Minority rights, democracy and development: The African experience

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Summary

The article argues that, in spite of recent attempts to marry human rights to development, such a marriage remains one of convenience or, rather, to the inconvenience of minority or indigenous peoples who are the focus of discussion. The article asserts that, contrary to the claim that the relationship between rights and development is non-existent to begin with, such a relationship does exist. The crucial issue, however, is the category of people who are allowed to enjoy rights to development and to enjoy the fruits thereof. This analysis is grounded in three types of relationship between rights and development. These are identified as positive, negative and passive relationships. The article contends that the positive relationship is captured and colonised by the political and economic elite who control and direct how and when those under their control should benefit from a negative or passive relationship approach between rights and development. It is contended that the negative and positive relationship perspectives have continued to dominate the dynamics of economic development from the Enlightenment era, through colonialism, post-colonialism and the globalisation era. In the context of promoting effective minority rights which lies at the heart of peace and stability in Africa, the article suggests a re-visioning of the relationship between rights, democracy and development in Africa which challenges the current notion of 'market democracy', and 'liberal international orthodoxy', among other mantras. The analysis tackles ways in which the effective promotion of minority rights can be realised.

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1   Introduction

The idea that the enjoyment of rights is a means to facilitate and promote development (or 'progress') was first recognised during the post-Renaissance era in European history.[1] It was postulated that mankind, by use of reason and science, could progress. According to Nabudere, 'rapid developments' and 'great advances' in technological progress were achieved as a result of the rise of the natural sciences.[2] The natural sciences, in turn, flourished due to the free-thinking environment which reigned at the time and allowed the intellectual movement to burgeon. This environment emerged through the contribution of the then-emerging middle class to the destruction of the power of the church and imperialists whose interests were in landed feudalism.[3] Thus, rights became a useful tool to promote progress and development. This era of progress led to the rise of technological development,[4] which saw a mechanistic image of scientific positivism (based on rationality and systematic observation) playing a pivotal role in shaping the paradigm of Western thought and technological development.[5]

Three approaches to the relationship between rights and development may be identified: the positive, negative and passive approaches.

The enjoyment of rights and its role in promoting progress and development establish a *positive* relationship approach between rights and development. This relationship is anchored in the proposition that rights serve as a gateway to attaining sustainable development by providing a congenial atmosphere where people will have the opportunity to realise their potential and capacities.

However, rights discourse and praxis were appropriated by the powers-that-be and exercised against slaves, the poor, workers and women in general. This practice relied on a *negative* relationship approach between human rights and development. The relationship, from a neo-liberal perspective, is that human rights are not crucial

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1   Precisely during the time of the Enlightenment when the idea of progress is said to have emerged. See L Baeck 'Shifts in concepts and goals in development' in UNESCO *Goals of development* (1987) 37 42. Also, GG Iggers 'The idea of progress: A critical reassessment' (1965) 71 *American Historical Review* 1-17.

2   D Nabudere *The political economy of imperialism: Its theoretical and polemical treatment from mercantilist to multilateral imperialism* (1977) ii.

3   J Berting 'Technological impacts on human rights: Models of development, science and technology, and human rights' in CG Weeramantry (ed) *The impact of technology on human rights: Global case-studies* (1993) 13 19.

4   According to Berting, the subduing of nature in the Jewish and Christian religions helped lay the foundation for the rise of Western technology; Berting (n 3 above) 21.

5   As above.

to those who produce wealth for capitalism, because wealth would trickle down to everybody upon the attainment of development.

Yet, the gateway to the enjoyment of rights should not be completely closed. Where it is observed that morale among the workers is low, production is on the decline as a result of abuses inflicted on the people, agitation is growing and bottled-up resentment is likely to explode, some piece-meal human rights reforms shall be implemented to bring order and stability. Upon a return to the normal situation, however, the original position should be reverted to. This is the *passive* relationship between rights and development approach which sees human rights as a necessary component of development only when development is threatened or disrupted.[6]

Applying these models to the situation which existed in Europe during the period of Enlightenment, it is noted that the negative and passive types were enjoyed by the underclass – workers, the poor, women, slaves and children (working as child labourers), but not the positive type. That is, the enjoyment of rights was restricted to those whose labour caused capitalism to thrive.[7]

In the same way, this class of people was not allowed to take part in the then-emerging democratic process. As a matter of fact, the classical liberal theory was dedicated to 'the individual right to unlimited acquisition of property, to the capitalist market economy, and hence to inequality, and it was feared that these might be endangered by giving votes to the poor'. Macpherson adds that liberal theory, like the liberal state, was not at all democratic.[8] It is small wonder that Bentham, though supportive of the idea of individual rights, described the idea of natural rights as 'nonsense upon stilts'.[9] Indeed, Bentham postulated that equality and productivity do not go together: Security of unequal property was an incentive for capital accumulation which was necessary to engender productivity. Also, a large labour force, whose incentive was fear of starvation, was a necessary prerequisite for the market to maximise productivity.[10]

6   K Appiagyei-Atua 'Developing indigenous perspectives on human rights as Akan contribution to international human rights law in the context of development' DCL dissertation, McGill University, 2000.

