

Challenges towards the realization of the Right to Development in Kenya

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Master of Laws (LL. M.)**

by

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Mini Dissertation

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ABBREVIATIONS AND ACRONYMS

ACHPRR	African Charter on Human and Peoples Rights
ACHPRRWA	African Charter on Human and Peoples Rights on the Rights of
AIDS	Acquired immune deficiency syndrome
AU	African Union
AWD	African Women's Decade
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CSO	Civil Society Organization
CRC	Rights of the Child
CDF	Constituency Development Fund
DFRD	District Focus for Rural Development
ERSWEC	Economic Recovery Strategy for Wealth and Employment creation
HIV	Human immunodeficiency virus
GDP	Gross Domestic Product
ICTs	Information and communications technologies
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organization
KDHS	Kenya Demographic and Health Survey
KIHBS	Kenya Integrated Household Budget Survey
KV2030	Kenya Vision 2030
IMF	International Monetary Fund
MTP	Medium Term Plan
MPND&V2030	Ministry of Planning, National Development and Vision 2030
MDG	Millennium Development Goal
NEPAD	New Partnership for Africa's Development
NIEO	New International Economic Order
NGO	Non-governmental organization
NGP	National gender policy
PRSP	Poverty Reduction Strategy Paper
RDF	Rural Development Fund
RTD	Right to Development
UN	United Nations
UDHR	Universal Declaration of Human Rights

Chapter 1

Thesis Statement

Development in terms of growth, progress, advancement and improvement has high premium world over. Although the right to development has only half-heartedly received national and international attention, the importance of development in modern times is not lost to the national and international community. In 1986 the Declaration on the Right to Development, was adopted by the international community. In 1993, the right to development was reaffirmed by the Vienna Declaration and Program of Action. In the Africa region, the right to development was already recognized by the African Charter on Human and Peoples' Rights (ACHPR, Banjul), 1981. At the national level, the Constitution of Kenya 2010 protects the rights to sustainable development but a closer look shows that this is only in regard to the environment and natural resources. The realization of the right to development still remains elusive for many Kenyans.

At the national level, development is something aspired to by Kenya since independence of the country in 1963. There have been many national development initiatives and currently, for example, Kenya aspires to be a “newly industrialized country by the year 2030”.¹ Yet development in this context has largely been viewed from the perspective of economic growth which is deemed a necessary but often manipulated used as a political tool in ethnic and political competition, thus determining who participates, contributes and benefit from development. This has resulted to skewed development and underdevelopment of the majority, empowering only a handful with almost half the population living below poverty line. In addition there has been nominal regard to negative effects of growth such as harm to the environment and especially the effects of unequal development within the country.

National statutory laws and policies are largely blind to the concept of development as a human right. At international level, development assistance is made conditional on good governance,

¹ Kenya Vision 2030, 2008

rule of law and democracy- basically civil and political rights which have proved to be elusive. As a result development has been unequal, unstable and elusive to many Kenyans.

Kenya rates poorly in many social indices and economic, for example, Kenya is ranked by UNDP at number 103 out of the total 169 countries surveyed in the list of inequality.² Currently, according to the First Medium Term Plan Update,³ about 48 per cent of Kenyans live in poverty (on less than “a dollar a day).” In the rural areas where about 79 per cent of Kenyans live, relying mostly on agriculture, the richest 20 per cent of the rural population take 61 per cent of rural income while the bottom 20 per cent of the rural population get only 3.5 per cent of rural income.⁴ Further, there are also great disparities in land ownership with a handful of people owning large tracks of land, some of it lying idle, while a large number of squatters do not own land.⁵ In the urban areas, 51 per cent of urban income goes to the top 20 per cent of the urban population while the bottom 20 per cent of the urban population receive only 5.4 per cent of the urban income.⁶ Even in times when there has been economic improvement, poverty levels have to a large extent remained steady around 46 to 50 per cent.⁷ In addition, underdevelopment and resulting poverty have been sustained and often exacerbated by development policies that do not address underlying causes of underdevelopment which include, slow growth especially from the mid-nineties, increased population and youth unemployment, environmental degradation, global climate change as well as political instability, particularly the post-election violence at the end of 2007 and the early part of 2008.⁸

² United Nations Development Programme (UNDP) Global Human Development Report, 2010.

