

# Actualising the Right to Development in Africa

## Options and Prospects

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### Abstract

*This article aims to assess the possible options and prospects for actualising the right to development (RTD) in Africa. Mindful of the controversy surrounding the legal status of the RTD, the article starts by problematising this by concisely looking at its legal attribute, its socio-economic and political dimensions and the polemics of defining its nature and scope. It then proceeds to discuss the progress made towards recognising the RTD. After establishing that the RTD is broadly recognised at the global level and is a binding human right in the African human rights system, the article examines the options and prospects for its actualisation. We contend that progress in entrenchment constitutionalism and the effective involvement of the people in the constitutional building and legislative processes provide some scope for transforming the RTD from the realms of a rhetorical and abstract legal concept into a practical reality. The article concludes that to actualise the RTD in African states, there is a need to lay down a solid constitutional framework, to make people's participation central to all development initiatives and to rely on international and regional cooperation.*

### Introduction

From time immemorial Africa has been marked by abject poverty and underdevelopment. In reaction, together with other developing parts of the world, it fought for the recognition of development as a human right. Therefore this is enshrined as a provision in Article 22 in the African Charter on Human and Peoples' Rights (ACHPR). Yet, 37 years after the adoption of the African Charter and 32 years after the adoption of the United Nations Declaration on the Right to Development (UNDRTD),<sup>1</sup> the RTD is still to be realised in Africa. It is against this backdrop that this article explores options and prospects to achieve or actualise this right in Africa.

The RTD remains one of the main contentious human rights topics of our time. However, it had been the focus of various resolutions and is one of the most referred to non-binding instruments, second only to the Universal Declaration of Human Rights (UDHR).<sup>2</sup> This led to the recognition of this right at a global level. In Africa, the recognition of the RTD has been more precise because it is expressly provided for under the ACHPR.<sup>3</sup>

However, the global and regional recognition of the right has not led to its actualisation, especially in Africa where it is provided for in a binding instrument, the ACHPR. The aim of this article is therefore to assess the possible options and prospects for actualising this right in Africa. Mindful of the controversy surrounding the legal status of the RTD, the article starts by problematising this by briefly looking at its legal attribute, its socio-economic and political dimensions and the polemics of defining its nature and scope. It then proceeds to discuss the progress made towards recognising the RTD. After establishing that the RTD is broadly recognised at the global level and is a binding human right in the African human rights system, the article examines the options and prospects for its actualisation. It concludes that to actualise the RTD in African states, there is a need to lay down a solid constitutional framework, to make people's participation central to all development initiatives and to rely on international and regional cooperation. Ultimately, the article shows that the controversy about the legal status of the RTD is an irrelevant issue in the African context and should not distract from the more concrete steps being taken for its actualisation.

## Problematising the Legal Right to Development

The UNDRTD defines the RTD in fairly broad terms. In this respect Article 1 states:

1. An inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.<sup>4</sup>

Given this broad definition, it is not surprising that the RTD is subjected to various interpretations. This section will briefly look at the definitional issue before focusing on the socio-economic and political context of the RTD.

### The right to development as a legal construct

The early conceptualisation of the RTD is usually associated with the late Keba Mbaye.<sup>5</sup> He viewed the RTD as the right of all human beings and argued that each person has the right to live and the right to live longer. This was taken up by Karel Vasak who viewed it as part of his newly created third-generation human rights, also known as 'rights of solidarity'.<sup>6</sup> Not only did he view the right of solidarity as part of the RTD, but also included others such as the right to a healthy and

ecologically balanced environment, the right to peace and the right to ownership of the common heritage of mankind. These developments led to the adoption (without vote) of the Resolution 4 (XXXIII) in 1977 by the Committee on Human Rights which called upon the UN Secretary General to engage research on the international aspects of the RTD. A year later the UNESCO's General Conference mentioned 'the right of every human being and group to full development'.<sup>7</sup> According to Malhotra, this statement implies 'equal access to the means of personal and collective advancement and fulfilment in a climate of respect for the civilisations and cultures, both national and worldwide'.<sup>8</sup> This is in line with the conclusion of the Conference on Development and Human Rights held in Dakar in September 1978, which concluded thus:

There exists a right to development. The essential content of this right is derived from the need for justice, both at the national and international levels. The right to development draws its strength from the duty of solidarity, which is reflected in international cooperation. It is both collective and individual. It is clearly established by the various instruments of the United Nations and its specialized agencies.<sup>9</sup>

Subsequent to this development, various meetings at the international level led to the adoption of the UN General Assembly resolution on the RTD in 1982,<sup>10</sup> the UNDRTD, and the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights.<sup>11</sup> The 2000 United Nations Millennium Declaration<sup>12</sup> and the 2005 World Summit outcome<sup>13</sup> recognised development as a human right.

Nevertheless, these developments did not end the controversy about the legal status of the RTD. One of the main arguments used by critics of the RTD as a legal construct is the idea that it appears in the UNDRTD, which is a non-binding instrument that has no legal force.<sup>14</sup> They argue that declarations are not included amongst the sources of international law as defined in Article 38 of the Statutes of the International Court of Justice.<sup>15</sup> In the opinion of Kratochwil, such non-binding instrument or soft law is nothing but 'a weak institutionalization of the norm-creation process by prodding the parties to seek more specific law solutions within the space laid out in the declaration of intent'.<sup>16</sup> Nevertheless, it must be recognised that international law is dynamic and non-static. Since the adoption of the International Court of Justice (ICJ) statutes in 1922, international law has evolved, and unilateral acts, equity, resolutions of the UN General Assembly or Declarations and *jus cogens* have been added to the traditional sources of international law.<sup>17</sup> Bearing this in mind, it could be argued that the intensity of international activities around the RTD has led to it progressing into customary international law which is a source of international law. These activities include the adoption of the UNDRTD, the establishment of an Open-Ended Working Group<sup>18</sup> and an independent expert on the right,<sup>19</sup> its incorporation in the 2000 United Nations Millennium Declaration and the setting up of the UN High-Level Task Force for the Implementation of the RTD.<sup>20</sup> As Baxi has correctly observed, besides the Universal Declaration of Human Rights, the RTD is one of the most repeated declarations within the UN system.<sup>21</sup> The constant activities on the RTD reveal the state practice and show the *opinio juris* or intention to be bound as an evidence of customary law. In this perspective, Baxi argues that 'it is clear that the programmatic content of the RTD has attained over the decades a wider endorsement from the community of states than in sight at the time of its adoption'.<sup>22</sup>

This view is also noted by Kunanayakam in these terms:

The normative character of the Declaration on the Right to Development is clearly linked to aspects that render it legally binding, although it is not a multilateral treaty. Apart from the numerous sources of international law, certain aspects of the right have become part of customary law, evidenced by intergovernmental and multilateral agreements in the area of development cooperation, including, inter alia, United Nations strategies and programmes for development, the establishment and development of an entire system of centralised multilateral organs and auxiliary organs, and specialised agencies. Even though the controversy on the Declaration validity continues, the principle at the core of the [RTD] remains current and, in multiple ways, continues to inspire the actions of numerous states and social organisations.<sup>23</sup>

