesses which have manifested themselves in serious ethnic conflicts, poor governance, wanton inequalities and chronic poverty. Indigenous rights in Africa must be assessed and asserted from this context.

Indigenous rights and people in Africa

While it is undeniable that the West ravaged and looted the entire continent through slavery, colonialism and neo-colonialism, the disproportionate disadvantage dispensed by these forces upon some communities in Africa is vehemently denied. Why is it so hard to appreciate that the Maasai, who lost over one million acres of grazing land in Kenya's vast Rift Valley to the British, today constitute one of the poorest communities in the country? Does it take rocket science to appreciate that the expulsion of the Batwa from the Bwindi and Mgahinga National Parks in Uganda to pave the way for the protection of the mountain gorilla, a key tourist attraction, has led to the near-decimation of this hunter-gatherer community? Does one need to ask what contributes to the penury of the Herero in Namibia, whom the Germans butchered en masse and used as guinea pigs at the turn of the 20th century?

The worst part of the nightmare is that rather than pave the way for the reconstruction of Africa's political and economic order, the departure of the colonialists ushered in a new set of black dominators who, taking advantage of the instruments and institutions of the colonial state, proceeded to plunder and loot the continent of its resources and completely closed the door to restitutive justice.

Contemporary public policy makers in Africa ignore the shame of colonialism and make vigorous attempts to construct a reality based on the 'national interest' rather than communitarian pursuits, which they consider provincial and therefore sectarian.

That some communities have refused to align their interests with national development priorities is

seen as failing to take on the responsibility and demands of progress. A critical analysis of indigenous rights and their beneficiaries would demonstrate the fallacy of this objection.

First, indigenous rights are grounded in the general notion of the universality of rights within a multicultural context as endorsed by the Vienna Declaration of 1993. That declaration unequivocally reaffirmed the inherent dignity and unique contribution of indigenous people to the development and plurality of society, and called for their full inclusion in the life of the state.

Second, indigenous rights must be seen as enabling substantive equality, thus spreading light to a group of people previously not reached by the transformative premise of the Universal Declaration of Human Rights. While non-discrimination is held up as a *jus cogens*,^[3] the fact that it is still difficult to achieve equality for all means that marginalised groups, be they women, children, minorities or indigenous groups, have to pursue strategies that go beyond formal equality to attain the promise of dignity for all people.

Third, the collective conception of rights has often seemed to be a child of a lesser god within a human rights system that has historically pitted civil and political rights against economic, social and cultural rights. Collective rights, which are central to the struggle of indigenous people the world over, have suffered from being poorly articulated, which has prevented them from being regarded as the norm. Thanks to Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and the progressive jurisprudence that has flowed from the Human Rights Committee on this article, a lot of ground has been laid for the protection of group rights to land and development, among other things. The rich array of solidarity rights provided for under the African Charter on Human and Peoples' Rights (the charter, hereafter), which lend themselves well to the cause of indigenous peoples, is thanks to Keba M'Baye, the Senegalese jurist. His appreciation of the dynamics of African society inspired the document.

The modern understanding of the term 'indigenous peoples' focuses on the lived experience of systemic marginalisation, discrimination, cultural difference and self-identification, in line with the emerging practice of the commission.

The notion of indigenous people in Africa also overlaps with the concept of minority rights, another problematic but less controversial term in the continent.

Africa's opposition to the adoption of standard-setting mechanisms and norms for indigenous peoples has largely been informed by misconceptions and myths. In 2006 an assault on the Draft Declaration on the Rights of Indigenous Peoples, led by Namibia and Botswana within the African group in the UN, caused the General Assembly to postpone its decision on the declaration, thereby holding in abeyance substantive recognition of indigenous rights under international law. When the African Union's assembly of heads of state and government met in Addis Ababa a year later, they justified the position of the African group on the grounds that indigenous rights as elaborated in the declaration would affect territorial integrity. The question that baffles many is whether the Batwa in Uganda, the Endorois in Kenya or the Bushmen in Botswana have designs to create their own separate states. Is it not obvious that the right to self-determination sought by these groups is one that can empower them and lead to their recognition and enhanced participation in public affairs? The *Katanga v Zaire* communication of 1976, which established that a variant of self-determination that ensures the inclusion of marginalised groups within a state is consistent with the principle of territorial integrity, was reiterated nearly 20 years later in the *Ogoni v Nigeria* decision by the African Commission on Human and Peoples' Rights.

The term 'indigenous people' should therefore be used in a practical way, to draw attention to and alleviate the particular form of discrimination from which communities suffer. In the African context these communities are almost always nomadic or hunter gatherers. By identifying with the term, they feel that the particularities of their suffering can be better articulated and can lend themselves to the protection of international human rights law and moral standards.

