

ACCESS TO JUSTICE FOR INDIGENOUS PEOPLES IN AFRICA

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Abstract

This paper explores the issue of access to justice for indigenous peoples in Africa, a topic that has received insufficient attention within the broader discourse on human rights and legal inclusion. The concept of indigenous peoples in Africa is examined, with a focus on the unique cultural, social and historical contexts that shape their relationship with the States and its legal systems. The African legal framework is analyzed in relation to its provisions for protecting indigenous rights, alongside an exploration of the mechanisms available for accessing justice within the continent. Key challenges to accessing justice, such as discrimination, the marginalization of indigenous knowledge, and the lack of recognition of customary law, are discussed. Landmark cases highlighting both the successes and failures of the legal system in addressing indigenous grievances are presented to underscore the gaps in the protection of their rights. The paper also addresses the concept of restorative justice as an alternative legal approach that aligns more closely with indigenous peoples' traditions of conflict resolution and healing. Finally, recommendations for improving access to justice for indigenous communities are offered, including legal reforms, better integration of indigenous legal systems, and the promotion of inclusive, culturally sensitive judicial processes. By examining these themes, the paper advocates for a justice system that respects the rights, cultures, and traditions of indigenous peoples, ensuring their full participation in the legal processes that affect their lives.

Keywords

Indigenous peoples, Africa, Fundamental Rights, Humanitarian aid, Justice, CSOs, NGOs.

Resumo

Este artigo explora a questão do acesso à justiça para os povos indígenas na África, um tema que tem recebido atenção insuficiente dentro do discurso mais amplo sobre direitos humanos e inclusão legal. Examina-se o conceito de povos indígenas em África, com enfoque nos contextos culturais, sociais e históricos únicos que moldam a sua relação com os Estados e os seus sistemas jurídicos. O quadro jurídico africano é analisado em relação às suas disposições de proteção dos direitos indígenas, juntamente com uma exploração dos mecanismos disponíveis para o acesso à justiça no continente. São discutidos os principais desafios para o acesso à justiça, como a discriminação, a marginalização do conhecimento indígena e a falta de reconhecimento do direito consuetudinário. Casos marcantes que destacam os sucessos e fracassos do sistema jurídico no tratamento das queixas indígenas são apresentados para sublinhar as lacunas na proteção de seus direitos. O artigo também aborda o conceito de justiça restaurativa como uma abordagem jurídica alternativa que se alinha mais estreitamente com as tradições dos povos indígenas de resolução e cura de conflitos. Por último, são apresentadas recomendações para melhorar o acesso das comunidades indígenas



à justiça, incluindo reformas jurídicas, uma melhor integração dos sistemas jurídicos indígenas e a promoção de processos judiciais inclusivos e culturalmente sensíveis. Ao examinar esses temas, o artigo defende um sistema de justiça que respeite os direitos, culturas e tradições dos povos indígenas, garantindo sua plena participação nos processos legais que afetam suas vidas.

Palavras-chave

Povos indígenas, África, Direitos Fundamentais, Ajuda humanitária, Justiça, OSC, ONGs.

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LAETITIA KOECHLIN

"For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others."

Nelson Mandela

Introduction

Access to justice is a fundamental human right that should be available to all individuals, regardless of sex, religion, ethnicity, race, or language. It ensures that everyone has the opportunity to seek and obtain a fair resolution to disputes, protect their rights, and receive equal treatment under the law. However, for indigenous peoples in Africa, access to justice remains a deeply challenging and often inaccessible reality. These communities, with their distinct cultures, languages, and ways of life, face numerous barriers in navigating mainstream legal systems, which are frequently ill-equipped to address their unique needs and realities. The issues surrounding access to justice for indigenous peoples in Africa are compounded by systemic marginalization, historical inequalities, and the lack of recognition of indigenous customary law within national legal frameworks. Traditional justice systems, which have served indigenous communities for centuries, often come into conflict with modern state-run judicial systems that fail to acknowledge or respect the legitimacy of Indigenous legal practices. These tensions raise important questions about the role of traditional justice mechanisms and the need for legal reforms that respect both the universality of human rights and the cultural autonomy of Indigenous peoples. While some indigenous juridical systems continue to function effectively within their communities, they are often excluded or undermined by state laws, exacerbating the struggles for justice faced by these populations. Understanding these dynamics is essential in advocating for a justice system that is truly inclusive and reflective of Africa's rich diversity.

The concept of indigenous peoples

Sometimes referred to as "autochthonous", "aboriginal", or "native" people, there is yet no universally accepted definition of the concept of "indigenous people".¹ However, the

¹ United Nations, 2021. *Guidelines in Indigenous Peoples Issues*.



United Nations has described indigenous peoples as any group or community of people who have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. It lists the factors that are relevant to understand the concept to include any ethnic community having priority in time, with respect to the occupation and use of a specific territory; "the voluntary perpetuation of cultural distinctiveness, which may include language, social organization, religion and spiritual values; self-identification as well as recognition by other groups or by state authorities as a distinct collectivity; and experiences of subjugation, marginalization, dispossession, exclusion or discrimination ». In the African context, the Commission, the Working Group on Indigenous Populations (WGIP) in Africa lists similar factors to include any people having a distinct culture from the dominant society, and whose cultures are under threat, in some cases, of extinction ; whose survival of their particular way of life depends on their access to their ancestral lands and the resources thereon ; who suffer discrimination as they are regarded as less developed than other parts of the society ; who suffer various forms of marginalization ; who are subjected to "domination and exploitation through political and economic structures that reflect the interest of the national majority; and who identify themselves as indigenous".² Many African countries do not formally recognize indigenous peoples in their constitutions or legal frameworks. As a result, indigenous groups often do not have legal standing or the right to claim specific protections under national laws. This lack of recognition can result in the denial of their rights to land³, culture, and self-determination. While the African Charter on Human and Peoples' Rights (the Charter) provides some protections, it does not explicitly define or recognize "Indigenous peoples." The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has been endorsed by many African nations, but its implementation is inconsistent. In many parts of Africa, indigenous communities are being driven off their ancestral lands to make way for wildlife reserves, tourist resorts or the extraction of natural resources.⁴ The Commission through its WGIP set out four criteria defining indigenous peoples ; occupation and use of a specific territory, the voluntary perpetuation of cultural distinctiveness, self-identification as a distinct collectivity, as well as recognition by other groups and an experience of subjugation, marginalization, dispossession, exclusion or discrimination.⁵ During the colonial period, the word indigenous was used for the people inhabiting or existing in land from the earliest times or from before the arrival of colonialists. The first organization to expand this concept was the Pan-American Union in 1938, which declared that indigenous people were descendants of the first inhabitants of the land. It was further examined by the General Assembly in 1949 whom recommended a study of the 'Social Problems of the Aboriginal Populations and Other Under-Developed Social Groups of the American Continent'. In 1960, the United Nations adopted Resolution 1514 which granted the