7   CB Macpherson 'Politics: Post-liberal democracy?' in R Blackburn (ed) *Ideology in social science* (1976) 17.

8   Macpherson (n 7 above) 19.

9   J Bentham *et al* (eds) *Rights, representation, and reform: Nonsense upon stilts and other writings on the French Revolution* (2002) 291.

10 Macpherson (n 7 above).

2   Application of the negative and passive relationships in Africa

When capitalist adventurism extended from Europe to the shores of Africa and the Americas, the local inhabitants who were encountered were considered not human but 'savage populations'.[11] Moreover, their lands were considered *terra nullius* and open for discovery and/ or conquest and annexation.[12] In addition, their cultures were labelled as heathen, backward and barbaric, needing to give way to European civilisation. As noted by Gozzi:[13]

> It was held, in particular, that the property rights of non-civilised peoples, grounded in the concept of 'occupation', could not be asserted against the 'sovereignty' of the European nation states. So it was the idea of national sovereignty that figured prominently in European international law, defining relations among Western states and legitimising their dominion over the lands taken by colonial expansion.

However, in the case of the Ottoman empire, China and Japan were admitted into the then exclusive European club of international law by way of an agreement (flowing from the 1856 Treaty of Paris) whereby they would grant the international minimum standard of treatment for aliens coming from Europe into their territories.[14] These aliens were mainly the economic and political elite of Europe who could not bear to live while enjoying a lower standard of rights enjoyment while pursuing their economic interests outside the confines of their territories.

On the other hand, a different set of rules was applied in the African context. Rather, the colonialists sought to deny and suppress any notion of rights belonging to indigenous African peoples. Labelling Africans as savages gave Europeans the licence to engage in their Christianising and civilising mission, supposedly with the goal of eradicating all notions of supposed barbarism in the African, replacing it with European notions of rights, democracy and the rule of law and

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11   P Fiore 'La science du droit international: Horizons nouveaux' (1909) 16 *Révue Générale de Droit International* 478.

12   See, eg, the International Court of Justice Advisory Opinion on Western Sahara para 80, in which it noted: 'Whatever differences of opinion there have been among jurists, the state practice of the relevant period [1884] indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*. It shows that in the case of such territories, the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers. Such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*.'

13   G Gozzi 'History of international law and Western civilisation' 20 April 2007 SSRN: http://ssrn.com/abstract=996239 or http://dx.doi.org/10.2139/ssrn.996239 (accessed 31 March 2012).

14   As above.

Christianity. In reality, however, the motive was to promote hegemony and empire building.

In the case of the Gold Coast (now Ghana), for example, under George Maclean's administration, a number of coastal communities had submitted voluntarily to British protection, whereupon that which became known as the Bond of 1844 was signed between the British and local chiefs. This document, which obliged local leaders to submit serious crimes, such as murder and robbery, to British jurisdiction, laid the foundation in law for subsequent British colonisation of the coastal area. The Bond of 1844 stated as follows:[15]

> Whereas the power and jurisdiction have been exercised for and on behalf of Her Majesty the Queen of Great Britain and Ireland, within diverse countries and places adjacent to her Majesty's forts and settlements on the Gold Coast, we, the chiefs of countries and places so referred to adjacent to the said forts and settlements, do hereby acknowledge that power and jurisdiction, and declare that the first objects of law are the *protection of individuals and property.*

That is, the main issue of rights protection for the locals was protection against abuse by their fellow indigenous peoples, but not protection against violations by the colonialists. In the circumstances, the best the colonialists could do was to allow the 'non-civilised' people to be given 'just treatment', as reflected in the League of Nations requirement on colonial authorities in mandatories.[16] Humane treatment, however, was not being treated with humanity, dignity and respect as required under human rights law.

All these reflect a negative application of the relationship between rights and development. As a result, violations of human rights in the colonies were rife. According to Howard, in the Gold Coast,[17] civil and political rights, as the contemporary world now defines them, were certainly not practised under colonial rule. She writes:[18]

> Indeed, the British initially opposed UN passage of the Universal Declaration of Human Rights because they were afraid that the declaration would oblige them to implement those rights in their colonies.

3   Birth of minorities in Africa through colonialism

Minority issues in Africa are strongly associated with colonialism. While not discounting the fact that minority groups existed in the pre-colonial period, it is also on record that some dominant ethnic groups

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15   My emphasis.

16   See art 23(b) of the Covenant of the League of Nations.

17   After independence in 1957, Gold Coast was changed to Ghana.

18   RE Howard *Human rights in Commonwealth Africa* (1987) 9.

gave protection to minority groups in its territory.[19] For example, among the Asante, a chief or king, in his oath of ascension to the throne, includes in his oath the promise not to disclose the origins of his subjects to avoid discrimination against them.[20]

However, the advent of colonialism created several new minority groups and exposed pre-colonial minority groups to new and intractable challenges through efforts to foster and facilitate the development of the colonial economic enterprise. First, minority groups were created through the policy of divide and rule whereby some members of the colonised population were 'raised' to a higher status than others, having been recognised as 'more human' or more prone to adopting European behaviours, lifestyles and mannerisms than others. These were given preferential treatment over their 'less human' brethren. The 'less human' brethren became minority peoples. A good example is the way in which Belgian colonial authorities treated the numerically-inferior Tutsis as genetically and physically superior over the numerically-superior Hutus who, as a result, became minorities under international law.[21]