The adoption of the UN Resolution 4 (XXXIII), which called for research on the RTD, was the beginning of the elaboration of the RTD,<sup>24</sup> which has now ascended into the realm of human rights within the UN system. Therefore, in moving forward, the following advice from Alston is germane:

In terms of international human rights law, the existence of the right to development is a *fait accompli*. Whatever reservations different groups may have as to its legitimacy, viability or usefulness, such doubts are now better left behind and replaced by efforts to ensure that the formal process of elaborating the content of the right is a productive and constructive exercise.<sup>25</sup>

In any event, while at the global level the legal nature of the RTD may still provoke some debate, there is no ambiguity on its binding nature in the African human rights system. It is one of the key features in the ACHPR<sup>26</sup> and has been the subject matter of various communications at the African Commission<sup>27</sup> and a case at the African Court on Human and Peoples' Rights.<sup>28</sup> Furthermore, the RTD is incorporated into the constitutions of several African countries.<sup>29</sup> Nevertheless, to appreciate the nature and scope of the RTD, it would be important to see to what extent it is linked to certain fundamental human rights such as the socio-economic rights.

### **The right to development as a socio-economic and political construct<sup>30</sup>**

In its early days, the call by developing countries for the RTD was based on their desire for the establishment of the New International Economic Order (NIEO) to eliminate what they perceived as world injustice that would enable these countries to speed up their socio-economic development. This led to the adoption of the UN Declaration and Programme of Action of the NIEO in 1974.<sup>31</sup> This was followed in the same year by the adoption of the Charter of Economic Rights and Duties of States.<sup>32</sup> In this way, the RTD foundation was constructed on the claim for socio-economic development in the developing world.

However, several developed countries did not support these 1974 instruments as the effect was to compel them to provide development assistance to developing countries. They argued that these instruments had no significance in international law and they saw the so-called 'New International Economic Order' as mere political posturing and rhetoric which had nothing to do with the law.<sup>33</sup> This led to the politicisation of the debate on the RTD, with two opposing camps: one made up of developed countries and the other developing countries. The latter, made up of countries belonging

to the Non-Aligned Movement (NAM) complained about their continuous poverty and underdevelopment which had not improved in spite of the decolonisation process and years of development cooperation<sup>34</sup> in which developing countries continue to face difficulties in participating in the globalisation process, with many of them facing the risk of being marginalised and effectively excluded from its benefits.<sup>35</sup> This position was strongly opposed by the developed countries, led by the United States of America (US). The controversy over the RTD became an ideological and political battle in which there were four groups. The first group was made up of a number of very dynamic members of the NAM in the Working Group on the RTD, who came to be known as the 'Like-Minded Group'.<sup>36</sup> This group viewed the RTD as the roadmap to reduce global inequities and fought for the institution of fair trade rules, technology transfer from the North to the South and the abolition of developing countries debts amongst others.

A second group, made up of more cautious developing countries, wanted to use the human rights-based approach in their national development plans and maintain good relations with the donor community at large.<sup>37</sup>

A third group was made up of a mix of countries in transition and some wealthy countries. This group viewed the RTD as a bridge to enhance the North-South dialogue and was inclined to support the implementation of the right. Nevertheless, the position of some prominent members of this group, such as the European Union (EU), was not always predictable. In commenting about their position, Marks said that 'they will go along with a resolution if nothing particularly objectionable is inserted or will abstain'.<sup>38</sup>

The fourth group or the 'outsiders', as they were referred to, was led by the US and included countries such as Japan, Denmark, Israel and Australia. These countries took a consistent lead in voting against any resolutions in the UN on the RTD.

Although a critical evaluation of the voting tendencies in the UN on the RTD demonstrates a lack of unanimity, there was nevertheless a clear and regular pattern. There was always a vast number in favour of these resolutions but the fact that the few objections came from the US and other powerful developed countries remained a serious problem.<sup>39</sup>

It is clear from the debates on the RTD at the global level that this had little to do with the concept of a human right to development *per se*, but rather that it was a political debate. Marks correctly writes:

[t]he political discourse of the various working groups on the RTD and the Commission on Human Rights is often characterised by the predictable posturing of political positions rather than practical dialogue on the implementation of the right to development.<sup>40</sup>

However, the politicisation of the RTD grounded on the NIEO ignored the fact that the concept of NIEO itself has a legal feature. In Pellet's words, the 'NIEO has, first of all, a legal connotation and mainly aspires to the development of new legal rules in the economic and social sphere and that is or, at least, claims to be, a New International Legal Order'.<sup>41</sup> This means that infusing the legal norm into the NIEO reflects the inherent dynamism of international law and its ability to develop and respond pragmatically to specific problems such as world poverty. In short, international law

does not operate abstractly but tries to find solutions to practical situations. This was emphasised by the International Court of Justice (ICJ) as follows:

A rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part.<sup>42</sup>

It is, therefore, our contention that although the political features of the RTD cannot be ignored, the socio-economic dimensions must always be factored in, if we are to enhance the prospects for better living conditions for the majority of people living in the developing countries.

### **The polemics of defining the nature and scope of the right to development**

Besides the controversy over the socio-economic and political nature of the RTD, there has also been questions about its nature and scope. The polemics revolve around the questions as to whether the RTD is a stand-alone or a composite right, an individual or collective right, and who the duty bearers and right holders are.

With respect to the stand-alone or the composite character of the RTD, the UNDRTD states that the right is an 'inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'.<sup>43</sup> The composite feature of the right is thus grounded on the need to ensure that the beneficiaries enjoy all aspects of development in which all human rights and fundamental freedoms can be realised. This is in line with Baxi's view that the important factor in the composite aspect of the right is the 'organic linkage between human rights' and not the individual recognition of each human right.<sup>44</sup> In this context, the accent is placed on a 'large number of "neighbouring rights" considered indispensably interlinked to the task of the realisation of the right to development'.<sup>45</sup>

The composite aspect of the RTD could also be viewed within the context of Sen's capability theory. Accordingly, making the RTD a reality entails empowering people through various freedoms/rights such as the right to education, health, food and association, which empower the needy to reach their potential. From this perspective, the RTD is consistent with Article 28 of the UDHR and can be defined as 'peoples' claims to social and economic arrangements that protect them from the worst abuses and deprivations, and that enable them to enjoy their security and dignity as human beings'.<sup>46</sup>

However, the composite feature of the RTD is not universally accepted. For some, such a collection of numerous rights in a basket called the RTD is confusing and renders the right vague and ambiguous and therefore not implementable.<sup>47</sup> In this regard, Bello, an exponent of this view, argues that the RTD is:

too woolly and does not easily invite the degree of commitment that one expects unequivocally in support of an inescapable conclusion; ... The right to development appears to be more like an idea or ideal couched in a spirit of adventure, a political ideology conceived to be all things to all men in a developing world, especially Africa; it lacks purposeful specificity; it is latent with ambiguity and highly controversial and 'directionless'; it strikes a chord of the advent of the good Samaritan.<sup>48</sup>