² Odum and Hari (2022).

³ The International Labor Organisation in its Convention n°169 from 1957 underlines the importance of the indigenous peoples' land rights and highlights the free, prior and informed consent principle (known as the FPIC principle), which the companies or any institution should respect before trying to do something on the land of ethnic communities

⁴ Gilbert (2017). LITIGATING INDIGENOUS PEOPLES' RIGHTS IN AFRICA: POTENTIALS, CHALLENGES AND LIMITATIONS. See the 2003's report by the WGIP/ Communities of the Commission on Human and Peoples' Rights which provides a profound analysis of the situation of indigenous peoples in Africa

⁵ See Chapter 4 (Report of the African Commission's Working Group of Experts on Indigenous Populations / Communities, 2005)



independence to colonial countries and peoples and characterized the foreign rule as a violation of the Human Rights, affirmed the right to self-determination and called for an end of the colonial rule. Between the 1960s and 1970s, an international level indigenous activism arose. In 1971, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities commissioned a study on the discrimination against indigenous peoples. The report, written by Cobo, published in 1983, was indicative of the difficulty in defining indigenous people. Despite the lack of an authoritative definition, there are criteria that help to define indigenous peoples.⁶ On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous and is recognized and accepted by these populations as one of its members – acceptance by the group.⁷ This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference. Indigenous peoples are distinct social and cultural groups that share collective ancestral ties to the lands and natural resources where they live, occupy or from which they have been displaced.⁸ In addition of the criteria stressed above, the United Nations Permanent Forum on Indigenous Peoples defined some more criteria such as a strong link to territories and surrounding natural resources ; distinct social, economic and political systems ; and distinct language, culture and beliefs.⁹ During the process of the UNDRIP's adoption, a formal definition of indigenous peoples needed to be set ; as there was no such definition under international law. Over the course of international discussion and debate, four themes emerged as being important criteria in conceptualizing indigeneity : priority in time, perpetuation of cultural distinctiveness, self-identification and recognition by other actors, experience of subjugation, marginalization or discrimination.¹⁰ Unfortunately, the predominant approach by African governments is the suppression of diversity through assimilation, with a focus on developing and integrating peoples who are seen as primitive. These pre-colonial development strategies mimic those of imperial states as well as various postcolonial development initiatives funded and led by the international organizations. The continent's complicated history makes identifying as indigenous in Africa a complex exercise. There are tensions fueled by issues of power, representation, and difference. In addition, the concept of indigeneity, originally championed by indigenous peoples from the Americas and Australasia, had to be molded and reframed to fit the African context as indigenous peoples (re)asserted their agency previously been erased by the State. It is therefore not that surprising that its applicability is questioned, despite the increasingly vocal engagement of the indigenous community. This molding of indigeneity to fit the African environment has led to skepticism among scholars who have pointed out that self-identification as indigenous can – and possibly has been – used by groups who might not identify as indigenous as a way to access the benefits of collective rights as a way to

⁶ Cobo (1987, pp. §379-380)

⁷ Cher (2023, p. 4).

⁸ The land and natural resources on which they depend are linked to their identities, cultures, livelihoods, as well as their physical and spiritual well-being. Indigenous peoples often lack formal recognition over their lands, territories and natural resources, are often last to receive public investments in basic services and infrastructure and face multiple barriers to participate fully in the economy, to have access to justice, and to participate in political processes and decision making.

⁹ Indigenous Peoples and the United Nations Human Rights System (2013, pp. 2,3).

¹⁰ See also Article 33(1) of the UNDRIP as it states the indigenous peoples' right to determine their own identity.



better access their natural resources and land rights. Important rights for indigenous peoples have been guaranteed by international and regional legal instruments¹¹, nevertheless the question has remained regarding if these protections are enough to protect indigenous peoples or whether a separately formulated response to their situation is necessary and appropriate.¹² Scholars have a divergent opinion on this matter, some would argue that indigenous voices will get lost under a generalist Human Rights system, whereas others believe it is sufficient to meet the needs of indigenous peoples.¹³ Collective rights versus individual rights is another contentious issue. Collective rights have historically been incompatible with international law that is traditionally centered on individuals and States, and so, indigenous rights – which include a set of collective rights – have been an uneasy fit for international law. Nonetheless, with the emergence of third generation rights¹⁴, the international legal forum has grown to accept indigenous group claims.¹⁵ Individual rights are those which belong to each person and which he or she can assert vis-à-vis the State, the community or other human being. Each individual can exercise these rights alone, according to his or her own will. But certain individual rights can only be exercised collectively – freedom of assembly, association or trade union freedom. Collective rights are those that belong to a group or collectivity and are intended to protect the integrity of that group or collectivity (right to development and right to self-determination)¹⁶, they can only be exercised if several people agree to use collectively – together and for the same purpose – the right that belongs to each of them.