³ First Medium Term Plan Update (Prepared By Ministry of State for Planning, National Development, & Vision 2030 and Office of the Deputy Prime Minister and Ministry of Finance) November, 2011.

⁴ First Medium Term Plan Update, 2011.

⁵ First Medium Term Plan Update, 2011.

⁶ First Medium Term Plan, 2011.

⁷ Kenya Integrated Household Budget Survey (KIHBS) 2005-2006.

⁸ First Medium Term Plan, 2011.

Kenya therefore like all African countries need to implement the right to development so that development is undertaken in a manner that effectively addresses the issues that undermine development most, these include poverty, inequality, and participation. Development if undertaken in Kenya from a human rights perspective would achieve poverty reduction, equitable distribution of income and wealth in a manner in which all citizens who in turn must participate in and benefit from the development without discrimination. In addition development from a human rights approach will address equitable access to social services, human rights as well as political participation.

Research question

To what extent can human rights based approach to development, which places human well-being at the centre of development process, entitling all individuals and all groups and all regions to participate, contribute and benefit without discrimination, aid in the realization of the right to developments in Kenya?

Sub questions

- a. What is the legal basis for the right to development in Kenya?
- b. What is the content of the right to development?
- c. To what extent are these rights not being realized in practice and what are the obstacles their realization?
- d. How would it benefit Kenya if the right to development is implemented?
- e. What can be done to rectify the situation using the idea of development as a human right and using indigenous home grown based solutions and strategies responsive to Kenyan circumstances?

Background and Rationale for the study

Long before development was construed as a human right, national development was emphasized in Kenya as a means of attaining growth and modernization. Although development was not conceptualized as a human right, the need for development has been at the fore, making it one of the major goals of independent Kenya. Development has thus been conceptualized as a being necessary for economic growth and not as a human right and this has had implications on the way in which development is undertaken as well as the resulting effects. It must however be noted that although development is not discussed in terms of human rights to which all (citizens) are entitled, there is legal basis for construing development as a human right.

At least some aspects of the right to development have a legal basis in Kenya as it is expressed in the Constitution of Kenya 2010, as well as in the human rights conventions ratified by Kenya. The Constitution of Kenya includes sustainable development as one of the national values and principles of governance.⁹ In addition, Kenya is a party to the African Charter on Human and Peoples' Rights (ACHPR, Banjul, 1981) which it ratified in 1992. The African Charter recognizes the right to development. Article 22 of the African Charter states that "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind" and that "States shall have the duty, individually or collectively, to ensure the exercise of the right to development."¹⁰ Although the African Charter does not define what constitutes development, the United Nations Declaration on the Right to Development which Kenya subscribes to does.

The 1986 United Nations Declaration on the Right to Development establishes development as a right on equal footing with other human rights. In the preamble defines Development as "A comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and all individuals on the basis of their active, free and meaningful participation in the development and in the fair distribution" of the resulting benefits.

⁹ Constitution of Kenya 2010 Article 10 (1) (d)

¹⁰ The African Charter on Human and Peoples' Rights, Article 22 (1) and (2).

Kenya also subscribes to the 1993 Vienna Declaration and Program of Action, which re-affirmed the right to development terming it “a universal and inalienable right and an integral part of fundamental human rights.”¹¹

Although the 1986, Declaration on the Right to Development and 1993 Vienna Declaration and Program of Action are still soft law, being only contained in declarations and resolutions, the Declaration nevertheless draws its foundation from legally binding treaties like the Universal Declaration of Human Rights (“UDHR”), which Kenya subscribes to and International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) which have been ratified by Kenya. In the case of Kenya it is also legally bound by provisions of the African Charter on Human and Peoples’ Rights (ACHPR, Banjul, 1981) which it ratified in 1992.