Second, another group of minorities evolved from those communities who wanted to maintain a subsistence lifestyle as hunters, gatherers and nomads[22] which did not conform to Locke's theory of property acquisition – that is, 'mixing one's labour with the soil' to produce wealth.[23] As a result, they were side-lined because they were not considered economically productive and therefore attractive to colonialism. It was such communities whose economic activities were considered stumbling blocks in the realisation of modernisation.[24]

Third, where mineral resources were found, the locals were forcibly driven off or subjected to all manners of abuse for them to relinquish control over their lands.[25] Fourth, because of the nature of their political and social set-up, when it came to using local authorities to

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19 S Adenito 'Ijebu a B'Eyan ("Ijebu or human being?"): Nineteenth century origins of discrimination against Ijebu settlers in colonial Ibadan, Nigeria' in MU Mbanaso & CJ Korieh *Minorities and the state in Africa* (2010) 143.

20 K Arhin *Traditional rule in Ghana: Past and present* (1985); also, GN Ayittey *Africa betrayed* (1992).

21 P Uvin 'Ethnicity and power in Burundi and Rwanda: Different paths to mass violence' (1999) 31 *Comparative Politics* 253.

22 Eg, the pygmies of the Great Lakes Region, the San of Southern Africa, the Hadzabe of Tanzania and the Ogiek, Sengwer and Yakuu of Kenya.

23 J Locke *Two treatises of civil government* (1988).

24 Refer to, eg, a speech by President Festus Mogae of Botswana in 2006 during the 40th anniversary of the country's independence in which he was quoted by the UN as saying: 'We should avoid setting up exclusive organisations whose membership is drawn from one tribe ... Our goal of nation building needs to prevail over narrow tribal sentiments.'

25 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

implement colonial policies such as 'indirect rule',[26] the authorities found it more expedient to deal with the 'more civilised brethren' with organised political structures. As a result, the 'more civilised' saw the others as inferior and treated them as such, during and after colonialism. Fifth, in communities whose lands could not produce cash crops such as cocoa, coffee, tea, and such that were in demand in Europe, nor minerals, a deliberate policy to create labour reserves was implemented to trigger labour flow to centres of commercial, farming, mining and industrial activities. In the case of Ghana, the northern sectors were neglected, occasioning men and women to stream down south to work as labourers and ending up in what we call *zongos*.[27]

Six, some were driven off their lands to live as 'reserves residents' or as 'squatters' in order to give their lands away to support settler colonialism.[28] Seven, in a few territories, such as modern-day South Africa, Zimbabwe, Namibia and Botswana, the colonialists practised settler colonialism which meant that the local peoples all became minorities.[29] Eight, as a result of the haphazard manner in which the colonial borders were carved during the Berlin Conference of 1884-1885,[30] some major ethnic groups found themselves split into two or more and joined to different neighbouring countries. Some of those who turned out to be inferior in numbers ended up as minorities in the new countries they were joined to. Examples are the Touaregs in Mali, Niger, Burkina Faso, Libya, and the Ewes in Togo and Ghana. In sum, quotes Abraham:[31]

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26 Indirect rule has been defined by Dr Lucy Mair as 'the progressive adaptation of native institutions to modern conditions'. See KA Busia *The position of the chief in the modern political system of the Ashantis* (1968) 105.

27 D Pellow *Landlords and lodgers: Socio-spatial organisation in an Accra community* (2008).

28 In both cases, communities enjoyed a severely limited 'right of occupancy' over their lands. A colonial agent is quoted by Okoth-Ogendo: 'I am afraid that we have got to hurt their (the natives') feelings, we have got to wound their susceptibilities and in some cases I am afraid we may even have to violate some of their most cherished and possibly even sacred traditions if we have to move natives from land on which, according to their own customary law, they have an inalienable right to live, and settle them on land from which the owner has, under that same customary law, an indisputable right to eject them.' HWO, Okoth-Ogendo *Tenants of the crown: Evolution of agrarian law and institutions in Kenya* (1991) 58. See A Barume 'Indigenous battling for land rights: The case of the Ogiek of Kenya' in J Castellino & N Walsh (eds) *International law and indigenous peoples* (2004) 363 365.

29 See Cobo's definition of minorities below.

30 Umozurike comments: 'The most irrelevant factor in deciding the fate of the continent was the Africans themselves who were neither consulted nor appraised of the conference.' UO Umozurike 'International law and colonialism in Africa' (1979) 3 *East African Law Review* 47, cited in A Anghie *Imperialism, sovereignty and the making of international law* (2005) 91.

31 G Abraham 'Lines upon maps: Africa and the sanctity of African boundaries' (2007) 15 *African Journal of International and Comparative Law* 61.

The 80 000 kilometres of boundaries bequeathed to Africa by its sometime colonial masters have contributed significantly to Africa's many problems: They unite those who should be divided and divide those who should be united; they limit access to resources that were once part of a shared heritage.