The African legal framework

The African [Banjul]¹⁷ Charter on Human and Peoples' Rights adopted on June 27, 1981, in Nairobi, Kenya at the Organization of the African Union's eighteen summit, was the first declaration to be adopted regarding the indigenous African peoples' Human Rights. Within the framework of the African regional system, the African Charter on the Rights and Welfare of the Child was adopted on July 11, 1990 and is the first regional instrument exclusively dedicated to the regulation of the rights of the minors ; and the Protocol to the Charter on the Rights of Women in Africa [Maputo Protocol] adopted on July 1, 2003.¹⁸ The last treaty adopted within the Organization of the African Union is the Protocol to the Charter on the Establishment of an Court ,¹⁹ adopted on June 10, 1998.²⁰ Other treaties of the system can be mentioned, such as the Organization of the African Union's Convention Governing the Specific Aspects of Refugee Problems in Africa adopted on September 10, 1969 or the African Union Convention for the Protection and

¹¹ See the legal framework chapter of this paper.

¹² The question here is regarding the necessary separate set of rights specifically for indigenous peoples.

¹³ Cher (2023, p. 6).

¹⁴ Also known as solidarity Human Rights, they are rights that try to go beyond the framework of individual rights to focus on collective concepts, such as community or people.

¹⁵ Cher (2023, pp. 11,12), in practice, collective rights have emerged and become increasingly acceptable under IL (Mazel, 2009). See Conventions No. 107 and 169, and the UNDRIP (Articles 3, 6, 26) – all affirms the collective indigenous rights to land, territories and resources.

¹⁶ The recognition of group rights for indigenous peoples is essential to establish an effective instrument for the protection of indigenous ways of life and to secure their cultural survival.

¹⁷ Ngom (1984, p. 68)

¹⁸ Rodríguez (2021, pp. 236-239)

¹⁹ Mubiala (2005, pp. 95,96)

²⁰ Droits de l'Homme en droit international - Recueil de textes (2007)



Assistance of Internally Displaced Persons in Africa adopted on October 23, 2009. There are significant signs of the emergence of new legal frameworks to recognize and protect indigenous peoples' rights across the continent. For instance, the new Constitution of Kenya, from 2010, recognizes historically "marginalized group",²¹ including indigenous communities. The Constitution of Cameroon also mentions in its Article 2 the protection of the rights of indigenous peoples. In 2011, the Republic of Congo became the first country to adopt a specific law on indigenous peoples : Law on the Promotion and Protection of the Rights of Indigenous Populations in the Republic of Congo.²² In 2022, the Democratic Republic of Congo took a big leap forward in recognizing the customary rights of its indigenous population by adopting a new law on the Promotion and Protection of the Rights of the Indigenous Pygmy Peoples. This historic law is the country's first ever legislation to formally recognize and safeguard the rights of indigenous peoples, in particular their land rights. The Constitution of the Republic of Benin makes the provisions of the Charter an integral part of the national constitution ; by clarifying how international should be treated in and by its domestic courts.²³ The Constitution of the Central African Republic states in its Article 6 the equality before the law of all human beings without distinction of race, ethnic origin, region, sex, religion, political affiliation or social position and the protection of the rights of indigenous peoples and the guarantee of equality for all rights in all the domains for men and women. Lastly, the Malawi's Constitution adopted in 1998, shows the protection granted to everyone, none withstanding their origin, race, customs, ethnicity in its Chapter IV – Section 26 of the Constitution²⁴ and Section 28.²⁵ It is up to Non-Governmental Organizations (NGOs) and Human Rights activists to advocate the advancement and implementation of these rights to the relevant state bodies, particularly the courts, who must in turn ensure that these rights have meaning and are better recognized for the population.

The mechanisms to access justice in Africa

Justice Charles Kajimanga²⁶ defines the access to justice as "The right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable." In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable. Access to justice helps to preserve human dignity, it is helpful in efforts to grow civil society and to reduce and end poverty. Delivery of justice should be impartial and non-discriminatory. To strengthen access to justice, the United Nations system works with national partners to develop national strategic plans and programs for justice reform and service delivery.

²¹ See Kenya's Constitution's Chapter seventeen – general provisions ; Article 260 – interpretation

²² N'ZOBO (2012)

²³ It can be seen through the Preamble of Benin's Constitution specifically references to the United Nations Charter, the Universal Declaration of Human Rights, and the UNDRIP ; and also in Benin's Constitution's Article 7, adopted on December 2, 1990.

²⁴ See Malawi's Constitution's Section 26 – culture and language

²⁵ See Malawi's Constitution's Section 28 – right to property

²⁶ Kajimanga (2013)



One of the major obstacles in accessing justice is the cost of legal advice and representation. The United Nations system supports the provision of legal aid by building the capacity of rights-holders, improving legal aid programs that empower rights-holders, particularly the poor and marginalized groups, and supporting legal awareness, legal aid clinics and public information campaigns. Access to justice is a requirement that is increasingly at the heart of the major debates of our time, whether in the fields of economic, political and social development, peace, Human Rights or culture. This issue forms a bridge between the past, the present and the future, as it refers to the marginalization and systemic discrimination suffered by members or groups of society. The solid international Human Rights framework developed over the last 70 years, and the way in which it is further developed through the interpretation of international Human Rights bodies, gives access to justice the normative contours and specificity necessary for its practical implementation. Major elements such as the rule of law, the right to the truth and other fundamental normative frameworks have given new weight to access to justice. Based on the legal framework defined in chapter 3, several cultural biases and discrimination within legal systems issue have been identified. As a matter of fact, indigenous women, children, youth, and persons with disabilities face discrimination on multiple grounds, which often puts them in a particularly disadvantaged situation. So, there is a huge need to pay attention to the situation of these specific groups, who face cumulative discrimination. Winning a court case, whether at the level of the Commission or nationally, has proven to be only one small step in the struggle against marginalization, discrimination, and dispossession.²⁷ The Commission's report argues that indigeneity "is today a term and a global movement fighting for rights and justice of those particular groups who have been left at the margins of development paradigms, whose cultures and way of life are subject to discrimination and contempt and whose very existence is under threat of extinction".²⁸