Further, Kenya subscribes to the Millennium Development Goals (MDGs). Finally the bilateral and multilateral agreements signed by Kenya nowadays include rights to development. Kenya is therefore obligated to respect, protect, promote and fulfil the right to development, yet the realization of the right to development has remained a big challenge.

This paper will seek to examine what effect using rights based perspective to development can have in promoting protecting and fulfilling the right to development in Kenya.

Literature Review

Preliminary literature review involves looking briefly at the history of development in Kenya, then looking at the legal basis for development and this will involve looking at the provisions of the Constitution of Kenya 2010, the previous development strategies, previous development reports, and more particularly the current development strategy which is the Kenya Vision 2030

¹¹ Vienna Declaration and Programme of Action:, World Conference on Human Rights, Part I, 10,U.N. Doc. A/CONF.157/23 (1993)

as well as the relevant case law. The paper will also look at the Declaration on the Right to Development and the relevant provisions of the International Convention on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Civil and Political Rights (ICCPR), the Convention on Elimination of all Forms of Discrimination against Women (CEDAW). At the regional level the paper will look at the African Charter on Human and Peoples' Rights with relevance to the right to development.

Although much has been written about development, little has been written on development as a human right in Kenya. Like many developing countries, Kenya has previously taken a restrictive approach to the issue of development and this is reflected in the available literature. Although at the forefront of national agenda, development, has been construed from a restrictive perspective measured in Gross Domestic Product (GDP) and Foreign Direct Investment (FDI) not from a holistic perspective as a means of accomplishing economic, social, cultural as well as civil and political rights with human well-being at the centre. Thus the writing on development has also followed this restrictive perspective, yet looking at development from a narrow perspective can negate a very important purpose of development, that of putting human well-being at the centre of development.

Until 1990s when United Nations Development Program (UNDP) started producing Human Development Reports, literature available discussed development in Kenya from economic perspective and not from a human rights perspective.

Kenya having been colonized by the British in the 18th Century, literature on development typically discusses national development in terms of pre-colonial and post-colonial economy, with some arguing that the economy of the country's (under)development is impacted by lack of capital, technical knowhow and other inputs while others argue that Western capital and power structure was imposed in such a way as to produce and perpetuate poverty, inequality, economic and political insubordination¹² through, the concept of development discussed is the Western concept of capitalist development.

¹² Leys C., *Under Development in Kenya: The Political Economy of Neo-colonialism*, 1975.

From the period of independence, Kenya emphasized national development, but the concept of development as understood in Kenya is the one that was inherited from colonial times which focused essentially on economic growth. Along with inheriting the restrictively construed concept of development, the actual “practice” development was skewed and unequal. Agriculture, industry, manufacturing and services were established in some areas while vast areas lagged behind in development of labour, commerce, education and agriculture.¹³ It is also important to mention here that the colonial economy changed the landholding structure by treating land as a commodity and concentrating it in few hands and this has also had major impact on the issue of development.

The post-colonial Constitution did not attempt to rectify this situation but basically safeguarded the white settler interests. However, to its credit, the postcolonial Constitution established regional governments whose mandate was to manage community concerns at the regional level and also to champion community interest at the national level. This way of managing affairs may have gone a long way in dealing with development needs of the regions and possibly addressed regional disparities, instead, the Regional Assemblies were soon abolished and power to make decisions concerning the regions vested in the Central Government that clearly did not fairly balance regional development needs. This led to a situation where development suffered as it continued to be skewed, without participation of the majority and benefits of development were unequally distributed.

The skewed development and inequality was recognized by the post-colonial government which stated in Sessional Paper No. 10 of 1965¹⁴ that the “state has an obligation to ensure equal opportunities to all citizens, eliminate exploitation and provide needed social services such as education, medical care and social security”.¹⁵ This particular objective of the Sessional Paper was on the right track to inclusive development, however it lacked implementation. To its

¹³ Ochien’g R. and Maxon R. M., Editors, *An Economic History of Kenya*, 1992, p. 269.

¹⁴ Sessional paper No 10 Of 1965: *African Socialism and its Application to Planning in Kenya*.