Along similar lines, Rosas observes that ‘the precise meaning and status of the right is still in flux’,<sup>49</sup> and therefore unidentifiable. Nevertheless, the emerging view is that the RTD echoes the interdependence and indivisibility of various rights to be realised under one ‘umbrella’ to ensure the well-being of all human beings.<sup>50</sup>

The other area of contention is on the duty bearers of the RTD. Though the debate has been intense, the emerging position is that the right has a national and an international dimension. On the one hand, at the national level, just like with all human rights, the state is the primary duty bearer of the RTD. As such, the state has the obligation to promote, protect and fulfil the RTD. However, this can only fully be done ‘through adequate constitutionalism, characterised by a strong separation of powers and respect for both the rule of law and human rights’.<sup>51</sup> To be conducive to the realisation of the RTD, national policies should be participatory and informed by the need to improve the standard of living for all.

On the other hand, the international dimension of the RTD posits that given the interconnectedness of the world economy through globalisation, national efforts for the achievement of the RTD should be complemented by the international community’s support, to say the least. This could be done by ensuring that international actions are revolving around the adoption of fair trade policies on the global market, solving the debt burden of developing countries, ensuring that wealthy countries respect their development assistance pledges and ensuring real global partnership for development in general.<sup>52</sup> Hence, in designing methods for the realisation of the RTD, the national and international dimensions should be viewed as complementary.<sup>53</sup>

The other area of disagreement revolves around whether the RTD is an individual or a collective right. According to the first article of the UN Declaration on the RTD, the RTD is an ‘inalienable human right by virtue of which *every human person and all peoples* are entitled to participate in...’ The emphasis on the human person and all peoples suggests that both individuals and groups are right holders of the RTD. According to Bedjaoui, ‘the right to development is the right of the human race in general’,<sup>54</sup> and as such covers individuals and groups alike. Sharing this view, which is the emerging position of the right holders of the RTD,<sup>55</sup> Kirchmeier describes this right as aiming to improve the well-being of individuals as well as groups.<sup>56</sup>

## Progress towards Recognising the Right to Development

Despite the debates on the RTD, there has been enormous progress towards its recognition. This progress is identifiable at the global level, in the African region and through the discourse on gender equality.

### Progress towards recognising the RTD at the global level

As pointed out earlier, at the global level, besides the UDHR, the RTD is mostly referred to as a non-binding instrument. It has been the subject of various workshops and seminars, has been at the heart of various UN resolutions including the 2000 Millennium Development Goals (MDGs), as well as the focus of the UN Working Group, with a UN independent expert appointed to study it, and the focus of a High-Level Task Force (HLTF) at the UN. In 1998 the Commission of Human

Rights established the UN Working Group on the Right to Development which was an open-ended intergovernmental body tasked amongst other to:

[M]onitor and review progress made in the promotion and implementation of the right to development as elaborated in the Declaration on the Right to Development, at the national and international levels, providing recommendations thereon and further analysing obstacles to its full enjoyment.

This was a recognition of the RTD which was reiterated when, from 2004 to 2010, the Working Group mandated the HLTF to translate the RTD into reality.<sup>57</sup> In this regard, the HLTF was asked to establish criteria and indicators to measure the extent to which states are taking actions individually and collectively to give effect to the RTD.<sup>58</sup> Some of the criteria suggested included that partnership for development should be comprehensive and based on human-centred development policy, and that it should be informed by participatory human rights processes and ensure social justice and equity.<sup>59</sup> These criteria could also be used as monitoring and evaluation for the achievement of the RTD. Atuguba argues that the HLTF's criteria and indicators are:

a useful tool for stakeholders to assess the current state of implementation of the right to development and facilitate its further realization at the international and national levels; contribute to mainstreaming the right to development in the policies and operational activities of relevant actors at the national, regional and international levels, including multilateral financial, trade and development institutions; and evaluate the human rights implications of development and trade policies and programmes.<sup>60</sup>

Despite the criticisms of the criteria from certain quarters,<sup>61</sup> their value remains significant in the sense that they suggest a clear recognition of the RTD as a human right at the global level. It could be argued that at that level, the RTD is a *fait accompli*<sup>62</sup> and the focus is on its implementation, hence the adoption and debate on the viability of the criteria.

### Progress towards establishing the RTD in the African region

The legal status of the RTD is much clearer in Africa, because it is expressly recognised in the ACHPR. The RTD has also been the subject matter of the African Commission's decisions in the following cases: *Gumne*,<sup>63</sup> the Democratic Republic of the Congo (*DRC*)<sup>64</sup> the *Endorois*<sup>65</sup> and *the Ogiek* at the African Court on Human and Peoples' Rights.<sup>66</sup> In the *Endorois* case, the African Commission acknowledged the fact that the RTD is a multifaceted human right comprising 'elements of non-discrimination, participation, accountability and transparency, equity and choices as well as capabilities'.<sup>67</sup> The African Court reiterated this in the *Ogiek* case.<sup>68</sup>

Furthermore, the recognition of the RTD in Africa is underscored by the fact that the right has been expressly provided for in the constitutions of many African countries.<sup>69</sup> Acknowledging the role of Africa in promoting the RTD, Baxi correctly argues that the continent has played an important role in developing the RTD.<sup>70</sup>



### **The RTD in the discourse on gender equality**

The RTD can also be viewed from the prism of gender equality. The RTD discourse opposes sex-based discrimination<sup>71</sup> and emphasises the right to participation of all, and the right to enjoy the benefit of development by all,<sup>72</sup> including women. The UNDRTD is unambiguous in calling on states to take 'effective measures to [ensure] that women have an active role in the development process'.<sup>73</sup>

Similarly and more specifically, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>74</sup> expressly recognises women's right to sustainable development.<sup>75</sup> The latter comprises women's right to land<sup>76</sup> and credit,<sup>77</sup> to participation in political decision-making processes,<sup>78</sup> to the establishment of culture,<sup>79</sup> in 'the planning, management and the preservation of environment',<sup>80</sup> and in 'the conceptualisation, decision-making, implementation and evaluation, of development policies and programmes'.<sup>81</sup> These rights are all elements of the RTD that acknowledges the indivisibility of human rights. Indeed, the African Women's Protocol recognises the RTD. To use Banda's words, this protocol is 'an important milestone in the recognition [of] women's right to development [which] is central to their empowerment'.<sup>82</sup> This acknowledgement of the RTD in the gender discourse is a clear recognition that despite the controversy on the right, the latter has made visible progress in securing a place in the human rights standards.

From the preceding, it could be argued that much work has been done on the RTD. This work is quantifiable in terms of UN resolutions, state practice, the contribution of the African Commission Jurisprudence and infusion in the gender justice discourse. The problem in Africa is not really how to recognise the RTD but rather how to effectively implement it in a manner that will enhance the quality of lives of the ordinary African.