Formal justice systems

The Commission

Since its inception in 1987, the Commission has sought to execute its mandate as stipulated in Article 45 of the Charter, which includes promoting and protecting human and peoples' rights and interpreting the Charter.²⁹ The Commission meets twice a year in ordinary sessions, where its members, states, organizations having observer status and other stakeholders engage in dialogue on pertinent human rights issues on the continent. The International Work Group for Indigenous Affairs has been at the forefront and indeed elicited interest through raising awareness and supporting the participation of indigenous peoples at the Commission's sessions³⁰ and has also facilitated and funded the Commission's Working Group and its activities.³¹ The Commission is officially charged with three major functions : the protection and the promotion of human and peoples'

²⁷ Werner (2023, p. 392), while technically the decisions of the Court are legally binding, there is no follow-up instrument or mechanisms to make sure that the States comply.

²⁸ See the Report of the Commission's WGIP from 2005, page 87

²⁹ Bojosi and Wachira (2006)

³⁰ See IWGIA's official website – <https://iwgia.org/en/>

³¹ Bojosi and Wachira (2006)



rights ; and the interpretation of the Charter. The WGIP in Africa was established by the Commission at the 28th Ordinary Session in Benin in 2000 and it consists of commissioners as well as external expert members. The WGIP carries out promotional activities for the rights of indigenous peoples, including country visits, research and sensitization seminars. Since 2015 the WGIP has carried out 13 country visits and research and information visits, as well as a number of seminars and research activities. The WGIP is an active participant in international gatherings on indigenous peoples' rights, and published in 2010 an Advisory Opinion on the UNDRIP. In 2003 the Commission adopted a groundbreaking report on the rights of indigenous peoples in Africa taking point of departure in the Charter.³² The adoption of an Advisory Opinion by the Commission to support the adoption of UNDRIP marked another step toward the affirmation of indigenous peoples' rights in Africa.³³ The Advisory Opinion not only participated in unlocking the reluctance of the group of African States to adopt the UNDRIP, but also reflected developments taking place at the international level on the rights of indigenous peoples as well as their connection to the continent. Remarkably, in recent years, the Commission has started to refer to indigenous peoples' rights in its examination of States' periodic reports.³⁴ All these factors and the recent decision of the Commission in the Endorois case indicate the emergence of a consistent jurisprudence on indigenous peoples' rights in Africa.³⁵

The Court

The Court was established by African countries to ensure the protection of human and peoples' rights in Africa. It complements and reinforces the functions of the Commission. The Court was established under Article 1 of the Protocol to the Charter, which was adopted by member states of the Organization of African Unity³⁶ in Burkina Faso, in June 1998. The Protocol entered into force on January 25, 2004. To date, thirty-four member states have ratified the protocol establishing the Court. To date, only eight of the thirty-four States parties to the Protocol have deposited the declaration recognizing the Court's jurisdiction to receive applications lodged directly by NGOs and individuals (Burkina Faso, Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger, Tunisia).³⁷ The Court's contentious jurisdiction applies to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned. As part of its advisory jurisdiction, the Court may, at the request of a Member State of the African Union, one of its organs or any African organization recognized by the African Union, give an opinion on any other legal question relating to the Charter or any other relevant human rights instrument, provided that the subject of the opinion is not related to a question being examined by the Commission. The Court is made up of eleven judges who are nationals of African Union

³² See the Resolution on the Adoption of the Report of the African Commission's WGIP, November 2003, ACHPR/Res.51 (XXVII) 34th Ordinary Session

³³ African Commission on Human and Peoples' Rights (May 2007)

³⁴ Bojosi and Wachira (2006)

³⁵ Gilbert (2011). INDIGENOUS PEOPLES' HUMAN RIGHTS IN AFRICA: THE PRAGMATIC REVOLUTION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

³⁶ Legally replaced by the African Union (AU) in 2001

³⁷ Rwanda withdrew its declaration in 2017 ; Tanzania in 2019 ; Ivory Coast and Benin in 2020.



member states. On the proposal of their respective States, the judges of the Court are elected, in their individual capacity, from among African jurists of proven integrity and recognized practical, judicial or academic competence and experience in the field of human rights. Judges are elected for a six-year term, renewable once. The judges of the Court elect from among their number a President and a Vice-President of the Court for a two-year term. They may be re-elected only once. The President of the Court resides and works full-time at the seat of the Court, while the other ten judges work part-time. In the performance of his duties, the President is assisted by a Registrar who performs the clerical, management and administrative functions of the Court. The Court may receive cases filed by the Commission on Human and Peoples' Rights, States Parties to the Protocol or African intergovernmental organizations. NGOs with observer status with the Commission and individuals may file cases directly with the Court, provided that the State they are suing has filed the declaration under Article 34(6) recognizing the Court's competence to accept cases from individuals and NGOs.