¹⁵ Sessional Paper No. 10 of 1965.

discredit and short sightedness however, the strategy adopted in the Sessional Paper was to limit the spending of government resources only to areas which were considered to have high potential. This had the effect of economic, social and political marginalization of areas considered to have low potential in turn leading to inequality and poverty as was documented by ILO in 1972¹⁶ while the World Bank in 1975 reported that development in Kenya was accompanied by imbalance between regions and different groups of population. The UNDP Human Development Reports have regularly highlighted poverty and inequality including gender inequality as major threats to development.¹⁷

Since the first development plan contained in Sessional paper No. 10, there have been several long term development plans in Kenya. The second Sessional Paper was issued in 1986 focussing in economic management and growth.¹⁸ This too only marginally moved towards its objective. It was under implementation during a time of particularly poor political governance (1990s) which saw economic growth drop to 0.6% in 2002,¹⁹ during this time, school enrolment declined from 92.10 per cent in 1990 to 87.84 per cent in 1993 and 98.91 per cent in 1999.²⁰ In 2003, after the election of a new Government (NARC), the new government the Economic Recovery Strategy for Wealth and Employment Creation (2003-2007) (ERSWEC) which saw improvement of the economy from 0.06 in 2003 to 7.1 in 2007.²¹ Despite the notable growth in the economy during this period however, poverty reduction was only nominal. For example although the government figures for this period indicates that poverty incidents were reduced by

¹⁶ ILO, *Employment, Income and Equality: A Strategy for Increasing Productive Income in Kenya* (Geneva, 1972).

¹⁷ http://hdr.undp.org/en/reports/national/africa/kenya/Kenya_2001_en.pdf.

¹⁸ The second Sessional paper No. 1 of 1986: *Economic Management for Renewed Growth*.

¹⁹ Adam C.S., Collier P. and Ndungu S. N., *Kenya: policies for Prosperity*, 2010 p 2.

²⁰ Kimalu P.K., Nafula N., Manda D. K., Bedi A. S., Mwabu G. and Kimenyi M. S. "Education Indicators in Kenya", *Eastern Economic Journal*, 32 (3), 493-513.

²¹ Adam C.S., Collier P. and Ndungu S. N., *Kenya: policies for Prosperity*, 2010 p 2.

10% in the period 1999 to 2006, in terms of absolute numbers, the numbers of poor people increased from 12 million to 16 million.²²

Presently Vision 2030, which covers the period 2008 to 2030, is Kenya's long-term strategy for development with the objective of creating prosperity, global competitiveness and high quality of life by the year 2030. The strategy's three pillars are the economic pillar which seeks to achieve in the Gross Domestic Product of 10 per cent by the year 2012, but which has been missed. In addition economic growth in Kenya as illustrated above has not always translated to improvement in the lives of the majority of the population and it is not apparent that the vision 2030 will overcome this weakness. The economic pillar targets the traditional economic growth in the areas of tourism, agriculture, wholesale/retail trade, manufacturing, IT enabled services, and financial services. The second is the social pillar, which aims at "improving the quality of life for all Kenyans" and targets human and social welfare programs, specifically: education and training, health, environment, housing and urbanization, children and social development, and youth and sports. The Third pillar is the political governance with the goal of a unified country with a democratic system that is "issue based, people centered, results oriented, and is accountable to the public" this pillar targets "The rule of law – the Constitution of Kenya, electoral and political processes, democracy and public service delivery, transparency and accountability, and security, peace building and conflict management" Although Vision 2030 does not mention the right to development, certain elements of the objectives and target areas express the tenets of the right to development, but as with the previous policies, the challenge lies in its implementation and the fact that development strategies are not tightly tied to a human rights-based approach.

