

## **Indigenous peoples' rights and sustainable development: The case for indigenous fisher communities in Kenya**

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*Man is an essential component of the ecosystem in which fishing takes place hence the participation of all relevant stakeholders including indigenous fishing communities should be encouraged.*<sup>1</sup>

### **The Challenges of Fishing in the 21<sup>st</sup> Century Kenya**

Fishing is one of the most important sources of livelihoods in Kenya. For over 4 centuries, Kenya's indigenous fishing communities have relied on fishing for their livelihood.<sup>2</sup> While it is estimated that more than 2.3 million Kenyans directly or indirectly depend on fishing and fish products<sup>3</sup>, existing Kenyan legislation, as well as the planned legislation (read Fisheries Management Bill 2009) inadequately provides for local community-based resource governance.

Total annual production of fish in Kenya is approximately 180,000 metric tons, but is declining<sup>4</sup>. About 92 percent of this fish comes from Lake Victoria, and the rest from the Indian Ocean (4 percent), inland lakes and rivers (3 percent) and aquaculture (1 percent).<sup>5</sup> Nile perch, constituting about 50 percent of the catch in Kenya, is the main export, earning about US\$50 million annually.<sup>6</sup> Other commercially important species in the domestic market are the small sardine fish *dagaa/omena* (30 percent) and tilapia (10 percent).<sup>7</sup>

The main reasons for the steady decline of the fish catch are pollution and overfishing. For example, in Lake Victoria, unsustainable fishing practises are rampant hence many changes in fish species biodiversity (from over 500 species of fish only three dominant species). Another threat is increasing water pollution' leading to changes in the lake's chemical and bio-physical characteristics. In the Lake Victoria region, three major cities, Kisumu, Mwanza and Kampala, industries like slaughter houses, dairy factories, fish factories, vegetable oil refineries, sugar factories, distillers, breweries, bottlers, cotton mills, leather industries, paper mills and soap factories all contribute to this pollution.

### **Identifying Kenya's indigenous fisher communities**

It is important to identify "indigenous peoples" and "indigenous fishing communities" to contextualise their issues and concerns as discussed herein. It is also important to underscore the fact that there are no internationally agreed definitions of these terms. Generally, indigenous peoples are known to

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<sup>1</sup> Food and Agriculture Organisation- FAO ( 2009),The Code of Conduct for Responsible Fisheries and Indigenous Peoples: An Operational Guide, Rome, p. 5

<sup>2</sup> Abila, O.R., Food Safety in Food Security and Food Trade Case Study: Kenyan Fish Exports. FOCUS 10 • BRIEF 8 OF 17 • SEPTEMBER 2003, FAO, Rome at <http://www.icsf.net/icsf2006/uploads/resources/bibliography/docs/english/%3C1142401027930%3EKenyan%20Fish%20exports%202001.pdf> visited 10/01/2011

<sup>3</sup> Government of Kenya – GOK (2009) , National Oceans and Fisheries Policy 2009, Government Printers, Nairobi p. 3

<sup>4</sup> *Op Cite 2*

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid*

*be tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions....*<sup>8</sup>

Therefore, indigenous peoples are specific population groups generally characterised by wanting to maintain a strong attachment to particular geographical locations and ancestral territorial origins, often expressed spiritually and through a sense of responsibility towards that territory; seeking to remain culturally, geographically and institutionally distinct from the dominant society, resisting full assimilation into the greater national body and tending to preserve elements of their own socio-cultural, economic and political ways of living and knowing, often based on distinctive languages and cultures. They also specifically and overtly self-identify as “indigenous” or “tribal.”<sup>9</sup>

In Africa, there have been arguments that all Africans are indigenous, creating resistance in recognising communities that self identify as ‘indigenous;’ However, when some particular marginalised groups use the term indigenous to describe their situation, they use the modern analytical form of the concept (which does not merely focus on aboriginality) in an attempt to draw attention to and alleviate the particular form of discrimination they suffer from.<sup>10</sup> It is this situation that the indigenous concept, in its modern analytical form, and the international legal framework attached to it, addresses”.<sup>11</sup>