Informal justice systems

African traditional justice systems can be referred as all the mechanisms African communities have applied in managing conflicts and disputes since ages, and which have been passed on from one generation to the other. These systems are often called traditional, informal, customary or non-state justice systems.³⁸ These systems have strengths, such as the high level of public participation, the fact that it helps discovering the truth and as a consequence it helps the survivors and the relatives of the deceased victims to handle their emotions of anger and loss and to understand what happened, and in the end, it contributes to reconciliation. Also, indigenous justice systems may benefit a higher degree of legitimacy as they reflect the norms, values and customs recognized for aged by their communities ; and these systems are usually geographically closer than the formal systems, there is usually no language issue as they speak all the same dialect, and it is way more affordable. In addition, in case of serious crimes or human rights violations, customary justice systems may contribute to reconciliation and communal stability as the perpetrators may return to the community and their own families. As a contrary, these traditional justice systems have weaknesses.³⁹ These weaknesses could be the abuse of the informal system's position, corporal punishment or violence based on sexual orientation, or violations of human rights and individual rights such as fair trial guarantees.⁴⁰ Other critics are regarding the violation of women's rights in particular and the non-protection of fundamental rights and freedoms of suspects in criminal cases.⁴¹ Although these informal justice systems have huge potential for enhancing access to justice for indigenous communities in Africa – as they have been sometimes excluded from the formal justice systems –, strengthen the rule of law and bring development among communities ; various challenges arise in operationalizing them. Indeed, some of these traditional practices have been declared illegal and in some

³⁸ Kariuki (2018). African Traditional Justice Systems.

³⁹ It should be noted that these cons are usually formulated from the Western point of view.

⁴⁰ Szpak (2019)

⁴¹ Kariuki (2018). African Traditional Justice Systems.



African countries such as Kenya or South Africa, there are laws proscribing the traditional practices despite their complementary role in dispute resolution with the formal systems.⁴² Some other challenges are due to the fact that African justice systems are regarded as inferior in comparison to formal justice systems, and these systems are threatened by modernization and by the socio-economic, political and cultural changes.

The challenges to access justice

Material issues

Indigenous peoples, particularly in rural areas, face economic and social disadvantages that limit their ability to access legal resources, including legal representation and to engage in lengthy legal battles. Many are illiterate or lack knowledge about the legal system, making it harder for them to assert their rights. Furthermore, widespread discrimination and stereotypes about indigenous peoples in many African countries and societies contribute to their marginalization in the legal system. This cultural bias can hinder their access to fair trials, legal processes and remedies. Also, in some African countries, corruption and a lack of effective governance system undermine the functioning of the judiciary, making it difficult for indigenous peoples to secure justice and especially when their cases involve powerful corporate or state interests.

Individual issues

Indigenous women

Numerous barriers exist for indigenous women in accessing justice on an equal basis to others. Indigenous women are disproportionately at risk of experiencing all forms of violence, compounded by multiple forms of discrimination based on race, gender and other forms of identity, including disability and sexual orientation. Remote or rural is another barrier for indigenous women to have access to justice. Indigenous women are overrepresented in national criminal justice systems. Reporting of violence against indigenous women is lacking, as sometimes they do not feel comfortable to fill complaints or as they may be unaware of the protections available. Lastly, justice systems are mostly male dominated and discriminating against women. International Human Rights law requires that States take all measures to ensure equality before the law.⁴³ The Committee on the Elimination of Discrimination against Women has noted with concern – in its study by the Expert Mechanism on the Rights of Indigenous Peoples from April 29, 2013 – the lack of women, including indigenous women, appointed to the judiciary and has called for gender-sensitization training of justice officers. The Committee has noted further that laws or customs that limit a women's access to legal advice or ability to seek remedy before courts, or accord lesser value to a female testimony, violate the right to equality before the law.⁴⁴

⁴² Kariuki (2015). Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities, p. 50)

⁴³ See the Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 15

⁴⁴ Expert Mechanism on the Rights of Indigenous Peoples (2013)



Indigenous children and youth

The rights of indigenous children and young people are recognized, implicitly and explicitly, by the Universal Declaration of Human Rights ; the ICESCR ; the Convention on the Rights of the Child ; the World Declaration and Plan of Action on the Survival, Protection and Development of Children ; the Declaration of the World Summit for Children ; the UNDRIP and of course the African Charter on the Rights and Welfare of the Child.⁴⁵ There is some discrimination towards indigenous youth ; despite the fact that the available data is limited, several studies show that indigenous children and youth are disproportionately represented in criminal justice systems. The Committee on the Rights of the Child pointed out that disproportionate high rates of incarceration of indigenous children may be attributed to systematic discrimination within the justice system and / or society. Other areas in which persistent barriers remain are access to justice for indigenous children who have been victims of domestic violence or sexual abuse ; and once in custody, indigenous youth may be less likely to benefit from non-custodial sentencing options or restorative justice measures, more likely to receive the most punitive measures and to be subjected to the harshest treatments, such as being placed in secure confinement. The Committee has called upon the States to take measures to address juvenile crimes without resorting to judicial proceedings wherever possible and also to support traditional restorative justice systems to promote the best interests of the child. The governments must make certain that their national constitutions as well as their statutory and customary laws, reflect the provisions of international Human Rights instruments. Nevertheless, it is argued that custom tradition, culture, and religion are major constraints to the recognition and protection of the rights of children in Africa. In several countries, traditional values are often deployed as an excuse to undermine Human Rights, including those of children.⁴⁶ For children's rights to be recognized and protected in an African country, it must be the case that the country has first internationalized its constitutional law ; then the country must establish a governing process that adequately constrains the state and prevents civil servants and political elites from acting with impunity and violating the rights of children. The issue is regarding the fact that such a governing process must have the judicial system that is independent enough to bring to justice those who violate children's rights. Unfortunately, in many African countries, even including those that have domesticated the various international Human Rights instruments, there is still a widespread abuse of the rights of the children.⁴⁷ Indigenous children and youth are exposed to economic and social factors that impact their fundamental rights. They are often forced to leave their traditional communities in search of work or education and move to the city where they are frequently discriminated against and do not have the same opportunities as others to find work and access education.⁴⁸ Their new condition

⁴⁵ Also known as the African Children's Rights Charter, adopted in 1990 and entered into force in 1999. The African Committee of Experts on the Rights and Welfare of the Child was formed in July 2001.