The main criticism which has been levelled against the Vision 2030 is that although Kenya is a highly unequal country, the vision does not address structural determinants of inequality such as urban rural divide, the policy of favouring high productivity areas, as well as regional, ethnic and sex discrimination, which if not addressed will only increase and sustain underdevelopment. In addition the vision acknowledges that gender inequality is a key challenge to development yet it does not put in place measures to achieve gender equality on the economic pillar leaving such

²² Kenya Integrated Household Budget Survey (KIHBS) 2005-2006.

measures only in the social pillar. In addition, despite implementation of Vision 2030 for the past 5 years (2007 to 2012), Kenya still rates poorly in many economic and social indices. Despite these impressive plans, Kenya is still plagued by regional and gender disparities.²³

The Kenya National Policy on Gender and Development (NPGD), 2000 expresses the policy of Gender mainstreaming and empowerment of women. The policy gives a framework for mainstreaming gender in all policies, planning and programming in Kenya and it is explicit that “it is the right of women, men, girls and boys to participate in and benefit equally from the development process.” Although the NPGD attempts to put in place institutional mechanisms for ensuring that the policy is effectively implemented, development process in Kenya is still not gender sensitive and many segments of the society especially women have not been fully embraced in the development process or its benefits. Thus the Kenya National Policy on Gender and Development has had little impact with regard to development in Kenya.

Other efforts at development policies which have at best had nominal success in their development objective include implementation of the Millennium Development Goal (MDGs), Gender and Development policy and Sector Development Strategy (SDS). However, implementation of these development efforts has not been optimal and therefore the efforts have not yielded an equal society or significantly reduced poverty.

Until the passing of the Constitution of Kenya 2010, successive Governments though, making development a major objective, have not managed to make a major shift in law or policy to bring about development that is inclusive, people centred and participatory. The issue of unequal development has been at the centre of many a struggle in Kenya formed a large part of the need for constitutional change.

The passing of the Constitution of Kenya 2010 has to an extent brought development in the ambit of rights. The Constitution recognizes the rights to sustainable development and establishes the Kenya National Commission on Human Rights and Equality Commission

²³ Kenya Integrated Household Budget Survey (KIHBS) 2005-2006.

whose functions include facilitating gender mainstreaming in “national development”.²⁴ In addition the constitution obligates everyone to cooperate with state organs and other persons among others “to ensure ecologically sustainable development...” Under the devolved system of government, the objects of devolution include the recognition of the right of communities to further their own development and to promote social and economic development.²⁵

Yet the constitution does not go far enough in boldly guaranteeing the right to development and only guarantees the right to sustainable development. It must be noted however that reference to sustainable development in the Constitution is stated more in terms of duties, obligations and responsibilities towards nature than as a human right. It is left to the interpreter to give sustainable development a compressive meaning such as “development that meets the need of the present without compromising the capabilities of future generations to meet their needs.”²⁶ In addition, the constitution leaves many gaps to be filled by implementers who may be reluctant to make changes having been beneficiaries of unequal development.

In terms of case law, the right to development has been litigated successfully before the African Commission on Human Rights which upheld the right to development in the *Endorois* case.²⁷ The Commission found that the way in which the Government of Kenya evicted the Community was from its traditional lands to make way for a game reserve and denied them access to resources constituted a violation of the rights of the community including the right to development under Article 22 of the African Charter.

²⁴ Article 59 (2) (b).

²⁵ Article 174 (1) (d).

²⁶ World Commission on Environment and Development (WCED): *Our Common Future* (Oxford: Oxford University Press, 1987).

²⁷ Communication 276 / 2003 African Commission for Human and People's Rights - Centre for Minority Rights Development (Kenya) (CEMIRIDE) and Minority Rights Group International on behalf of *Endorois* Welfare Council vs. Kenya

Methodology

This paper looks at and critically examines the legal framework for promoting and protecting the right to Development in Kenya. The paper analyzes the constitution of Kenya 2010, as well the some cases touching on the right to development. With regard to practices the paper examines key policies on the national development of Kenya 2010. The paper also examines the extent to which law and practices have promoted and protected or derogated the rights to development using the information from human development reports. Finally, the paper will determine whether taking into account the human rights perspective in legislation, litigation and practices can help in the realization of the right to development in Kenya. Desk review has been used in this paper owing to time constraint and the legal nature of the investigation.