A cry from the dark: living on the fringes

Groups that self-identify as indigenous live a peripheral existence. Most governments in Africa do not have disaggregated data or indicators to monitor the social, economic and political status of indigenous people. How then can they track progress towards achieving the Millennium Development Goals if the poorest of the poor are not even properly recognised? A major concern is that many states will focus on the bottom line of reaching the MDGs, rather than the matter of who reaches them or how. This risk was noted in the Human Development Report of 2003.[5]

Take the Twa in Burundi, Rwanda, DRC and Uganda, for instance. Their lifestyle and the rate of deforestation has kept them moving for decades and left them vulnerable – falling through the cracks of a modern social and legal system which would normally secure tenure on both their lands and livelihood assets. Growing pressure to preserve the few remaining rainforests in the most densely populated countries of the Great Lakes region means that they find themselves excluded from their traditional habitats. The Rwandan state has for decades been tightening its control over forest areas, driven by the need for more protective conservation policies, the growth of the tourism industry and security concerns along its borders with DRC, Burundi and Uganda. The Batwa have been the most affected by these measures, which have uprooted them from their traditional lifestyle and means of earning a living. They have been unable to make a successful transition to a sedentary life and a market economy.

Most indigenous communities, including the Twa, were never compensated when expelled from the 'protected areas' or 'state reserves' they used to live in, due to their traditional marginalisation and to flawed legal and policy frameworks. As a result, their living conditions have degenerated further. Today, most Batwa lead a shockingly impoverished existence. A recent report by the Forest Peoples Programme predicts that the Twa are in danger of extinction unless massive and concerted action is taken to reverse their decline.

Such is the state of many other groups of indigenous people, both pastoralists and hunter gatherers, from the Barabaig in Tanzania to the Tuareg in Mali.

The road less traveled

Indigenous rights, shunned by politicians across the continent, have found solace in an unlikely quarter: the judiciary. Reputed to be incorrigibly corrupt and inefficient, judiciaries across the continent have yet to be acknowledged as bastions of justice for the weak. It is here that the struggle for recognition and respect for indigenous rights has been most vociferously waged. From Botswana to Kenya, South Africa to Uganda, courts have become the theatre for dramatising the plight of indigenous people and the sheer scale of their destitution. In Kenya, a toothless goat was produced to persuade a court of allegations of environmental genocide perpetrated against the indigenous IL Chamus community. In Botswana, hundreds of members of the Basarwa community, clad in their colourful traditional attire, endured a 200-day hearing to demonstrate that they were indeed a recognisable group, contrary to the state's assertion. Judicial proceedings have been used with mixed results to seek land restitution for an indigenous group in South Africa, halt state displacement

of the Ogiek from the Tinet forest in the Rift Valley of Kenya, procure provision of social services for the Benet in Uganda, stop a multinational mining company from procuring a land concession in the Magadi area of Kenya for soda ash production, and secure language rights in Namibia.

Disappointingly, African governments have been reluctant to embrace with open arms the decisions of their own judiciaries. The government of Botswana, for instance, side-stepped the decision of its constitutional court and refused to allow the Basarwa to return to their hunting livelihood in the Central Kalahari Game Reserve. A year after the Kenyan constitutional court held that a constituency should be created for the IL Chamus in Baringo to ensure their participation in policy making, no action has been taken. A similar state of affairs prevails in Uganda, where two years after consent judgment was entered allowing the Benet rights to graze and farm the land they occupy, there has been no action by the administration to back up the court's decision. In a continent that professes respect for the rule of law as a central tenet of its constitutional order, the failure to implement judicial decisions is a mocking indictment of Africa's commitments to good governance and democratic ideals.

Undeterred, indigenous groups have seized on regional mechanisms to develop standard-setting precedents on indigenous rights, but their attempts have yet to bear fruit. In 2006 the Bakweri lands claim against the Cameroonian government was defeated when the commission declared the communication inadmissible. Indigenous people in Africa wait with bated breath for the commission's decision with respect to the Endorois communication against the Kenyan government, which seeks the restitution of ancestral territory.

The media houses, belatedly, have taken their cue from these dramatic scenes and begun to highlight the folly of non-recognition of indigenous communities' plight in Africa, enabling the African public and policy makers to consider their predicament. Mainstream civil society organisations such as ActionAid and CARE in Uganda have begun to demand state attention to indigenous rights as a means of attaining the Millennium Development Goals. The rise of organisations such as the Centre for Minority Rights Development in Kenya and the Indigenous Peoples of Africa Coordinating Committee (IPACC) in South Africa, dedicated solely to the struggle for indigenous rights in Africa, is also helping give visibility to these issues.

Good news, difficult to come by, is slowly emerging. Countries such as South Africa and Cameroon have taken the bold step of commencing processes to ratify ILO Convention 169, which extends a substantive regime of rights for indigenous people, including the right to free, prior and informed consent in relation to development processes on indigenous lands.

Not yet out of the woods...

Indigenous people's struggles for recognition of their rights must be considered within the context of building multicultural societies in Africa, where diverse identities contribute towards the well-being of the whole. Without this paradigm shift, indigenous rights will continue to be perceived negatively, as instruments of parochialism and division. Yet to achieve this shift, Africa must rise up to the challenge of its own identity. Until then, it is 'not yet uhuru'(*) for indigenous groups in Africa.

(*) "Not yet uhuru" means the independence fought for by the Kenyan people had not been achieved. It comes from the title of a book written by the first vice-president of Kenya, the late Oginga Odinga, who observed that despite the country's declared independence, the government led by blacks was as oppressive as the colonial government.

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