The Jurisprudence behind the Right to Self-determination and Right to Development in the African Charter for Human and Peoples Rights*

Issa G. Shivji
Professor Emeritus
School of Law
University of Dar es Salaam
issashivji@gmail.com

By way of Introduction

- In this short presentation I want to focus on Peoples Rights in the African Charter.

- The concept of Peoples Rights is the most innovative part of the African Charter unlike many other regional human rights instruments; yet it has not received sufficient attention from academics and regional human rights bodies, particularly in recent decades. The Charter takes an integral view of the three generation of rights: civil and political rights, social, economic and cultural rights and collective rights.

- I want to focus on the jurisprudence of two peoples rights: right of peoples to self-determination (Art. 21) and the right to development (preamble and Art. 22(1)(2).

- In discussing the jurisprudence of these two rights, I want to draw on the rich jurisprudence developed by the African Commission on Human and Peoples Rights (the Commission).

- While the African Commission has discussed these rights in several cases,** I will focus on one particular case where it discussed at great length the meaning and purport of these two rights. This is the case of:

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** Among these are: The Social and Economic Rights Action Centre v Nigeria, Comm. 155/96, (2000-2001), *The Ogoni Case*, Katangese People's Congress v. Zaire, Comm. 75/92, (1994-1995), *The Katangese Case,* Democratic Republic of Congo v Uganda, Rwanda and Burundi, 277/99, *The DRC case.* All these decisions are available online on the African Commission website.

CENTRE FOR MINORITY RIGHTS DEVELOPMENT (KENYA) AND MINORITY RIGHTS GROUP INTERNATIONAL ON BEHALF OF ENDOROIS WELFARE COUNCIL (ENDOROIS CASE)[***]

- I'll start with the meaning of peoples in the African Charter.

Meaning of Peoples

- At the outset let me make three observations:

  i) Nowhere the Charter defines the term 'peoples'. Although reading the Charter as a whole it is not difficult to draw a working definition of the term.

  ii) The term 'people' is in plural; not in singular thus implying that it refers to peoples within the state with their own specific identity.

  iii) The Charter does not use the term 'indigenous' which is the term commonly used in the West-Centric human rights discourse derived from the reality of the Americas where the original inhabitants of the continents were more or less decimated by European invaders. The remnants are now called 'indigenous people', not citizens.

  Of course, many of us know or should know, that the term 'indigenous' in West dominated historiography has several connotations including 'backward, uncivilised people' which flies in the face of real history of these people. But I will not go into it here except caution you that in Africa when we use this term, we should be both circumspect and cautious.

[***] Briefly the facts were: Endorois pastoralist people were forcibly removed from their ancestral lands around Lake Bogoria by the Government of Kenya to make way for Game Reserve gazetted by the Government. The land around Lake Bogoria provided Endorois with medicinal salt licks which helped to raise healthy cattle. The Lake Bogoria was also the site of ancestral worship, religious festivities and traditional rituals. Endorois people believe that the spirits of Endorois people live in Lake Bogoria. The Complainants thus alleged breach of several Articles of the African Charter including Art. 14 (right to property), Art. 22 (right to culture), Art. 21 (right to natural resources) and several other Articles.

To be sure, in the **Endorois** case, the Commission does use the word 'indigenous' since it is enjoined to draw inspiration from international human rights instruments (Art. 60) but it uses it alternatively with 'peoples'. While recognising that the terms 'peoples' and 'indigenous' are contentious, the Commission was of the opinion that there are certain criteria which help to identify 'peoples'. And these are:

(i) '[T]he occupation and use of certain territory'. In this the Commission recognised link with ancestral land as an important ingredient in identifying 'peoples' – where land is not only the site of livelihood but also of religious and cultural practices.

(ii) '[T]he voluntary perpetuation of cultural distinctiveness';

(iii) '[S]elf-identification as a distinct collectivity, as well as recognition by other groups';

(iv) ' [A]n experience of subjugation, marginalisation, dispossession, exclusion and discrimination'. This is well captured in the term 'oppressed peoples' used in Art. 20 of the Charter.

Now I turn to the right of self-determination.

Right of Self-Determination

- The right of self-determination is unambiguously recognised by the Charter. Art. 20 provides – and this is worth quoting in full.

Art. 20(1): "All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely

determine their political status and shall pursue their economic and social development according to the policy they have freely chosen."