4   Development, modernisation theory and their impact on minorities

Modernisation theory evolved as a popular economic and political concept by neo-liberal economists when it became evident that colonialism could not be sustained and that political independence was inevitable.[32] It was adopted as a model of development packaged for implementation as a means by which colonialism could escape blame for the negative development impact generated by the unrelenting exploitation and plunder of the resources of the colonised. Thus, it became the new development model for implementation in colonised states in order not to sever the centre-periphery relations[33] that capitalism established through colonialism. It was also a means for the colonialists to act as the 'new redeemers', though practically responsible for the problems created in the first place.

This notion of development was imposed on the decolonised states by the US.[34] According to Esteva, the US opened the era of development for the world when, on assumption of office in 1949, President Truman set the policy of embarking 'on a bold new program for making the benefits of American scientific advances and industrial progress available for the improvement and growth of underdeveloped areas'.[35] The old imperialism – exploitation for foreign profit – was to be replaced by 'a program of development based on the concepts of democratic fair dealing'.[36] This supposedly new development paradigm was to move the relationship from the negative to the positive, but in reality it was simply old wine in a new bottle.

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32   W Zapf 'Modernisation theory and the non-Western world' paper presented to the conference 'Comparing processes of modernisation', University of Potsdam, 15-21 December 2003 http://bibliothek.wzb.eu/pdf/2004/p04-003.pdf (accessed 20 April 2012). Also see CK Wilber & K Jameson 'Paradigms of economic development and beyond' in CK Wilber & K Jameson *Directions in economic development* (1975) 7.

33   See, eg, AG Frank 'The development of underdevelopment' in JD Cockcroft *et al* (eds) *Dependence and underdevelopment* (1972).

34   L Baeck 'Shifts in concepts and goals in development' in UNESCO *Goals of development* (1988) 42 43. Other Western states that followed similar policies include Britain, France, Belgium, West Germany, Portugal, Spain, etc.

35   HS Truman Inaugural Address, 20 January 1949, in *Documents on American foreign relations* (1967). See G Esteva 'Development' in W Sachs (ed) *The development dictionary: A guide to power as knowledge* (1992) 6.

36   As above.

The effect of this 'development statement' was that from that period onwards, the Western model of progress was foisted on the 'backward' and 'underdeveloped' countries as their only escape route to freedom, civilisation and improvement of their lot.

Rostow, for example, outlined four stages of evolution that all countries would have to go through towards the attainment of economic growth. First, the 'traditional' stage; the 'preconditions of modernisation' is established in the second stage; third, the 'take-off' stage; and fourth, the 'drive to maturity'.[37] One salient feature of this model of development is the notion that economic growth, based on industrialisation and catapulted by science and technology, would spawn a gradual uni-dimensional evolution towards a more open global society imbued with some peculiar characteristics.[38] Development is thus to be measured by the level of technological advance as attained in a 'high mass consumption' society. This model gives the state a prominent role to play as the agent 'for advancing the human and economic dimensions of development through its exclusive prerogatives in collective problem-solving and conflict resolution'.[39]

The process of modernisation had a devastating effect upon Africans, and on minority groups in particular. One example is through the policy of homogenisation and integration of colonised economies into the global economy and amalgamation of different ethnic entities to form the independent nation states of Africa.

At the time of independence, African leadership adopted this policy by seeking to consolidate communities of people into the nation state by abandoning its original agitation during the anti-colonial struggle for a Commonwealth of Free African States which called for the abolition or adjustment of 'artificial barriers and frontiers drawn by imperialists to divide African peoples'.[40] This approach would have helped to give better protection for minorities.

However, under the Charter of the then Organisation of African Unity (OAU), minority rights issues were not put on the agenda. All references to 'peoples' were interpreted to mean a whole people, a country as a whole, with no apparent reference to minorities. Moreover, the principle of *uti possidetis* was affirmed in the 1964 OAU

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37 WW Rostow *The stages of economic growth: A non-communist manifesto* (1960).

38 These include (a) increasing individual occupational and social mobility together with a growing equality of educational opportunities; (b) a fading away of differences based on traditional differences and life-styles; (c) a concomitant growth of the middle classes as a consequence of the increasing demand for highly-skilled and professional workers; and (d) consequently, a decrease in collective types of antagonism, especially of class struggle.

39 S Shivakumar 'The constitutional foundations of development workshop in political theory and policy analysis' Indiana University, Bloomington, 2.

40 Abraham (n 31 above) 68.

Cairo Declaration on Border Disputes Among African States,[41] which sought to legitimise national borders inherited from colonial rule. Thus, Julius Nyerere, the first President of Tanzania, is quoted as saying that '[Africans] must be more concerned about peace and justice ... than we are about the sanctity of the boundaries we inherit'.[42] In addition, sovereignty and territorial integrity were held sacrosanct, underpinned by the principle of non-interference in internal affairs.[43]

It was further argued that to preserve national unity, the community had to be incorporated into the state or the community equated to the state. Thus, for example, article 4 of the OAU Cultural Charter for Africa states:[44]

> The African states recognise that African cultural diversity is the expression of the same identity; a factor of unity and an effective weapon for genuine liberty, effective responsibility and full sovereignty of the people.