### **Options and Prospects for Actualising the Right to Development**

In order to actualise the RTD, a number of measures need to be taken. The starting point is the laying down of a solid constitutional framework. This should pave the way for an approach that is people-driven and people-based and will need strong regional and international support. These critical imperatives for making the RTD a practical reality will now be examined.

#### **Laying a solid constitutional framework**

The actualisation of human rights in general does not happen in a vacuum, and the RTD is no exception. To be effective, the RTD, like any other human right, needs to operate within a constitutional framework that promotes the fundamental principles of constitutionalism. The primary objective of such a framework must be not only to entrench constitutionalism, but also promote good governance, accountability and respect for the rule of law.

Amongst the critical core elements of constitutionalism that need to be entrenched in the constitution are provisions that recognise and protect fundamental human rights, and provide for a separation of powers, an independent judiciary and institutions for the support and strengthening of constitutional democracy.<sup>83</sup>

Without independent constitutional institutions such as a human rights commission and an ombudsman to monitor the enforcement of the RTD, and in this was complement and support whatever measures the courts may be called upon to take, the right will remain at the rhetorical level. This in essence speaks to a multidimensional approach to the RTD that cannot be operationalised if the foundation on which it is laid at the national level is not solid. While the UNDRTD<sup>84</sup> urges states to take appropriate measures and policies for the achievement of the RTD, in the absence of a constitutional framework which promotes constitutionalism, these measures would not yield positive results, especially if the state cannot be held accountable for taking the wrong measures or for not taking action at all. As Fombad puts it, a framework that promotes constitutionalism ensures that government 'should not only be sufficiently limited in the way that protects its citizens from the arbitrary rule but also that such government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations'.<sup>85</sup> In fact, the RTD cannot be actualised in an environment characterised by injustice, corruption, unfairness and general unethical behaviour. As correctly observed in a study by the Secretary General on the regional and national dimensions of the RTD, the violation of human rights is often the 'natural consequences of systems rooted in injustice and inequality and which are often created and reinforced by a range of consciously pursued political, social and economic policies'.<sup>86</sup> It is therefore necessary to ensure policies aiming to achieve the RTD at national level 'focus as much on the democratic transformation of existing political power structures as on the quest for achieving more equitable economic and social policies and structures'.<sup>87</sup> For this to happen, the constitution should be based on and reflect the development priorities and preoccupation of the people. This calls for a peoples-based approach to which we will now turn our attention.

### **Towards a Peoples-based Framework**

A peoples-based framework raises two issues: first, how the people are involved in the constitution-building process; second, the aspects of the RTD that may be reflected in the constitution.

#### *Peoples' participation in constitution building*

A peoples-based constitution-building process requires that the ordinary citizen actively participates in the whole process of designing and adopting the constitution. Furthermore, all aspects of the constitution, especially the Bill of Rights, should be submitted for popular approval. According to Ghai, public participation in constitution building is crucial for 'the acceptance and durability of the constitution'.<sup>88</sup> Back in 1969, the Special Rapporteur of the Commission on Human Rights, Manouchehr Ganji, in his study *The Realization of Economic, Social and Cultural Rights*, concluded that:

the basic principle governing the question of human rights in development should be the participation of the people in deciding their own style of individual and corporate life in general and in particular their participation in decision-making in connection with development programmes, in the implementation of those programmes and in the benefits derived from them.<sup>89</sup>

This view is reflected in the UNDRTD which highlights ‘active, free and meaningful participation’ as a key indicator of the RTD.<sup>90</sup> A peoples-based approach will ‘enable people to control their own destinies and to realise their full potentials’.<sup>91</sup>

Furthermore, a participatory process is likely to stimulate a sense of belonging and ownership which brings people together and unites them on a collective development path. Such a process can also act as a school in which people receive the necessary education and preparation needed to play a role in the affairs of their society.<sup>92</sup> From this perspective, Moehler’s study of the participatory constitution-building process in Uganda demonstrates that Ugandans who were keen to participate in the process became more conversant about the political system as they understood the concepts of participation and human rights as well the democratic process in general. They were equipped to make a meaningful contribution as opposed to a symbolic appearance in the democratic process.<sup>93</sup>

Although popular participation has its own downside,<sup>94</sup> the fact remains that such an approach is ‘more legitimate and lasting than bargains among elites’.<sup>95</sup> The virtue of peoples’ participation cannot be overemphasised as it speaks to their own development and destinies through the adoption of social reforms, laws and legislations in which they have to play a role. This suggests that the right to participation goes beyond the adoption of the constitution to trickle down to involvement in the adoption of laws and legislations. In this regard, Ghai writes:

The constitution should itself create space for constant public participation, in the legislative process, in the monitoring of government, in easy access to the courts and other complaints authorities for the protection of constitutional values, and so on.<sup>96</sup>

This view was judicially validated by the South African Constitutional Court in the *New Clicks* case when it held that ‘the Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies’.<sup>97</sup> This view was reiterated in the case of *Doctors for Life International v The Speaker of the National Assembly and Others*,<sup>98</sup> which became the landmark case for explaining in detail the right of individuals to participate directly in the legislative process.<sup>99</sup> In this case, the applicants, Doctors for Life International (DFL), lodged a complaint directly to the Constitutional Court, challenging the constitutionality of four bills.

DFL alleged that the process followed by the National Council of Provinces (NCOP) did not give the complainant the possibility to participate in the elaboration of the bills and that they failed to invite the public to make written submissions and to conduct public hearings on these bills and thus failed to comply with its duty to facilitate public involvement in its legislative processes and those of its committees.<sup>100</sup> The respondents rejected the allegations and maintained that they did comply with their respective duties to facilitate public involvement in the passing of the bills. In addition, they claimed that the obligation to facilitate public involvement only required that the public be given an opportunity to make either written or oral submissions sometime during the process of making laws.<sup>101</sup>

The court stated that although parliament and the provincial legislatures have a broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, measures are taken to ensure public participation should be reasonable.<sup>102</sup>

However, the court made an exception with respect to one of the pieces of legislation. It pointed out that since this Bill did not generate public interest when disseminated for public comments, the NCOP did not act unreasonably in not holding public hearings on this statute, hence the dismissal of the claim relating to that particular bill.

The *Doctors for Life* case is an illustration of how, through participatory democracy, citizens can 'engage in self-governance'. The more they do, the more they 'gain in self-respect, autonomy and empathy for others', which are all instrumental for the actualisation of the RTD.<sup>105</sup> Thus, in a democratic society, firstly, laws must 'result from a fair and open participatory process in which all publicly available reasons have been respected'.<sup>104</sup> Secondly, 'the outcome is such that citizens may continue to cooperate in deliberation rather than merely comply'.<sup>105</sup> Moreover, finally, 'the source of sovereign power' is 'the public deliberation of the majority'.<sup>106</sup> Whenever these criteria are met, the ground would be fertile for the actualisation of the RTD.