Structure

The first Chapter of this paper will deal with introduction and literature review on the right to development in Kenya this chapter also states the thesis statement, the research question, the background and Rationale for the study as well as, methodology and the Structure. Chapter two contains the theoretical framework. It looks at the Concept of Development and development as Human Right. It also looks briefly at the history of the Right to Development and then goes on to examine the Declaration of the Right to Development and the elements of the right to development. It also looks at the contestations around development as a Human Right and analyse whether indeed there is an added Value in constructing development as a right and end with the chapter conclusion. Chapter three examines the legal and policy position of the right to development in Kenya. With regard to the legal position, it takes into account the country's Constitution and case law which have a bearing on the right to development, as well as international law such as the International Conventions such as the ICCPR and CEDAW, the African Charter on Human and Peoples Rights. With regard to policies, the chapter looks at several national development policies. Chapter four will examine the extent to which the right to development been realized or not realized in Kenya as well as the obstacles to the realization of the right to development and explain the poverty syndrome in Kenya and response by the

international community. Chapter five will suggest steps that can be taken to rectify the situation using human rights perspective and will include the conclusion and recommendations.

Chapter Two

Theoretical framework

Development is critical to humanity as it enables human beings to enjoy their dignity and rights as human.²⁸ Development has many components and it is easy to focus on some and leave [out] others and this may lead to undesired consequences. In Kenya, the focus of development has been on economic growth. It is assumed that economic growth would, without further intervention, lead to “national prosperity” which includes economic development and human development. For example Vision 2030 Delivery Secretariat Status Report (October 2013) on the achievements so far did not mention say anything regarding poverty alleviation, and the “poor” or “poverty”, The secretariat has however, justified the omissions arguing that poverty will be tackled broadly through programmes such as infrastructure development, ensuring food security and water provision.

Available literature shows that placing emphasis on economic growth has not always achieved the intended results as economic growth has been inconsistent and it has not necessarily led to human development.²⁹ At the time of Kenya’s independence, Kenya like other newly independent states sought to spearhead the process of modernizing the society and raising its income of the people through industrialization.³⁰ Although it is often argued that economic growth will lead to human development, this is not always the case particularly when development policies and their implementation are skewed concentrating development means and benefits in few hands or few regions. In such a situation the average growth may increase but in actual terms of human development only few people will benefit leaving the rest in a state of underdevelopment. In the case of Kenyan the objective of development in Kenya is economic

²⁸ Article 1 Universal Declaration on Human Rights (UDHR) 1948.

²⁹ Rapley, J., *Understanding Development: Theory and Practice in the Third World*, 3rd Edition, 2007 p 1.

³⁰ Rapley, J., *Understanding Development: Theory and Practice in the Third World*, 3rd Edition, 2007 p 2.

prosperity which in turn is intended to lead to human well-being. This has led to two problems with regard to achieving human development. Firstly economic prosperity has not been even. Pegging human development to economic prosperity would mean that when economic prosperity slows down, human development should also slow down. Secondly human development has not always been achieved even during the times of high economic growth. The proposition here is that in order to achieve sustained human and economic development, Kenya should guarantee all its population the right to development. This would put people as the “subject and the object of development” and ensure removal of a range of constraints that keep about 50 per cent of the population in poverty and deprives them of material goods and ability to exercise rights and enjoy freedoms. Development should be for human beings and therefore human beings must be put at the centre of development.

Kenya recognizes the importance of development and has since independence initiated various development strategies with a view to attaining “national prosperity”. The strategies that have been put in place however, have focused on economic growth and emphasized on ventures that would lead to high economic advancement. There have been varying degrees of successes and failures as economic growth has not been constant over the years, sometimes up often stagnating and other times down.³¹ For example between 1964 and 1980 the country’s economy grew by an average annual GDP of 6 per cent, between 1980 and 1990 there was a slowdown in the economy grew by an average by 4 per cent. Between 1990 and 2002 the country the average annual GDP growth was only 1.9 per cent, by contrast the population during this period grew at an average of 2.9 per cent annually. From 2003 to 2007 some recovery has been made and there has been a decline in absolute poverty from 53% to 46% by 2007, however, even with sustained economic recovery and declines in absolute poverty, Kenya continue to be one of the poorest and unequal countries and many challenges persist hindering the realization of the right to development. The constant in the equation has been growing poverty and inequality. This indicates that the models (theories and practice) of development used by Kenya have not achieved development or its assumed benefit to all the population. Kenya’s poverty levels have