The pursuit of this policy meant for most minority groups 'internal colonialism'. They were and some are still treated as second-class citizens. They continue to struggle for recognition of their land rights; some remain on reserves carved out for them by the colonial authorities, and so on. Some are still considered 'backward and inconvenient entities' that pose as stumbling blocks to development and need to be assimilated or denied citizenship status. They have been killed, dispossessed or forced to assimilate in the process of nation building and national economic growth.[45]

Also, the African Commission on Human and Peoples' Rights (African Commission) describes the indigenous peoples of Africa, *inter alia*, as follows:[46]

> They often live in inaccessible regions, often geographically isolated, and suffer from various forms of marginalisation, both politically and socially. They are subjected to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalisation violate their human rights as peoples/communities, threaten the continuation of their cultures and ways of life and prevent them from being able to genuinely participate in decisions regarding their own future and forms of development.

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41 *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, judgment of 22 December 1986, ICJ http://www.icj-cij.org/icjwww/ (February 2000).

42 Abrahams (n 31 above).

43 See arts III (2) & (3) of the defunct OAU Charter.

44 Adopted at the 13th ordinary session of the OAU in Port Louis, Mauritius, 2-5 July 1976.

45 R Barsh 'Socially-responsible investing and the world's indigenous peoples' http://www.firstpeoples.org/corporate/background.htm (accessed 17 April 2012).

46 African Commission on Human and Peoples' Rights *Indigenous peoples in Africa: The forgotten peoples? The African Commission's work on indigenous peoples in Africa* (2006).

In the context of the rights-development relationship approach, it can be argued that African states unremittingly pursued the negative relationship approach in its dealings with its citizenry, particularly minorities. They became the inheritor state by maintaining the repressive colonialist policies and its means to maintain order and cohesion. Among others, it was contended that a strong hand was needed to propel economic growth and give room for the exercise of civil and political rights. Politically, it was argued that the granting of human rights would lead to the unleashing of centrifugal forces that may occasion the collapse of the new fragile nation state.[47]

5 Minority rights protection at the international level

Attempts have been made in the past by some scholars to define minority groups. However, elements of these definitions were found problematic in its application to minorities in the African context. Referring to one definition of indigenous people proposed by Francesco Capotorti,[48] one notices that there are some major shortfalls in its application to Africa. For example, the definition contains the idea of two main groups, one dominant and other non-dominant. However, looking at the ethnic composition of most African states, there are several different minority groups located in the same country, with one (or sometimes a few more) as the dominant and the rest in non-dominant status.

Another important *lacuna* that is significant for consideration in terms of minority rights in Africa is the notion that the idea of the preservation of culture, traditions, and such is not pursued in a vacuum or in isolation from the issues of survival and development. It is therefore vitally important to attach culture and tradition to the mode of economic survival and development of the group. Such *lacunae* are taken for granted in the leading literature on minority rights which gives only scant attention to minority rights issues in Africa. Ethnicity is portrayed as the principal cause of civil wars in Africa. However, the ethnic factor is only one of the factors, if not simply the immediate cause. Remote factors are mainly economic and political: access to scarce resources and political power.

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47   Y Ghai 'Human rights and governance: The Asian debate' (1994) 15 *Australian Year Book of International Law* 1.

48   UN Special Rapporteur on Minority Rights: 'A group, numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language' Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities UN Document E/CN 4/Sub 2/384/Add 1-7 (1977).

Looking at José Martínez Cobo's definition,[49] it is noted that in the African context, 'indigenousness' is not always tied to aboriginal status or original title to land. There are other traditional means of tracing common descent or ancestry, such as through myths and fables. Further, the definition limits itself to territories that have suffered from settler colonialism whereby colonialists are considered the dominant group and the locals as the minority. But this situation only applies to a few countries in Africa.

The international community has taken key steps to promote minority rights through the promulgation of various international instruments, including the Convention on the Prevention and Punishment of the Crime of Genocide;[50] the International Convention on the Elimination of All Forms of Racial Discrimination;[51] Convention (No 169) Concerning Indigenous and Tribal Peoples;[52] the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities;[53] and the UNESCO Universal Declaration on Cultural Diversity.[54]

The latest addition to the list is the United Nations Declaration on the Rights of Indigenous Peoples.[55] This instrument is a comprehensive document which seeks to give effective protection and promotion of the rights of minorities. Among others, the Declaration recognises external self-determination (under articles 3 and 4 of the Declaration) if exercised in line with the demands of the UN Charter (under article 46). Article 4, for example, stipulates:

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49 Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. His definition is: Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of that society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. Their historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors': Occupation of ancestral lands, or at least parts of them; common ancestry with original occupants of these lands; culture; language; residence in certain parts of the country, or in certain regions of the world; and, other relevant factors. Study on the Problem of Discrimination against Indigenous Populations, UN Doc E/CN 4/Sub 2/1986/Add 4.

50 Approved and proposed for signature and ratification or accession by General Assembly Resolution 260 A (III) of 9 December 1948.

51 Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965.

52 Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its 76th session.