At the regional level, through *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya*,<sup>107</sup> the landmark case on the RTD, the African Commission was unequivocal in pointing out that a meaningful right to participation goes beyond mere participation in free and fair elections. The Commission was of the view that the lack of 'meaningful participation'<sup>108</sup> by the indigenous community known as the Endorois people in projects on their land was a violation of their RTD. This was because it found that these people 'were informed of the impending project [on their land] *as a fait accompli* and not given an opportunity to shape the policies or their role in the game reserve'.<sup>109</sup> For the participation to be meaningful, beneficiaries of the project should be involved right from its conceptualisation to its implementation and in the sharing of benefits. To ensure the meaningfulness of participation, 'even if the beneficiaries [of a project] ignore their right to participate, they should be educated and kept informed to ensure their inclusion in development projects that are directly linked to achieving the RTD'.<sup>110</sup> The lack of meaningful participation of the Endorois people through training, provision of information or other means led to the ruling in their favour. In reaching its decision, the Commission rejected the Kenyan government's allegations that the right to participation of all is ensured through a democratic process, informed by free and fair elections involving representatives of the Endorois people.<sup>111</sup> This is a clear indication that meaningful participation goes beyond free and fair elections. Both the *Doctor for Life* and the *Endorois* cases illustrate how peoples' participation in lawmaking and development projects are significant for the actualisation of the RTD.

## International and Regional Cooperation

This section demonstrates that actualising of the RTD also happens through international and regional cooperation.

### *International cooperation*

The RTD is anchored in cosmopolitanism that calls for a better life for all in an environment without boundaries.<sup>112</sup> This entails a global responsibility for the realisation of the RTD through international cooperation. The latter is based on international solidarity or moral obligations as well as legal obligations to ensure development wherever it is needed. These two criteria for international cooperation were underscored in the first UN resolution dealing with the RTD in 1977.<sup>113</sup>

In the discussion leading to the adoption of this resolution, it was repeatedly emphasised that '... assistance for the economic and social development of developing countries was a moral and legal obligation of the international community, in particular of the industrialised countries'.<sup>114</sup> The solidarity and moral attribute of the RTD was emphasised during the Conference on Development and Human Rights held in Dakar in September 1978.

It concluded thus:

There exists a right to development. The essential content of this right is derived from the need for justice, both at the national and international levels. The right to development draws its strength from the duty of solidarity, which is reflected in international cooperation. It is both collective and individual. It is clearly established by the various instruments of the United Nations and its specialized agencies.<sup>115</sup>

In addition, the 1979 UN Secretary General's Report on the International Dimensions of the Right to Development as a Human Right<sup>116</sup> presented a connection between the RTD and international solidarity. According to the report, the RTD is linked to the fact that 'development is the condition of all social life and therefore an inherent requirement of every obligation'. This view was also reiterated by Donnelly who argues that 'advocates of the right to development are correct: in a just world, underdevelopment would not be permitted; morality and justice do demand development'.<sup>117</sup>

The international community's responsibility is grounded not just on international solidarity,<sup>118</sup> but also based on moral universalism which proposes that 'individuals and political communities have a moral obligation to [their fellow citizens, and to] other societies in the form of both the wider society of states and the universal community of mankind'.<sup>119</sup> The interconnectedness of the global economy justifies the international solidarity for a better standard of living for all, especially in developing countries.

As far as legal arguments for international cooperation for the realisation of the RTD are concerned, besides the UNDRTD,<sup>120</sup> the UN Charter urges the international community to work together for a higher standard of living, better economic opportunities, and prohibition of discrimination everywhere.<sup>121</sup> This requirement is also made by the UDHR in its Articles 22 and 28 that are unambiguous in calling for the establishment of a global order characterised by a high living standard.<sup>122</sup> In the light of these global human rights instruments, Chowdhury and De Waart argue that the RTD is a principle of international law.<sup>123</sup> This view is shared by Salomon who argues that under the [UN] Charter, UN member states relinquish a degree of their sovereignty and instead accept international cooperation in the respect for, and observance of, human rights as a common purpose of their contemporary collective activities.<sup>124</sup>

Although the international dimension or cooperation aspect of the RTD remains contentious, with views calling on state nations to take responsibility for their development, it is almost impossible to consider development at a national level while ignoring the external factors of globalisation. The UN position has been stated as follows:

While, ultimately, it is for the developing countries themselves to do their utmost to accelerate their economic and social progress, their efforts will be frustrated if the necessary international policies are not adapted to create an environment conducive to supplementing and strengthening these efforts.<sup>125</sup>

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) had taken a similar view when it concluded that 'a global approach to world problems is manifestly the only approach which comes to terms with their real nature'.<sup>126</sup> Despite those who doubt the legal effect of the RTD, it is clear that the doubters are increasingly in the minority. The main preoccupation today should be on how to make the RTD to work effectively and change the lives of people, especially the poor and marginalised in society. Besides international cooperation, there is a need for regional cooperation. It is to the latter that we will now turn.

### *Regional cooperation*

In the RTD context, regional cooperation and collaboration in development projects amongst African countries are imperative for the actualisation of this important right. In fact, Article 22(2) of the ACHPR urges member states to work individually and together for the realisation of the RTD. In responding to this call, regional cooperation has been identified as the building blocks for development. This was embodied in the 1991 Abuja Treaty which set up an African Economic Community in which the establishment of regional economic communities was central.<sup>127</sup> Subsequently, the Organisation of African Unity originally established<sup>128</sup> to free the continent from colonialism and apartheid in South Africa, was turned into the African Union (AU) in 2002, where the first AU summit took place. At the same occasion the New Partnership for Africa's Development (NEPAD), originally adopted in 2001 by the head of states, was also endorsed by African leaders.<sup>129</sup> NEPAD is an African plan designed to address the challenges of poverty and ensure the African renaissance. After realising that this could not be done successfully without good governance, African leaders added the African Peer Review Mechanism (APRM) to support NEPAD. The APRM was embodied in the Declaration on Democracy, Political, Economic and Corporate Governance which strives to provide a conducive environment for the realisation of development on the continent. This was the commitment for the establishment for a 'just, honest, transparent, accountable and participatory government and probity in public life'.<sup>150</sup> The APRM objective was indeed to provide an opportunity for African leaders to hold each other accountable on matters of governance.

Although African countries recognise the need to cooperate for the achievement of the RTD, so far the record is not encouraging. Regional integration remains illusory. This is so because many of the Regional Economic Communities (RECs) are handicapped by conflicts caused by multiple memberships, with countries such as Zimbabwe belonging to the Common Market for Eastern and Southern Africa (COMESA) and to the Southern African Development Community (SADC) at the same time. In a similar vein, the DRC belongs to the Economic and Monetary Community of Central Africa (CEMAC) and SADC groups. These multiple memberships create serious challenges in terms of harmonisation of activities, duplication and wastage of scarce resources.