³¹ Adam C.S., Collier P. and Ndungu S. N., Kenya: Policies for Prosperity, 2010 p. 16

stayed the same since 2007, and 50 years after independence, 44 to 46 per cent of people in Kenyans live below poverty line.³² By 2030, with the World Bank estimates that 30 per cent of the people of Kenya will still be living below the poverty line.³³ In terms of absolute numbers, this means that to approximately 20 million people will be living below poverty levels since the population of Kenya is estimated to grow to 60 million by 2030. The question would therefore be why realization of the right to development has eluded Kenya.

The response as to why realization to the right to development has eluded many Kenyans can be traced to development strategies and policies that focused more on economic growth and industrialization with assumption that this would better the quality of life for the population, rather than holistic development that places human wellbeing at the centre of development process. For human development to be achieved along with economic growth, it is important that development is looked at from a from human rights perspective. The approach (theories and practice) of development adopted by Kenya have not integrated human rights in addition development lacks human centeredness, yet ultimately development is meant for human beings. Although the constitution of Kenya 2010 enshrines the human rights values of equity, equality, non-discrimination, participation, transparency and accountability, the mode of development strategies adopted lack these principles particularly in practice.

The Concept of Development

Development as a concept has progressed the through history. From a simple concept synonymous with industrialization having a straight forward goal of raising incomes so that people could get richer and so to have access to goods and services and the measure of success of

³² <http://www.worldbank.org/en/country/kenya/overview>.

³³ [4] <http://www.worldbank.org/en/country/kenya/overview>.

development was in terms of “how much more money”.³⁴ Development has progressed through history and has been shaped by various demands which include industrialization, political and social ideologies like communism, liberalism, world wars and post war periods and in the case of formerly colonised countries like Kenya, colonial and post-colonial demands. Today the concept of development has been stated to be so broad in its scope as to defy conceptual definition³⁵ leading to lingering controversy”.³⁶ Browning³⁷ observes that as a discipline, development now “encompasses such broad areas as human rights, infrastructure and planning, economics, political governance, health, a sustainable exploitation of the natural environment and international aid”.³⁸ Being as wide as to encompass just about everything has posed a big challenge in the concept of development and makes claiming it as a right. Indeed opponents of the right to development as we shall see later often as “how can you claim everything. Thus making it seem like an impossible feat. However despite the ever expanding scope, development properly construed reveals the interconnectedness of civil and political rights on the one hand and economic, social and political rights on the other hand. And all these rights are claimable. Yet the interconnectedness of rights is itself problematic particularly as certain groups mainly from the West have always had problems with accepting economic, social and cultural rights as human rights thus deepening controversy the definition of development. Being multifaceted, some aspects of development may be emphasized by some groups or communities while other groups or communities may emphasize other aspects. Similarly the way in which development is understood may vary from region to region or even from place to place within a region and the

³⁴ Rapley, J., *Understanding Development: Theory and Practice in the Third World*, 3rd Edition, 2007, p 1, 2.

³⁵ Arjun Sengupta ‘Right to development as a Human Right’ *Economic and Political Weekly* July 7, 2001 2527 and James C N Paul ‘The United Nations and the Creation of an International Law of Development’ 36 *Harv. Int’l. L. J.* 307, 1995.

³⁶ Arjun Sengupta 36 *Harv. Int’l. L. J.* 307, 1995.

³⁷ Browning, R. *The right to development in Africa: an emerging jurisprudence? Examining the Endorois recommendation by the African Commission for Human and People’s Rights-* University of Cape Town, August, 2011.