53 Adopted by General Assembly Resolution 47/135 of 18 December 1992.

54 Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation at its 31st session on 2 November 2001.

55 Adopted by General Assembly Resolution A/61/L.67 of 13 September 2007.

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

However, as noted above, Africans are opposed to external self-determination for African minorities. This position has been reaffirmed by the African Commission in its advisory opinion on the United Nations Declaration on the Rights of Indigenous Peoples,[56] in which it noted:[57]

> The ACHPR has interpreted the protection of the rights of indigenous populations *within the context of a strict respect for the inviolability of borders and of the obligation to preserve the territorial integrity of state parties,* in conformity with the principles and values enshrined in the Constitutive Act of the AU, the African Charter on Human and Peoples' Rights (the African Charter) and the UN Charter.

However, Africa's position is in direct conflict with the African Commission's own decision in the *Katangese* case, in which it decided:[58]

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

That is to say, if two conditions had been met, namely, violations of human rights which seek to compromise the territorial integrity of a country and where the minority group is denied the opportunity to participate in governance, then the minority group could exercise its right of self-determination. Because these situations had not been fulfilled in the case of the Katangese within Zaire, it meant it could only exercise a variant of internal self-determination.

This view reflects the proper position under international law, which is affirmed in *The Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Kosovo* case), in which the UN General Assembly sought an advisory opinion regarding the legality of Kosovo's unilateral declaration of independence. The ICJ noted that[59]

> [t]he illegality attached to the declarations of independence ... stemmed not from the unilateral character of these declarations as such, but from

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56   Adopted by the African Commission on Human and Peoples' Rights at its 41st ordinary session held in May 2007 in Accra, Ghana.

57   African Commission on Human and Peoples' Rights advisory opinion (n 46 above) para 6 (Commission's emphasis).

58   *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) para 6.

59   Advisory Opinion of 22 July 2010, para 81.

the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character *(jus cogens)*.

Africa should therefore amend its rigid stance to reflect that of international law which supports a positive relationship between rights and development for minorities. Also, to facilitate the monitoring of minority rights, Africa has to adopt the 'violations approach' proposed by Chapman.[60] Among the approaches proposed by her which are of direct relevance to our discussion, contains violations relating to patterns of discrimination.[61] Articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulate that violations related to discrimination represent a fundamental breach of the Covenant,[62] which cannot be excused on grounds of being subject to progressive realisation. Also, under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[63] apart from the usual obligation on states to promote non-discriminatory policies, states are also obliged to take proactive steps to eliminate discrimination against minorities through affirmative action.[64]

6   Democracy and minority rights

Though liberal democracy and it ideology have helped to sustain the West, these concepts have not proven effective and workable in most African societies. One fundamental factor is the imposition of its majoritarian vision of the liberal international orthodoxy,[65] instead of a

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60   AR Chapman 'A "violations approach" to monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23.

61   The other two relate to state violations resulting from government actions, policies and legislation and the state's failure to satisfy minimum core obligations of enumerated rights.

62   Art 2(2) calls on state parties to guarantee that the rights enumerated in the Covenant 'will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Art 3 further amplifies that state parties must 'undertake to ensure the equal rights of men and women to the enjoyment of all economic, social, and cultural rights set forth in the present Covenant'.

63   Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965 and entered into force 4 January 1969, in accordance with art 19.

64   Art 1(4).

65   According to Rothchild, a majoritarian vision of liberal internationalist orthodoxy 'calls for individual (but not group) rights, separation of powers, party competition, and tolerance of diversity can at times also be extremely rigid and conformist'. D Rothchild 'Liberalism, democracy and conflict management: The African experience' paper presented at Conference on Facing Ethnic Conflicts: Perspectives from Research and Policy Making, Bonn, Germany 14-16 December 2000 http://www.zef.de/download/ethnic_conflict/rothchild.pdf (accessed 31 March 2012).

pluralistic, multi-ethnic-based notion of democracy, which recognises and takes into account the interests and wellbeing of minorities. Thus, attempts by Western states to impose its brand of democracy on non-Western states have not been in the best interests of minority groups and for the sake of political stability and social cohesion, particularly in the African context.

What makes the democratic idea even more precarious is the fact that it has been watered down to the notion of 'market democracy' which aims more at ensuring the efficacy of the democratic structure to promote market efficiency and does not support the positive rights-development relationship.

Judging by Africa's past record of a lack of recognition of minority rights and the fact that the new Constitutive Act of the African Union (AU) does not deal with minority rights issues, unless a situation degenerates into a crisis,[66] this type of democratic arrangement does not bode well for the future stability and development of the African continent.

Rothchild cites the Burundi example where, at the urging of the US and various non-governmental organisations (NGOs), democratic elections were called for and held in Burundi from 1993 to 1994 in an effort to bring peace between the Hutus and Tutsis. However, the plan failed. Instead, it paved the way for the resumption of intergroup violence in Burundi. The first reason for the failure of the Burundi plan was that ethnic differences were exploited by the local elite who have always felt threatened by regular political change through the ballot box. The second reason is that political participation was emphasised over and above the formation of strong civic institutions. Rothchild notes:[67]

> Clearly, to the extent this preference for liberal democracy becomes an orthodoxy and fails to adjust to local realities and alternative visions, it can sometimes complicate the process of managing conflict in ethnically-divided societies.