⁴⁶ Reid (2013)

⁴⁷ Mbaku (2022, p. 231), this is due to the fact that these countries do not yet have a governing process that can adequately prevent those whose role it is to enforce the laws and protect children from prohibiting adoption behaviors that contribute to non-enforcement of the law.

⁴⁸ Fonds des Nations Unies pour l'enfance Convention relative aux droits de l'enfant Groupe de la jeunesse (ONU, 2000), indigenous children and young people are one of the groups most at risk of fundamental rights



can have devastating consequences on their self-esteem and cultural identity, and thus be at the root of many serious medical and social disorders, such as depression and drug addiction. Indigenous youth inherit the responsibility of protecting and preserving the traditional lands, resources and sacred sites that represent their cultural heritage and determine their identity. Various Human Rights bodies, including treaty and Charter bodies, can address concerns about the rights of indigenous children, such as UNICEF, the United Nations Youth Advisory Group.

Indigenous disabled persons

A key framework Convention is the one on the Rights of Persons with Disabilities, which guide the interpretation of other relevant international Human Rights and the development of instruments in this regard. Non-discrimination is a general principle of this Convention – Article (3)b). Indigenous persons with disabilities face considerable obstacles in terms of access to justice ; such as living in rural areas, limited access to information provided in accessible formats and appropriate languages, inaccessibility of legal counsel. There are also concerns regarding the treatment of indigenous persons with disabilities in detention. Indeed, the United Nations Office on Drugs and Crimes has found that indigenous persons with disabilities face magnified difficulties in prisons and that women prisoners with disabilities are at particularly high risk of manipulation, violence, sexual abuse and rape.^{49,50} Although legal protections and the social status of indigenous persons with disabilities have both improved, there still are many areas where services and accessibility fall short,⁵¹ some areas need to be addressed : services, legal capacity, imprisonment. Nevertheless, some factors could contribute to overcome these issues. For instance, at the international level, the Committee on the Rights of Persons with Disabilities instituted by the United Nations has taken the opportunity to comment on the situation of indigenous persons with disabilities' access to justice. Its observations have focused on the equality and non-discrimination issue, the liberty and the security of the person, the importance of data and statistics and the situation of indigenous children with disabilities.

Landmark cases

The Endorois case n°276/2003

The 2010 decision by the African Commission marked a significant milestone in the recognition of indigenous peoples' rights in Africa, especially concerning land and natural resource claims. The case arose from the forced eviction of the Endorois community – approximately 60,000 people – from their ancestral lands around Lake Bogoria, Kenya, to make way for a game reserve. The Endorois alleged that the Kenyan government

violations, as their language, customs and values often set them apart from the society to which their community belongs.

⁴⁹ Pollack (2014, pp. 310, 311)

⁵⁰ See United Nations Office on Drugs and Crime, Criminal Justice's Handbook on Prisoners with special needs, 2009, p. 45

⁵¹ Larson (2014, p. 225), the persons with disabilities still face wide gaps in achievement, access and services



violated their rights to property, culture, religion, and development by evicting them without adequate prior consultation or compensation for the loss of their land. In its ruling, the Commission found several violations of the Charter, particularly concerning the Endorois' right to property, access to natural resources, and the freedom to practice their religion and culture. The Commission recommended that the Kenyan government formally recognize the Endorois' ownership of their ancestral land, grant them unrestricted access to Lake Bogoria for religious and cultural purposes, and provide compensation for the community's losses. This ruling was pivotal for several reasons. It was the first time the Commission addressed the rights of Indigenous peoples in Africa and the first international decision to acknowledge a violation of the right to development. Furthermore, the Commission recognized the Endorois as an indigenous community, completing an ongoing process of ethnic identification that had begun in the 1990s. The decision also has far-reaching implications for the rights of Indigenous peoples across Africa, especially given the increasing pressures on land from environmental conservation and economic development projects. Although the Kenyan government has not fully implemented the Commission's recommendations, the case has significantly raised awareness about the plight of Indigenous peoples in Kenya and across the continent. It contributed to the creation of a new community-based land tenure system in Kenya's 2010 Constitution, but further legal and policy reforms are necessary. Additionally, the case has attracted attention from international human rights bodies and civil society organizations, emphasizing the growing global recognition of indigenous rights in Africa.

The Ogiek Case nº006/2012

The Ogiek people, an Indigenous community of about 20,000 members, have historically inhabited the Mau Forest in Kenya, relying on it for residence and sustenance as a hunter-gatherer society. Despite their long-standing presence, in October 2009, the Kenya Forestry Service ordered their eviction from the Mau Forest. The government refused to recognize the Ogiek as an Indigenous group deserving of protection. In response, the Centre for Minority Rights Developments and Minority Rights Group International submitted a complaint to the African Commission, which was referred to the African Court in 2012. The Court ruled in May 2017 that Kenya had violated the Ogiek's rights by forcibly evicting them from their ancestral land and denying them access to its resources, which disrupted their traditional practices and religious ceremonies linked to the forest. The Court ordered Kenya to reinstate restrictions on land transactions in the Mau Forest and to respect the Ogiek's right to land and natural resources. Additionally, Kenya was instructed to pay compensation to the Ogiek and take steps to legally recognize and protect their ancestral land, including granting them collective land title and ensuring their consultation on any development or conservation projects. The Court's 2022 ruling further mandated Kenya to engage in consultations regarding land concessions and to fully recognize the Ogiek as an Indigenous people. This decision marked a historic step in securing the rights of Indigenous communities in Kenya and has been seen as a hopeful precedent for other marginalized groups. However, despite these rulings, the Kenyan government continued to violate the Ogiek's rights, including a 2020 eviction. As of now,



the task force report on the matter has not been released, and the Ogiek's struggle for justice remains ongoing.