Indigenous fishing communities are, therefore, indigenous peoples, whose dependence on fishery resources and dependent ecosystems is shaped by the need to meet livelihood requirements and food security<sup>12</sup>. For them, fishing goes beyond the mere function of meeting food security needs; it is a way of life ... fishing communities ... are the custodians and responsible users of ... fishery resources<sup>13</sup>. They utilise fishery resources for food and commercial purposes; they also get involved in related activities such as net making, production of storage and container facilities and boat building. Fishing is also used to meet social and cultural needs of indigenous communities.<sup>14</sup>

In Kenya, the rights of these communities are captured through Article 56 of the Constitution which provides for the rights of minorities and marginalised groups. The Constitution of Kenya does not set the criteria to identify minorities and indigenous peoples/communities. However, the criteria set for ‘marginalised Communities’ in Article 260 are largely in conformity with international standards and norms as among others:

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<sup>8</sup> Article 1: ILO Convention 169 (1989), United Nations, New York.

<sup>9</sup> Food and Agriculture Organisation - FAO (2009), The Code of Conduct for Responsible Fisheries and Indigenous Peoples: An Operational Guide. Rome, p. 5

<sup>10</sup> African Commission on Human and Peoples Rights (ACHPR)/International Work Group on Indigenous Affairs (IWGIA) (2005), Report of the African Commission’s Working Group on Indigenous Populations/Communities. Eks/Skolens Trykkeri, Copenhagen, Denmark. P 88

<sup>11</sup> *Ibid*, 114

<sup>12</sup> Food and Agriculture Organisation- FAO (2009), The Code of Conduct for Responsible Fisheries and Indigenous Peoples: An Operational Guide, Rome.

<sup>13</sup> *Ibid*

<sup>14</sup> GOK, National Oceans and Fisheries Policy 2009, Government Printers, Nairobi page 3

- a. A community that, because of its relatively small population or *for any other reason*, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
- b. A *traditional community* that, out of a need or desire to preserve its *unique culture*<sup>15</sup> and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;

A number of communities in Kenya fall into the bracket of minorities and/or indigenous peoples. These groups can be grouped, depending on cultures, traditions, and/or livelihoods into indigenous peoples, religious minorities, ethnic minorities and linguistic minorities. Locally, hunters and gatherers, pastoral communities, and some fishing communities identify as 'minorities' or 'indigenous people'.<sup>16</sup> This is based on their lifestyle, numerical strength or mode of social and economic set up.<sup>17</sup> Fisher communities have relied and continue to rely on their indigenous fishing knowledge and practices for subsistence.<sup>18</sup> Examples of indigenous fishing communities in Kenya include the Luo found in several counties of Nyanza region, the Abasuba in Migori County, the Abanyala and Abasamia in Busia County, the Turkana and Elmollo in Turkana County, the Illchamus in Baringo County, Bajuni, Sanye and Jibana at the Coast.

### **Why the regulatory mechanisms for Management of fisheries resources in Kenya should recognise indigenous fisher peoples' rights**

Aquatic resources, although renewable, are not infinite and need to be properly managed, if their contribution to the nutritional, economic and social well-being of the people is to be sustained<sup>19</sup>. Thus rights to fisheries are fundamental not only as a key tool in fisheries management and conservation, but also as an integral ingredient in the pursuit of secure livelihoods on the part of indigenous peoples.

In Kenya, the management of fisheries using regulatory instruments has left indigenous fishing communities subject to changing national aspirations of governments; these largely reflect the values and aspirations of the dominant culture as represented by government with the end result being the erosion of the ability of indigenous fisher communities to manage, harvest and use natural resources in ways that are consistent with their cultural needs.<sup>20</sup>

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<sup>15</sup> Culture manifests itself in many forms and is embedded in the daily practices and knowledge of minorities and indigenous peoples; it includes the duties and obligations that are necessary for social life to continue and is fundamental to the collective identity and the distinctiveness of the group. See M Hooper and T Lynch in Rose Shoton, Use of Property Rights in Fisheries Management