Indeed, democracy is supposed to be empowering when people are able to transcend their personal interests and meet as a group to articulate needs, assess capacities, impose duties and make rights claims or assert the same in order to deal with their needs. It in turn involves finding, through this interaction, the means to interpret their experiences, the injustices and stumbling blocks to their development and realise self-hood and contribute to community development. The process involves the exercise of the right to freedom of association, movement, assembly, and the like, which helps people to acquire agency, recover selfhood and earn self-confidence. This is the positive rights-development relationship in action.

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66 Under art 4(h), the Union reserves the right to intervene in a member state 'pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity'.

67 Rothchild (n 65 above) 5.

However, where sovereignty is vested in an authority 'that proclaims its competence and willingness to settle all issues of collective action facing the society',[68] democratic governance becomes unitary and centralised in focus. It then loses its relevance for application in communities that are multi-ethnic in composition and that have serious minority rights issues to grapple with.

This brings us to the relationship between respect for minority rights, peace and development. The contention is that the suppression of minority rights compromises peace and that the absence of peace in turn impacts negatively on development. In other words, the rights-development relationship in this respect will be a negative one. However, this policy is what many African states have pursued against minorities.[69] Therefore, attempts by African states to suppress indigenous minority rights with the hope of attaining stability and development have failed because the negative rights-development relationship is unsustainable. In its report on conflicts in Africa, the Committee on Elimination of Racial Discrimination expressed[70]

> its alarm at the growing mass and flagrant violations of human rights of the peoples and ethnic communities in Central Africa, in particular, massacres and even genocide perpetrated against ethnic communities, and resulting in massive displacement of people, millions of refugees, and ever deepening ethnic conflicts.

As well, as noted by Christopher J Bakwesegha, a representative of the OAU:[71]

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68   S Shavikumar http://www.indiana.edu/~workshop/wow2/publications/jun1699. pdf (accessed 31 March 2012).

69   African Commission on Human and Peoples' Rights (n 46 above).

70   The Committee on the Elimination of Racial Discrimination, Statement on Africa: 20/08/99 A/54/18 para 24 (Other Treaty-Related Document) 55th session 2-27 August 1999 reiterating its recent decisions, declarations and concluding observations, such as decision 3 (49) of 22 August 1996 on Liberia; Resolution 1 (49) of 7 August 1996 on Burundi; decisions 3 (51) of 20 August 1997, 1 (52) of 19 March 1998, and 4 (53) of 18 August 1998 on the Democratic Republic of the Congo; the declaration of 13 March 1996 on Rwanda; the concluding observations on Rwanda of 20 March 1997; the concluding observations on Burundi of 21 August 1997; decisions 4 (52) of 20 March 1998, 5 (53) of 19 August 1998 and 3 (54) of 19 March 1999 on Rwanda; decision 5 (54) of 19 March 1999 on the Sudan, which were the results of the Committee's consideration of the ethnic conflicts in these state parties under its early warning and urgent action procedures within the context of the Convention. It also referred to the Secretary-General's report on 'Causes of conflict and the promotion of durable peace and sustainable development in Africa' (A/52/871-S/1998/318 dated 13 April 1998), which noted, among others, that 'the main aim, increasingly, is the destruction not just of armies but of civilians and entire ethnic groups'.

71   It is on record that in the last 30 years, more than 30 wars have been fought in Africa. In 1996 alone, 14 of the 53 member states of the OAU were affected by armed conflicts, accounting for more than half of war-related deaths worldwide and resulting in more than eight million refugees and displaced persons. Most of these states bear an ethnic dimension. CJ Bakwesegha Keynote Address on 'The Rise of the Ethnic Question' Bonn, Germany, 13-16 December 2000.

> There is hardly any country in Africa that has been spared the wrath of ethnic conflicts in terms of loss of lives, destruction of property as well as human displacement.

The situation in the Niger Delta is instructive. The strong-arm tactics employed by the Nigerian government as well as Shell to deal with the disruption of the work of Shell by minority groups in the Niger Delta have resulted in the exacerbation of Nigeria's chronic fuel shortages as well the death of thousands of people through explosions while trying to take out fuel from the leaking pipes, extra-judicial executions and the wanton invasion and destruction by military task force personnel.[72] Shell has also reported increasing theft, or 'bunkering' of crude oil from its facilities, resulting in the loss of up to 32 000 barrels per day of production.[73] The Nigerian government has undertaken a number of measures to appease the aggrieved Niger Delta citizenry and calm the situation. However, typical of the application of the passive relationship between rights and development, this has not worked.

Minority Rights Group International emphasises the positive link between minority rights and development in the following terms:[74]

> What the development agencies overlook is the added value of giving special consideration to minorities – and their rights – in wider development policies .... Incorporating minorities' rights into the development process, and making the fulfilment of these rights a goal of development, will strengthen the success of development. Minority rights, if fully respected, are a useful tool for overcoming many of the key barriers to development already identified by development practitioners ... Mainstreaming minority rights in development co-operation will not only provide for improved human development for persons belonging to minorities; enforcement of minority rights can mean better development for all as a result of more democratic governance, greater stability and new policies to target development funds more effectively.