The Ogoni and Shell case

The case of the Ogoni people in Nigeria against Shell is primarily associated with the long-standing environmental and human rights issues resulting from Shell's oil operations in the Niger Delta, particularly in Ogoniland. The Ogoni people, who live in the Niger Delta region, have long protested the environmental degradation caused by oil exploration and extraction, as well as the human rights abuses they believe are associated with Shell's activities. The case highlights the complexities of multinational corporate responsibility, the intersection of human rights and environmental justice, and the challenges faced by communities in conflict zones in seeking accountability from powerful corporations. The struggle of the Ogoni people has also inspired similar activism and legal actions around the world, as communities fight for environmental justice and the protection of their rights. The outcome of the Ogoni people's case against Shell has been mixed. While there have been financial settlements, particularly the 2008 U.S. settlement, and legal victories concerning some of the environmental damage (e.g., in the Netherlands), the widespread environmental devastation and human rights abuses in the Niger Delta persist. The consequences include limited justice for the victims, with many still waiting for compensation or accountability for the full scale of human rights abuses, slow environmental restoration, with Ogoniland remaining one of the most polluted regions on earth, global awareness of the need for greater corporate responsibility, particularly for oil companies operating in fragile states and continued activism from Nigerian communities, demanding reparations and systemic change in how oil resources are managed and how companies like Shell operate in the Niger Delta. Ultimately, the Ogoni case remains a symbol of the ongoing struggle for environmental justice, human rights, and corporate accountability, and its consequences continue to shape discourse around corporate responsibility and sustainable development globally.

Restorative justice

Restorative justice is an approach that emphasizes repairing the harm caused by criminal behaviour through cooperative processes that involve victims, offenders, and the community. In the context of Africa, indigenous peoples often face challenges in accessing justice, as their customary practices and legal systems may not always align with national legal frameworks. However, there are examples where restorative justice mechanisms have been integrated into the legal systems, or where indigenous justice practices have been recognized to ensure access to justice for indigenous communities. For instance, South Africa has made significant strides in incorporating restorative justice principles, particularly in the post-apartheid era. The country's Truth and Reconciliation Commission is an example where restorative justice was used to address the atrocities of apartheid and give victims, including indigenous and marginalized groups, a platform to tell their stories and seek reparations. South Africa recognizes the traditional justice systems of indigenous communities, especially in rural areas. Traditional Courts were



historically used by indigenous communities to address disputes. These systems prioritize reconciliation, restitution, and community restoration, with a focus on repairing harm rather than punishing offenders. Through the Traditional Courts Bill from 2017, the country seeks to balance the legal rights of indigenous people with its national laws. However, there has been significant criticism of the Bill's approach to gender equality, as traditional courts sometimes uphold patriarchal customs. In Kenya, the Maasai and Nandi communities, among others, traditionally use restorative justice methods to address grievances. They use elders as mediators in conflict resolution, with the aim of restoring balance and ensuring that all parties are reintegrated into society. Kenya has promoted Alternative Dispute Resolution mechanisms, which include restorative justice practices, through the Judicial Service Commission and local community initiatives. The government has worked to integrate these methods into formal justice systems to provide indigenous peoples with a platform for accessing justice. The National Policy on Peacebuilding and Conflict Management from 2011 encourages the use of indigenous conflict resolution methods, especially among pastoralist communities like the Maasai and Turkana, recognizing their role in peacebuilding and restorative justice. Rwanda is known for its Gacaca Courts, which were used to address crimes committed during the 1994 Genocide against the Tutsi. These Courts were community-based and utilized restorative justice principles to promote healing and reconciliation. The Gacaca system, though not exclusively indigenous, shares key elements with traditional African restorative justice practices. These Courts encouraged offenders to confess, ask for forgiveness, and make restitution, while also allowing victims to participate in the process of reconciliation. It provided marginalized communities, particularly those in rural areas, with a means to access justice outside the formal court system, helping to bridge the gap between traditional practices and national legal frameworks. The integration of restorative justice principles into the legal systems, especially in relation to indigenous peoples, varies widely across the African continent. Many countries, such as South Africa and Rwanda, have made significant strides in recognizing the importance of indigenous justice systems, blending them with formal judicial processes. However, challenges remain, particularly in ensuring that indigenous justice practices respect human rights and that indigenous peoples have equal access to both traditional and formal justice systems. Another avenue to explore are the truth commissions⁵² which have on many occasions been established in nations where there are indigenous peoples in order to redress Human Rights violations, in accordance to the right of victims to an effective remedy and the right to know the truth to the fullest extent possible.⁵³ Truth commissions investigate violent historical periods⁵⁴ and are going further than the traditional focus on individual Human Rights violations to tackle collective Human Rights violations to economic, social, cultural and environmental rights. The involvement of indigenous peoples in these processes has varied, ranging from not being included at all, to more recent instances of truth commissions established specifically to address rights violations

⁵² Lavin (2014), a key factor contributing to the development of the right to the truth is the establishment of truth commissions.

⁵³ The right to truth has been increasingly recognized by various United Nations Resolutions, expert reports, and national courts, regional and international decisions. See United Nations Human Rights Council's Resolution A/HRC/EMRIP/2013/2 and Resolution A/HRC/27/65.