<sup>16</sup> Lillian Aluanga, 'Banjul ruling offers ray of hope to the minorities,' *The Standard* 28<sup>th</sup> April 2010 at <http://www.standardmedia.co.ke/specialreports/InsidePage.php?id=20000004406&cid=259&> accessed on 10/01/2011

<sup>17</sup> *Ibid*

<sup>18</sup> Minorities Reforms Consortium's definition in their memorandum presented to the Committee of Experts on Constitutional Review (CoE) on Constitutional Review. Minorities Reforms Consortium (MRC) is a network of Pastoralists, Hunter Gatherers, Fisher Communities, Ethnic, Religious and Linguistic Minorities. It is hosted by the Centre for Minority Rights Development (CEMIRIDE)

<sup>19</sup> Food and Agriculture Organisation- FAO ( 2009), The Code of Conduct for Responsible Fisheries and Indigenous Peoples: An Operational Guide, Rome, p. 5

<sup>20</sup> M Hooper and T Lynch in Rose Shoton, Use of Property Rights in Fisheries Management

This, therefore, means that for a proper and sustainable management of fisheries resources in Kenya, it is imperative that the rights of fisher and coastal communities be mainstreamed in policy and legislative arrangements that the country is currently pursuing, after the coming into effect of the new Constitution. This is not seen in the current Fisheries Act (CAP 378) that does not have a definition for fishing communities, meaning that they are not viewed as central to the sustainability of the fisheries sector and its resources. Further, it completely does not address itself to equitable sharing of the accruing benefits from the sector, which is clearly a violation of the rights of indigenous fisher communities in the country, as it discriminates them from benefiting from their natural resources. This omission is repeated in the Draft Fisheries Management Bill 2010 which is still at the drafting stage. The meaning of this is that the regulatory mechanisms being put in place by the government, or those that are already in place, are counter to Article 69 (1) (a) of the Constitution that recognises the right of the indigenous fisher communities to directly or indirectly benefit from fisheries resources. Further, through Article 69 (1) (b), the Constitution recognises that they have a role to play in the management, protection and conservation of environment (including natural resources therein). Article 7.6.6 of Food and Agriculture Organisation's Code of Conduct for Responsible Fisheries and Indigenous Peoples recognises explicitly the interests of 'local fishing communities' by providing that "when deciding on the use, conservation and management of fisheries resources, due recognition should be given ... to the traditional practices, needs and interests of indigenous peoples and local fishing communities which are highly dependent on fishery resources for their livelihood"<sup>21</sup>. Further, Article 7.2.2 (c) provides that "the interests of fishers, including those engaged in subsistence, small-scale and artisanal fisheries [should be] taken into account." These provisions apply to indigenous fishers whose subsistence fishing activities are often in conflict with other interests among them industrial aquaculture and the creation of non-participatory and exclusive Marine Protected Areas (MPAs). These provisions address and emphasise economic, social and cultural rights such as employment, poverty alleviation and food security.

The preamble of the current Kenyan Constitution commits to the well being of individual, family, communities and the nation at large. Key to this well being is the question of management and exploitation of natural resources, especially by indigenous communities. Substantively, this includes, among others: the rights of persons to engage in economic and social activities which are part of their culture; protection from forcible relocation; land and resource rights; guarantees against severe environmental degradation; and protection of sites of religious or cultural significance.<sup>22</sup> Article 28 of the Kenyan Constitution provides that every person has inherent dignity (state of being worthy of esteem or respect) and the right to have that dignity respected and protected. Realising the economic social and cultural rights for these communities is without doubt a significant step towards protecting the dignity of persons from indigenous fisher communities. Recognising fisher peoples rights in regulatory mechanisms in fisheries management will thus have a significant positive impact on the

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<sup>21</sup> Food and Agriculture Organisation – FAO, Code of Conduct for Responsible Fisheries and Indigenous Peoples

<sup>22</sup> See HRC Concluding Observations on Chile, UN doc. CCPR/C/79/Add.104, 1999, para. 22;

efforts to realise Economic Social and Cultural rights of these communities and by extension civil and political rights.