In such contexts, polycentric systems of governance are the preferred choice to realise this goal. Polycentric designs for governance[75]

> stress processes of self-co-ordination [and co-operation] among multiple, independent, and overlapping problem-solving units, with each capable of making adjustments to other such units, *as co-ordinated through a general system of rules*.

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72   In the most serious such fire, in October 1998, more than one thousand people died in Jesse, Delta State, but similar explosions have continued to take place. Several hundred people died in July 2000 in a fire in Adeje, near Warri, Delta State, and dozens died from smaller explosions throughout the year. HRW 'Update on violations of human rights in the Niger Delta' http://www.hrw.org/backgrounder/africa/nigeriabkg1214.htm (accessed 17 April 2012).

73   As above.

74   'Minority Rights Group International, Minority Rights and Development: Overcoming exclusion, discrimination and poverty' (2002) executive summary of paper submitted to the UN Working Group on Minorities.

75   As above.

This affords problem-solving units within a polycentric system greater discretion to solve local problems locally.[76] It also gives room for the realisation of the potential of the local people, and thereby to acquire agency, self-confidence and the recognition of their worth and dignity. For that matter, it is not merely a question of recognising the underdevelopment and poverty of minorities and seeking to help them; it is a question of giving them space to contribute to helping themselves and the community as a whole.

In the case of *Pushpanathan v Canada*, the Supreme Court of Canada noted that 'a polycentric issue is one which involves a large number of interlocking and interacting interests and considerations'.[77] The Court explained:[78]

> While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint.

7   Conclusion

The article has sought to analyse the critical relationship that exists or should exist between human rights, democracy and development, particularly as it affects minorities, and to contend that the so-called relationship between them has remained in the negative/passive and not crossed the line to the positive. Although the recognition of the need for a positive relationship approach is present, its enjoyment is only made available to those who tread the corridors of powers – be it multinational corporations, heads of government or local political elites. Thus, the notion that the positive relationship has been established with the fall of communism is being touted largely for political reasons and as a public relations gimmick. Human rights rhetoric is used as a façade to deflect criticism and as a means to actually facilitate increased exploitation of an already exploited people, particularly minorities.

It notes further that it is troubling that African states have been manipulated to go along with various forms of development agendas by Western states, even in the New Partnership for Africa's Development (NEPAD) project. This is reflected in, for instance, NEPAD's subscription to the 'global standards of democracy' which do not take into account a multi-ethnic approach to democracy. The same goes for the African

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76   n 74 above, 12.

77   *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 para 36.

78   As above.

Charter on Democracy, Elections and Governance[79] which calls for, among others, 'universal values and principles of democracy and respect for human rights'.[80]

Moreover, African leadership has only given indirect attention to minority rights in the AU's Constitutive Act. With the realisation by the AU of the relationship between a lack of democratic space and civil wars and the subsequent impact of that on development,[81] one would have expected the AU to wake up to the realities of the times and to give due recognition and respect to a pluralistic approach to democracy.

A positive approach to ethnicity in African politics is needed. It is the only way to constructively deal with the ethnic dimension exploited by African leaders and which has accounted for almost all of the 30 or more wars that have been waged in Africa since the formation of the OAU, including both inter-state and intra-state conflicts.

The type of democracy that is prescribed for Africa is not only tied, but it does not establish the positive relationship between human rights and development. It is simply presented as a functionalist tool to pave the way for the establishment of market forces that will facilitate further exploitation of an already over-exploited, marginalised, disenfranchised and disempowered community. That is the essence of *market* democracy. According to this democratic arrangement, human rights are not considered key. The emphasis is simply on some form of political participation through periodic elections. However, democracy is more than that.

To help establish the positive relationship between human rights and development, African citizens should be given the opportunity to design effective, workable and practical grassroots democracy. Democracy should play a role in establishing the proper relationship with human rights and development. It has to be in tune with the needs and circumstances of the people. Additionally, it has to be owned by them, be identified with their aspirations and daily experiences and its practice should likely lead to the attainment of sustainable, holistic development. Furthermore, democracy should be located in a broad-based, inclusive national government represented by all ethnic groups in the country, no matter how large and diverse. This may include the automatic reservation of certain parliamentary seats for disenfranchised and marginalised minority groups.

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79   Adopted at the 8th Summit of the Assembly of Heads of State and Government of the AU held in Addis Ababa, Ethiopia, 29-30 January 2007 and entered into force on 15 March 2012.

80   See art 2(1) of the African Charter on Democracy, Elections and Governance.

81   Eg, the Preamble to the AU Constitutive Act states, *inter alia*: 'Conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda.'

An African notion of rights would see human rights as the key to unlocking the fetters to development. The ultimate goal of development should be the realisation of human potential and dignity through the ability of the community to meet its needs through its members' efforts and contributions. In short, development must be seen as an end in itself, to be attained through the exercise and enjoyment of rights. Clearly, then, it is the contention of this article that development is meant to enhance people's core values, and that development or growth is desirable only if it is consistent with the people's deepest values, including those of minorities.