⁵⁴ Librizzi (2014), The recommendations of truth commissions generally seek to identify the causes of the violations, determining patterns of abuse and preventing recurrence.



experienced by indigenous peoples, where indigenous peoples have led the processes from their initiation. In many cases, however, truth commissions have failed to address the needs of indigenous peoples in any significant ways. Challenges faced by truth commissions include ensuring the independence and credibility of the commission ; political interference ; inadequate funding; and ensuring continued participation of marginalized groups, civil society and victims' organizations. Truth commissions have also been criticized for weak outcomes, lack of implementation of their recommendations or adequate follow-up. Implementation of these recommendations has generally been weak even where recommendations are strong. There are a number of advantages of truth commissions, including that they might be more consistent with indigenous peoples' conceptions of justice and cultures; they can inspire political commitment to the resolution of grievances. A positive example of indigenous engagement comes from the Truth, Justice and Reconciliation Commission of Kenya.⁵⁵ Truth commissions have varying purposes and modes of operation, yet many display features that align with or support restorative justice principles. Truth commissions have significant potential to help remedy abuses suffered by indigenous peoples and strengthen their rights. Implemented properly, with strong guarantees of independence, integrity and adequate leadership, as well as considering the rights, perspectives and needs of indigenous peoples, truth commissions can help strengthen the identity of indigenous peoples, and respect for their civil, political, economic, social and cultural rights, as well as their rights to ancestral lands and natural resources the rights of indigenous peoples and proposing policies to prevent further violations. National NGOs have a key place in the work of truth commissions.⁵⁶ Indeed, they usually monitor the commission's activities, provide honest feedback and push the commission to respond appropriately to the needs of victims and communities. CSOs may offer support services that the commission may wish to refer the victims and survivors to – such as individual or group counselling, community support mechanisms, or basic medical services to those injured or still suffering from past violence.

Improvements for accessing justice as indigenous peoples in Africa

Scholars generally agree that one of the most important goals of the international indigenous movement is to advance indigenous rights under international law.⁵⁷ Several key actors have played significant roles in this movement. Three United Nations bodies, namely, the WGIP, the Permanent Forum on Indigenous Rights, and the Special Rapporteur on the Rights of Indigenous Peoples, have been instrumental in setting norms on indigenous rights. International and African NGOs played an important advocacy role for setting up an African regional protection of Human Rights mechanism. NGOs have played an advocacy role with the Commission, helping it to improve its

⁵⁵ Although not specifically focused on indigenous peoples, the Commission provided an explicit forum for the expression of indigenous issues regarding historical injustices, marginalization and ethnic tension. The Commission hired indigenous people as part of its staff ; conducted public hearings allowing testimony in different languages, including Maasai ; and conducted outreach to indigenous communities and organizations that addressed their rights.

⁵⁶ Rule-of-law tools for post-conflict states : truth commissions, 2006.

⁵⁷ Morgan (2007)



working methods. By May 30, 2003, the Commission had granted consultative status to 13 National Human Rights Institutions and by January 1, 2004, the Commission had already granted consultative status to more than 300 NGOs.⁵⁸ The Commission has gradually defined the framework for its relations with NGOs and national rights institutions, to which it grants consultative and affiliate status respectively. Human Rights NGOs with observer status are required to present their activity reports to the Commission. National Human Rights Institutions granted affiliate status with the Commission are obligated to submit reports on activities undertaken in promoting and protecting Human Rights under the Charter and at the national level. As analyzed before in the paper, the African Constitutions have a high level of Human Rights norm recognition, but the enforcement through the Commission is relatively weak and remains problematic. Nevertheless, this situation has improved since the development of subregional institutions and an indigenous African fundamental rights jurisprudence. Indeed, the domestic level is the most important in the protection of Human Rights – followed by the regional and global systems – as the domestic level has the benefit of direct enforcement, and the regional scale has the advantage of peer pressure that the global level often lacks. Nonetheless, the effectiveness of the mechanisms and their capacity to facilitate the coordination of Human Rights norms recognition and enforcement have yet to be proven. International indigenous rights coalitions involve indigenous and non-indigenous CSOs. Similarly as self-identification points out on different aspects of indigeneity across regions or continents, there is a variance between indigenous and non-indigenous CSOs. This can be explained through the fact that they might have different understandings of indigenous values, symbolism and customs. The four main issues these CSOs are advocating are regarding the unequal treatment African indigenous peoples can face, the self-determination concern, the violence and threats to indigenous culture and the question of the environment. Even though indigenous and non-indigenous CSOs may have not the same approach in their messaging and interpretation of indigenous rights issues in the international scene, their voices are heard – and even more since the adoption of the UNDRIP as the CSOs in indigenous rights coalitions are more homogenized. The State has a responsibility to ensure the promotion and protection of Human Rights principles, norms and instruments ; CSOs and NGOs have a role to play through its struggles and participation in Human Rights culture.⁵⁹

Conclusion

The struggle for access to justice among indigenous peoples in Africa is multifaceted, involving both legal and cultural dimensions. While the African legal framework, including institutions such as the African Court and the African Commission, offers avenues for addressing grievances, the gap between legal recognition and practical implementation remains a significant challenge. Indigenous peoples continue to face barriers in accessing

⁵⁸ Mubiala (2005, pp. 92,93)

⁵⁹ Zeleza (2007, p. 491), CSOs have expanded, and in the last two decades, Human Rights NGOs have emerged as powerful instruments in Africa's drive for the promotion of Human Rights and development.



both formal and informal justice systems, often due to socio-political marginalization, historical injustices, and limited awareness of their rights. Informal justice mechanisms, such as community-based dispute resolution, provide a more culturally relevant avenue for seeking justice, yet they are often under-recognized or inadequately supported by the States. Restorative justice, with its emphasis on healing and community reconciliation, presents an alternative approach that is more aligned with the values of many Indigenous communities in Africa. However, its broader application faces challenges in terms of state support and integration within formal legal frameworks. To improve access to justice for indigenous peoples, both African and international legal systems must work collaboratively to ensure that indigenous rights are not only recognized in theory but also implemented in practice. This involves legal reforms, strengthening indigenous representation within formal legal bodies, and fostering greater awareness and respect for indigenous customary law and cultural practices. In doing so, Africa can move closer to a more inclusive and just legal system that honors the rights and dignity of its indigenous peoples.

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