### **Capturing the concerns and rights of indigenous fisher peoples in Kenya: ensuring inclusion in the legislative and policy processes**

An appropriate governance framework would need to consider the conservation and sustainable use of resources, economic and social (equity) needs, institutional arrangements to implement it, as well as research to improve policies and performance of the ... fisheries [sector]<sup>23</sup>. This can only be achieved through a participatory process, where all stakeholders, including indigenous fisher communities effectively and in an informed manner, participate in formulating and implementing these policies and legislative arrangements.

The Declaration on the Right to Development (DRD) recognises that equal attention and urgent consideration should be given to the participatory and non-discriminatory implementation, promotion and protection of civil, political, economic, social and cultural rights the failure of which presents an obstacle to development.<sup>24</sup> This is buttressed by the Kenyan constitution through various provisions. One of the national values of the Kenyan Constitution is participation, as provided through Article 10 (2) (a). In Article 56, the Constitution provides that the State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are in governance and other spheres of life. Through Article 69 (1) (d) the State is required to encourage public participation in the management, protection and conservation of the environment.

Contrary to the foregoing provisions, in the objectives of setting up the Kenya Fisheries Service in the Draft Fisheries Management Bill (2010) nothing is envisaged relating to the indigenous fishing communities participation in fisheries management, protection of intellectual property rights as and equitable sharing of accruing benefits. Rather, it appears that the Bill is focussed on only promoting commercial fishing, rather than also addressing socio-economic and cultural needs and rights of the indigenous fisher communities. For instance, in Article 6 (j) it provides as one of the functions as undertaking the development of appropriate fisheries infrastructure, to facilitate investment in the commercial fisheries, in collaboration with relevant agencies, including government departments. The role of indigenous fisher communities is completely absent.

### **Conclusion**

The effective participation of minorities and indigenous peoples in public life is an essential<sup>25</sup> for their proper integration into society. Natural resources are the engine of economic and social progress. For indigenous fisher communities, this is extremely important. Peoples' esteem, identity, well-being and

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<sup>23</sup> Food and Agriculture Organisation- FAO ( 2009),The Code of Conduct for Responsible Fisheries and Indigenous Peoples: An Operational Guide, Rome, p. 5

<sup>24</sup> *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Report of the HRC, 45 UN GAOR Supp. (No. 43), UN doc. A/45/40, vol. 2, 1990, 1.

<sup>25</sup> See UN High Commissioner on Minorities notes on participation cited at <http://www.osce.org/hcnm/23623.html>. Accessed on 10/01/2011

harmonious existence with their environment are tied to the natural resources around them;<sup>26</sup> for fisher communities, include water and wetlands fisheries, and agro ecological potential. Sadly, existing policies treat fisheries resources merely as capital stock to be exploited for short-term economic gain, leading to unsustainable exploitation and consequent violation of the rights of indigenous fisher peoples. <sup>27</sup> In deed, the UN Minorities Forum in December 2010 noted that Governments should value and protect the pursuit of traditional livelihood practices by minority groups. Such practices frequently add value to the wider economy but may face threats from environmental change, economic crisis or undue restrictions on activities. It recommended that fisher peoples should participate in policy decisions on the conservation of fish stocks and the protection of coastal regions [lake] and rivers.

### **Recommendations**

To the Government of Kenya (Ministry of Fisheries Development)

- Recognise that indigenous fisher communities in Kenya are key stakeholders in the fisheries sector in Kenya
- Ensure that all regulatory mechanisms mainstream the rights of indigenous fisher communities
- Ensure informed and effective participation of members of indigenous fisher communities, not only in the formulation of the fisheries management bill, but also in future legislative and policy formulation processes.

### **Local Civil Society Organisations**

- Support the efforts by the indigenous fisher communities to realise their rights through lobbying and advocacy
- Mainstream the concerns and aspirations of indigenous fisher communities in their programming

### **To the International Non Governmental Organisations**

- Support the participation of indigenous fisher communities in the legislative and policies processes
- Strengthen the capacities of indigenous fisher communities' organisations to be able to lobby and advocate for their rights, as well as hold government accountable.

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<sup>26</sup> See Kenya at Crossroads – Scenarios for the Future , IEA and SID 2001 at 83-84

<sup>27</sup> *Ibid*