Another constraint to regional integration in Africa is caused by the Economic Partnership Agreements (EPAs) between the EU aiming to replace the Cotonou Agreement. The latter was characterised by the preferential system which enabled African and Caribbean and Pacific (ACP) countries to export freely to the EU without having to reciprocate to the EU countries. This preferential system is now in the process of being replaced with the EPAs system which is compatible with the World Trade Organisation (WTO) Agreements<sup>151</sup> which reject preferential treatment. Even

though before the EPAs, some African countries belonged to more than one Regional Economic Community (REC), under the EPAs regime, regional integration in Africa is weakened.<sup>132</sup> This is so because ACP countries are compelled to negotiate through EPA regional bodies established by the EU. The Eastern and Southern Africa group (ESA), the Economic Community of West African States (ECOWAS), SADC, COMESA and the Economic and Monetary Community of Central Africa (CEMAC) are EPAs negotiating bodies in Sub-Saharan Africa. Under the EPAs negotiation body, Malawi, Mozambique, Zambia and Zimbabwe are moved from SADC to ESA. This results in regional disintegration rather than regional integration. Echoing an ACP representative, Kamga writes:<sup>133</sup>

The EC's insistence on trying to determine what is best for the ACP and how we should configure our economic space seems more than a little disingenuous. It is difficult to see how the [European] Commission can reconcile its current negotiating approach with the statements made by various Commission officials that it is up to ACP regions to determine the pace and priorities of their regional integration.

Moreover, various RECs limit themselves to mere economic integration without free movement of people between borders. Besides the exception of ECOWAS, free movement of people in RECs remains a challenge. This is illustrated by xenophobic attacks in 2008 and 2015 in South Africa where the majority of victims were from the SADC region where South Africa is located.<sup>134</sup> Similarly, in the CEMAC region, Cameroonians were chased away from Equatorial Guinea in 2014<sup>135</sup> and even in ECOWAS, which is generally the exception, Ghanaians were once chased away from Nigeria<sup>136</sup> and vice versa.<sup>137</sup>

The other weakness of regional cooperation in Africa is generally visible in international fora where Africa fails to unite and present an African position. African countries' positions are generally informed by self-interest as they put their national interests before regional interests. Furthermore, the APRM conceived to keep African leaders on their toes on governance issues is yet to make a tangible difference. This is due to the lack of a vigorous process where reviewed leaders are held accountable. According to Manby, the tone of the meetings of the Forum of the African Peer Review Mechanism has been rather less robust.<sup>138</sup>

In the final analysis, for regional cooperation to make a difference in actualising the RTD, African countries have to establish true RECs characterised by the free circulation of goods and people; they should reduce multiple memberships in RECs and find a way to remain in their original groupings while negotiating EPAs. In addition, African countries should always strive to remain united and pay more attention to a broad common continental position rather than focus on narrow national interest. Furthermore, the APRM should be given biting teeth by enabling it to hold African leaders accountable for their misdeeds. Closing these gaps will provide a viable option for the actualisation of the RTD in Africa.

## Conclusion

This article aimed to explore options and prospects for the realisation of the RTD in Africa. After showing that the RTD has legal, political as well as socio-economic features, hence its multifaceted character, the article considered various options and prospects for the realisation of the RTD.

It has been argued that for the RTD to become a reality, there is a need for a solid constitutional framework characterised by the separation of powers, and a participatory framework in which peoples' participation in constitution building and the legislative process is significant. In addition, it has been shown that the RTD cannot be realised without international cooperation characterised by mutual respect and shared responsibility between the partners. Furthermore, the RTD also needs regional cooperation and true regional integration in which partners are fully accountable to each other for its realisation. Ultimately all stakeholders for the realisation of the RTD have to play their role in its actualisation in Africa.

## Notes and References

- 1 Adopted by the UN General Assembly in res 41/128 of 4 December 1986.
- 2 The UDHR was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 – General Assembly resolution 217 A (III). For more on the reference to the RTD see Baxi, U., 2008. Normative content of a treaty as opposed to the Declaration on the Right to Development: Marginal observations. In Marks, S.P., (ed.). 2008. Implementing the right to development – The role of international law. Geneva: Friedrich Ebert Stiftung, p.47.
- 3 Adopted by the Organization of African Unity in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 December 1986.
- 4 UNRTD, Article1.
- 5 Chief Justice of Senegal [later a judge at the International Court of Justice (ICJ)] in his address in 1972 at the International Institute of Human Rights in Strasbourg. Also see, M'baye, K., 1972. Le droit au développement comme un droit de l'homme. *Revue des droits l'homme*, 5, pp.505-534.
- 6 Vasak, K., 1982. International dimensions of human rights. Available at: [www.en.allexperts.com](http://www.en.allexperts.com). The article in which the generation's theory was first presented by Vasak: Vasak, K., 1977. A 30-Year Struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights. *UNESCO Courier*, 29-30; See also Malhotra, R., 2005. 'Right to development' – Where are we today? In Sengupta, A., Negi, A. and Basu, M., (ed.). 2005. Reflections on the right to development. Delhi: India Sage Publications, pp.130-131.
- 7 Malhotra, 2005, p.131.
- 8 Ibid.
- 9 1978 Dakar Conference quoted from Malhotra, 2005, pp.130-131.
- 10 UN General Assembly Resolution 37/199 of 18 December 1982.
- 11 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.
- 12 Adopted by the General Assembly, New York, 6-8 September 2000, 55/2. United Nations Millennium Declaration.
- 13 Rehof, L.A. and Gulmann, C. (ed.). 1989. Human rights in domestic law and development assistance policies of the Nordic countries. Dordrecht; London: Martinus Nijhoff, p.84.
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- 15 According to it, the sources of international law are:
  - (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states
  - (b) International custom, as evidence of a general practice accepted as law
  - (c) The general principle of law recognized by civilized nations
  - (d) Subject to the provision of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
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Partnership for Africa's Development. Unpublished LLD thesis, University of Pretoria, p.136.