I would like to make three observations on this:

i) The right to self-determination is linked to right to life, in this case right to life as a collective. And right to life, as you know, is one right which cannot be derogated from.

ii) The right to self-determination cannot be subjected to restrictions or exceptions or derogated from.

iii) The right to self-determination includes the right to make your own policies, choose your political status and your path of development.

The importance of this cannot be overstated particularly in the current international situation where African states are subjected to the dictates of hegemonic powers and the so-called "development partners".

- There are two aspects of the right to self-determination: external and internal.
- External refers to the right of peoples to independence and sovereignty of colonised people. I suggest that this right should not be read as a one-off right, that is, once you have attained independence the right is exhausted. This is a continuous right and continues to subsist in the peoples. Why do I say so?

  Art. 21(1) is read together with the preamble which stipulates 'total liberation of Africa' and gives an 'undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism [yes, zionism], and to dismantle aggressive foreign military bases…'. Again Art. 21(5) stipulates that State parties 'undertake to eliminate all forms of economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources'.

As we know, or should know, neo-colonialism and economic exploitation continue to exist. Africa is not fully liberated and therefore the right to self-determination has not been fully realized.

- **Internal self-determination** of the peoples refers to peoples within the State. They also have the right to self-determination. Both, external and internal self-determination, are well captured in Art. 20 (2) where it is stipulated that 'Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination…'. I suggest that the reference to oppressed peoples is a reference to the peoples inside a state – which is internal self-determination.

Next I turn to the right to development.

Right to Development

- Art. 22(1) provides for a wholesome right to economic, social and cultural development. 'All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.'

- The African Commission in their decision in the **Endorois** case develops a profound jurisprudence on this right.

- *Firstly*, the Commission observed that the right to development is a 'two pronged test, that is both constitutive and instrumental' or 'useful as both the means and end.' (para. 277). Thus the Commission held that it is not sufficient simply to look at the end product, that Is development, but one must look at *development as a process* in which the people concerned have participated fully and meaningfully.

- *Secondly,* by deepening the meaning and implication of participation, the Commission linked the process of development to the right of self-determination.

That is to say that the process of development is a particular manifestation of the right of self-determination.

- *Thirdly*, the Commission argued that the recognition of the right to development 'requires fulfilling five criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent'. (para. 277)

  These five criteria read together, I suggest, amount to defining the process of development as a participatory democratic development from below rather than development imposed from above. And the process of development which fully takes account of the right of self-determination of the people.

- *Fourthly*, where the development involves taking land of the people concerned, as in the case of **Endorois**, 'the State not only has a duty to consult with the community, but also to obtain their free, prior and informed consent, according to their customs and traditions'. (para. 291)

- *Finally,* according to the Commission, development should result in the empowerment of the people concerned and should expand the realm of their capabilities and choices.

  In sum, the Commission is characterising development as a terrain of expanding the realm of freedom of the people or what Mwalimu Nyerere once called 'Development in Freedom'. Thus development and freedom are interdependent and mutually re-enforcing.

Conclusion

In conclusion I would like to make two observations:

1. To the best of my knowledge, neither the African Court of Human and Peoples Rights, nor the East African Court of Justice have drawn on the rich jurisprudence

developed by the African Commission on collective rights, in particular the right of peoples to self-determination and right to development; and customary property rights to ancestral lands and destruction of cultural and religious sites as, for example, often alleged by Maasai people in a number of cases filed before the EACJ.

2. Secondly, the decisions of the African Commission have surprisingly not entered the public legal and political discourse because legal and other academics, particularly in Tanzania, with the exception of a few intellectual-activists, seem to pay little heed to the plight of marginalised groups such as the Maasai of Loliondo.

3. If this presentation of mine can generate some discussion on the series of decisions collective rights of the African Commission it would have served its purpose.

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Epilogue: (23/02/2023)

When I made this presentation, the Vic-President of the Court gracefully drew my attention that the African Court had duly taken on board the jurisprudence developed by the Commission in the case of African Commission on Human and Peoples' Rights v Kenya (2017) Application 006/2012, The Ogiek Case. I have since read this decision. It is an interesting decision in its own right. The case is almost on all fours with the Endorois case. The Court expounded on some of the same articles discussed in the Endorois case. Hopefully I will have occasion to discuss it on another occasion