- 17 Thirlway, H., 2006. The sources of international law. In Evans, M. (ed.). 2006. International law. Oxford: Oxford University Press, p.135; For more on the *jus cogens* nature of the RTD, see Murray-Bruce, F. 2003. Should anybody be poor – An analysis of the duties and obligations of the international community to the eradication of poverty and growth of sustainable development in light of the *jus cogens* nature of the Declaration of the Right to Development. *bpress legal series working paper No 725* (on file with author).
  - 18 The Working Group was established by the Commission on Human Rights, in its resolution 1998/72.
  - 19 Commission on Human Rights, Resolution 1998/72 adopted without a vote on 22 April 1998, appointed Arjun Sengupta as the UN Independent Expert of the RTD.
  - 20 The fifth session of the Working Group on the Right to Development recommended, among other things, the constitution of a high-level task force for the implementation of the RTD within the framework of the Working Group. This recommendation was adopted at the 60th session of the Commission for Human Rights through its Resolution CHR 2004/7.
  - 21 Baxi, 2008, p.47.
  - 22 Ibid.
  - 23 Kunanayakam, T., 2013. The Declaration on the Right to Development in the context of United Nations standard-setting. In UN Realising the right to development – Essays in commemoration of 25 Years of the United Nations Declaration on the Right to Development. Geneva: UN, p.48.
  - 24 M'Baye, K., 1978. Le développement et les droits de l'homme. Paper presented to the Colloquium on Development and Human Rights, Dakar, 7-12 September 1978, organised by the International Commission of Jurists and the Association Sénégalaise d'Études et de Recherches Juridiques, p.25.
  - 25 Alston, P., 1981. Development and the rule of law: Prevention versus cure as a human rights strategy. In International Commission of Jurists (ed.). 1981. Development, human rights and the rule of law. Oxford New York: Pergamon Press, p.31.
  - 26 Article 22.
  - 27 *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda 3* (DRC case Comm 227/99: 20th Annual Activity Report of the African Commission, annex IV, 111.) and *Kevin Mgwanga Gumne et al v Cameroon* (Gumne case Comm 266/2003: 26th Annual Activity Report of the African Commission, annex IV); *Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois) v Kenya* (Endorois case Comm 276/2003: 27th Annual Activity Report of the African Commission, annex 5).
  - 28 African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Right v. Republic of Kenya*. Judgement in Application 006/2012.
  - 29 Paragraph 3 of the Preamble of the 1996 Cameroonian Constitution; the 1995 Ugandan Constitution National Objectives and Directive Principles of State Policy, objective number nine; Section 30 of Chapter 4 of the 1994 Malawian Constitution and chapter 3 on Fundamental Rights and Freedoms; the 1994 Ethiopian Constitution, article 43.
  - 30 This section relies on the history and theory of the RTD as discussed by Kamga, 2011, pp.146-151.
  - 31 UN GA res 3201 (S-VI), 1 May 1974.
  - 32 UN GA res 3281 (XXIX).
  - 33 Pellet, A., 1987. A new international legal order: What legal tool for what changes? In Snyder, F. and Slinn, P. (ed.). 1987. International law of development. Abingdon: Professional Books, p.117.
  - 34 Marks, S., 2004. The human right to development: Between rhetoric and reality. *Harvard Human Rights Journal*, p.139.
  - 35 G.A. Res. 56/150, UN GAOR, 56th Sess., Supp. No. 49, at 341, UN Doc. A/56/150 (2001).
  - 36 This group consisted of Algeria, Bangladesh, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, and Vietnam. See further, G.A. Res. 150, UN GAOR, 56th Sess., Supp. No. 49, at 341, UN Doc. A/2890 (2001).
  - 37 Marks, 2004, p.141.
  - 38 Ibid.
  - 39 The disagreement on the RTD was manifest during the vote of the General Assembly Resolution 41/128 of 1986 proclaiming development as a human right, where the USA cast the only negative vote and eight other countries abstained. Even after the adoption of the UNDRDT in 1986, the debates remain polarised at the UN. From 1998 to 2008, several resolutions on the RTD were adopted (some without votes) at the Commission on Human Rights (CHR or the Commission), from 2006 Human Rights Council, and at the General Assembly.
- In 1998, the resolution E/CN.4/RES/1998/72 was adopted at the CHR without a vote whereas at the General Assembly, 125 votes in favour, 1 vote against and 42 abstentions were recorded for the resolution A/RES/53/155. In 1999, the resolution E/CN.4/RES/1999/79 was adopted at the CHR without a vote and at the General Assembly 119 votes for, 10 against and 38 abstentions were recorded for the resolution A/RES/54/175. In 2000, the resolution E/CN.4/RES/2000/5 was adopted without vote at the CHR and the resolution A/RES/55/108 was also adopted without a vote at General Assembly. At the CHR in 2001 the EU (except the UK) was for the RTD, 3 abstentions (UK, Canada and the Republic of Korea) were recorded and Japan and the USA voted against. The same year (2001), at the 56th session of the General Assembly (September–December) 123 votes in favor and 4 against (Denmark, Israel, Japan, and the USA), with 44 abstentions were recorded. The abstaining countries included Australia, Austria, Belgium, France, Germany, Norway, Sweden, and the UK, who had voted for the resolution in the previous year. At its 57th session in December 2002, where the General Assembly adopted the conclusions of the Open-Ended Working Group on the RTD, it recorded

133 votes in favor, 4 votes against (United States, Australia, the Marshall Islands and Palau), and 47 abstentions. At the CHR in April 2002, when the Commission (in the absence of the USA) was preparing the endorsement of the conclusions adopted by consensus at the third session of the Open Ended Working Group, 38 countries voted for the RTD, 15 countries including the EU (incorporating the UK), Canada, Japan, South Korea abstained and there was zero vote against, perhaps because the USA was not a member of the CHR in 2002. The disagreement between UN member states was also visible in 2003 when the Commission decided to call upon its Sub-Commission on the Promotion and Protection of Human Rights to prepare a concept document assessing the avenues for the implementation of the RTD, including the adoption of an international legally binding instrument on the right amongst others. 47 countries voted for the resolution; the USA, Australia and Japan voted against and 3 abstentions were recorded. In this vote, the USA stood strongly against the paragraph of the resolution considering the option of an international legal standard of a binding nature and drew the attention of the General Assembly to the recorded votes of Australia, Canada, Japan, and Sweden on the paragraph which were identical to its own. The USA stood against the paragraph because it was not discussed in the Working Group and on the grounds that it was going to lead to wastage of resources. Danies, the USA Representative to the commission, stated that: '[The USA's] delegation opposed the proposal that the Sub-Commission should prepare a concept document on a legally binding instrument on the right to development because it would devote scarce resources to a project that would be unlikely ever to garner significant support.' A similar trend of divergence on the RTD was observed in the same year (2003) at the General Assembly when 173 votes in favour, 3 against and 5 abstentions were recorded for the resolution A/RES/58/172. In the subsequent years the voting pattern on the RTD at the UN did not change.

- 40 Marks, 2004, p.141.
- 41 Pellet, 1987, p.117.
- 42 ICJ Advisory Opinion of December 20, 1980, *Interpretation of the Agreement of 25 March 1951 between the W.H.O and the Egypt*, No 10, Rep, p.76.
- 43 Article 1 (1), *our emphasis*.
- 44 Baxi, U., 1983. The New International Economic Order, basic needs and rights: Note towards development of the right to development. *India Law Journal*, 23, p.235.
- 45 *Ibid*.
- 46 Vizard, P., 2006. Human Development Capability Association: The human development capability approach and human rights, p.4, briefing note, quoted in Kamga, 2011, p.125.
- 47 Rosas, A., 2001. The right to development. In Eide, A., Krausus, C. and Rosas, A. (ed.). 2001. *Economic, Social and Cultural Rights*. Dordrecht; Boston: Martinus Nijhoff, p.251.
- 48 Bello, E., 1992. Article 22 of the African Charter on Human and Peoples' Rights. In Bello, E. and Adjibola, B. (ed.). 1992. *Essays in Honour of Judge Taslim Olawale Elias*. Dordrecht: Martinus Nijhoff, p.462.
- 49 Rosas, 2001, p.251.
- 50 Kamga, S.A.D. and Fombad, C.M., 2013. A critical review of the jurisprudence of the African Commission on the right to development. *Journal of African Law*, 57(2), p.204.
- 51 *Ibid.*, p.203.
- 52 *Ibid*.
- 53 Malhotra, R., 2013. Towards operational criteria and a monitoring framework. In UN Realising the right to development – Essays in Commemoration of the 25 Years of the United Nation Declaration on the Right to Development. Geneva: UN, p.394.
- 54 Bedjaoui, M., 1989. The difficult advance of human rights towards universality in a pluralistic world. Proceedings at the colloquy organised by the Council of Europe in co-operation with the International Institute of Human Rights, Strasbourg 17-19 April 1989; p.32 (on file with author).
- 55 Kamga and Fombad, 2013, p.204.
- 56 Kirchmeier, F., 2006. The right to development – Where do we stand? State of the debate on the right to development. Dialogue on Globalization, *Occasional Paper* p.10. Available at: <http://www.fes-globalization.org/publications/FESOccPapers23.pdf> [Accessed 28 May 2018].
- 57 Atugba, R.A., 2013. Equality, non-discrimination and fair distribution of the benefits of development. In UN Realising the right to development – Essays in Commemoration of 20 years of the United Nation Declaration on the Right to Development. Geneva: UN, p.115.
- 58 Commission on Human Rights Resolution 1998/71, par. 10(a)(i), endorsed by Economic and Social Council decision 1998/269.
- 59 Human Rights Council Fifteenth session. Right to development report of the high-level task force on the implementation of the right to development on its sixth session. Geneva, 14–22 January 2010, /HRC/15/WG.2/TF/2/Add.2.
- 60 Atugba, 2013, p.115.
- 61 Malhotra, 2013, p.394.
- 62 Alston, 1981, p.31.
- 63 *Kevin Mgwanga Gumne et al v Cameroon (Gumne case Comm 266/2003: 26th Annual Activity Report of the African Commission, annex IV)*.
- 64 *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda (DRC case Comm 227/99: 20th Annual Activity Report of the African Commission, annex IV, 111.)*.

- 65 Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois) v Kenya (Endorois case Comm 276/2003: 27th Annual Activity Report of the African Commission, annex 5). For a thorough analysis of this cases, see Kamga and Fombad, 2013, pp.196-214.
- 66 African Court on Human and Peoples' Rights. *African Commission on Human and Peoples' Right v. Republic of Kenya*. Judgement in Application 006/2012.
- 67 Kamga, S.A.D., 2011. The right to development in the African human rights system: The Endorois case. *De Jure*, 2, p.390; Also *Endorois case par. 128*.
- 68 African Court on Human and Peoples' Rights. *African Commission on Human and Peoples' Right v. Republic of Kenya*. Judgement in Application 006/2012.
- 69 Cameroon Constitution, Preamble; Malawian Constitution, article 30; Ethiopian Constitution, article 43.
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- 71 UNDRTD, article 6 (1).
- 72 See article 2 (3) and 8 (2) of the UNDRTD.
- 73 Article 8 (1) of the UNDRTD.
- 74 Adopted on 11 July 2003 in Maputo, Mozambique and entered into force on 25 November 2005.
- 75 Article 19.
- 76 Article 19 (c).
- 77 Article 19 (d).
- 78 Article 9.
- 79 Article 17.
- 80 Article 18 (2)(a).
- 81 Article 19 (b).
- 82 Banda, F., 2013. Women, human rights and development. In *UN Realising the right to development – Essays in Commemoration of 20 years of the United Nation Declaration on the Right to development*. Geneva: UN, p.157. Our emphasis.
- 83 Fombad, C.M., 2007. Challenges to constitutionalism and constitutional rights and the enabling role of political parties: Lessons and perspective from Southern Africa. *American Journal of Comparative Law*, 55(1), p.7.
- 84 Article 8.
- 85 Fombad, 2007, p.7.
- 86 Study by the Secretary General on the regional and national dimensions of the right to development as a human right (1980, 1981). Par. 13 of 1981 document, the Introduction and Part One (Impact of some international factors on realization of the right to development at the national and regional levels), were issued as document E/CN.4/1421 in 1980; Part Two (Promotion of the right to development at the national level) and Part Three (Promotion of the right to development at the regional level (and containing concluding observations)), were issued as document E/CN.4/1488 in 1981. The paragraph references in this section refer to the latter document.
- 87 Par. 27 of 1981 document.
- 88 Ghai, Y. and Galli, G., 2006. Constitution-building Processes and Democratization: Lessons Learned. *Democracy, conflict and human security*. In International Institute for Democracy and Electoral Assistance (IDEA Handbook series), p.232. Available at: <https://www.idea.int/sites/default/files/publications/democracy-conflict-and-human-security-handbook-volume-2.pdf> [Accessed 29 May 2018].
- 89 United Nations publication, Sales No. E.75.XIV.2, Part. 6, par. 122.
- 90 UNDRTD, Preamble, article 8 (2).
- 91 1981 Secretary General Studies, par. 15.
- 92 Ghai and Galli, p.236.
- 93 Moehler, D., 2008. *Distrusting Democrats: Outcomes of participatory constitution making*. Michigan: University of Michigan Press.
- 94 Ibid; Also Ghai and Galli, 2006, p.236.
- 95 Ghai and Galli, 2006, p.238.
- 96 Ibid.
- 97 *Minister of Health & Another v New Clicks S. Af. (Pty) Ltd & Others* 2006 (1) BCLR 1 (CC) at 344-47 (S. Afr.), p.40.
- 98 *Doctors for Life International v The Speaker of the National Assembly and Others* CCT 12/05
- 99 Aspect of the analysis of *Doctors for Life* provided here relies on Djoyou Kamga, 2011, pp.354-368.

- 100 *Doctors for Life* case, par. 7.
- 101 *Doctors for Life* case, par. 1 and 4.
- 102 *Doctors for Life* case, par. 127 and 128.
- 103 Czapanskiy, K.S.. and Manjoop, R., 2008. The right of public participation in the law-making process and the role of legislature in the promotion of this right. *Duke Journal of Comparative & International Law*, 16 and 19(1), p.16.
- 104 *Ibid.*
- 105 *Ibid.*
- 106 *Ibid.*
- 107 The *Endorois* case.
- 108 Par. 281. For more on this see Morel 'Communication 276/2003, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya*' 2010 *Housing and ESCR Rights Law Quarterly*.
- 109 Par. 281.
- 110 Kamga and Fombad, 2013.
- 111 *Endorois*, Par. 270.
- 112 Kamga and Fombad, 2013.
- 113 In resolution 4 (XXXIII), adopted without a vote by the Commission on Human Rights on 21 February 1977.
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