³⁸ Browning, R. 2011.

way development is interpreted can differ depending on the context.”³⁹ In Kenya’s context, to borrow Browning’s definition development is understood to mean using of the state, to put in place social, economic, political and legal mechanisms to bring about higher economic growth and higher per capita income and it is assumed that higher economic growth and higher per capita income will in turn lead to higher standards of living for the population.⁴⁰ For this to happen, all the arms of the government must operate optimally with the executive making policies and implementing which respect human rights, the legislatures passing laws which respect and promote human rights as well as an independent judiciary capable of pronouncing judgements that respect human rights and a suitable law enforcement agency to enforce the law and judgments as the Commissions and other independent state institutions must promote protect and fulfil human rights. Apart from the multidimensional character of development, it also has levels. There is development at the individual level, the community or group level, the national level, sub regional and regional levels as well as at international level all which have a bearing on what development involves.

At the level of the individual, development entails increased skills and capacity and implies greater freedoms, creativity, self-discipline, responsibility and material well-being which cumulatively relates to society and state.⁴¹ Development at the level of society or state entails increased capacity to regulate both internal and external environment.⁴² Goulet sees development at social level as entailing “simultaneously the vision for a better life, more materially richer,

³⁹ Browning, R. 2011.

⁴⁰ Browning says that development in the contest of developing counties can be viewed “as the use of social, economic and... and legal mechanisms to effect change and achieve a higher standard of living.”

⁴¹ Udombana, N. J. The Third World and the Right to Development: Agenda for the Next Millennium, Human Rights Quarterly, Volume 22, Number 3, pp. 753-787, August 2000.

⁴² Udombana, N. J. 2000.

more modern institutionally and a more efficient technologically as well as a range of ways to achieve that vision.⁴³

In the economic sense which has been highlighted by Kenya and other developing nations, in the discourse of development, Udombana supports Goulet's version of development arguing that the concept of development is as old as civilization and involves human beings capacity to understand and make a living in his environment which includes devising tools and organizing work, basically what is today referred to science, technology and entrepreneurship as well as a range of services and amenities.⁴⁴

Development in practical terms can be summed up in the words of Tuyizere⁴⁵ who puts is succinctly stating that development refers to both qualitative and quantitative improvement in the standard of living of a given people both 'materialistic' also 'idealistic. It implies quality of life in terms of income, employment, reduction in death rates, unemployment, better services including infrastructure, health and education for all as well as increased liberties and increased participation by the people in the governance and decision making of their society.⁴⁶ Development should achieve empowerment for the people, empowerment being the process by which people take control and action in order to overcome obstacles.⁴⁷ Development can thus be summed as using mechanisms at the disposal of the state, group or individual to improve human standards of living in a sustainable manner.

⁴³ Denis Goulet, *Development: Creator and Destroyer of Values in Human Rights In The Twenty-First Century: A Global Challenge* 689–90 (K.E. Mahoney & Paul Mahoney eds., 1993).

⁴⁴ Udombana, N. J. 2000.

⁴⁵ Tuyizere Alice, P. "Gender and Development: The Role of Religion and culture" Makerere University, 2007

⁴⁶ Tuyizere Alice, P., 2007

⁴⁷ UNICEF ESARO, 2000

Development as Human Right

That development is important in human life and for human well-being is not in doubt. However, since development as a concept is so wide that it almost defies definition leading to much controversy, development as a right is therefore even more contested. Even in the human rights discourse, there is much contestation as to whether development is or is not a right. The proponents of the right to development argue that the right to development is not new and that it has its foundation on the already existing international covenants and the Universal Declaration of Human Rights.⁴⁸ The proponents of development as a right also argue that it is a core right and that all other rights stem from it, or point to it. Development as a right has been described as a precondition of liberty, progress, justice and creativity as “the alpha and omega of human rights, the first and last human right, the beginning and the end, the means and the goal of human rights.”⁴⁹ Many especially developed nations sidestep the terminology the ‘right to development’ preferring to use rights approach to development, in this paper the terms are used interchangeably and the meaning intended is the right to development.

It is therefore necessary to bring the right to development home to add value to development efforts by putting human well-being at the centre of development process. This in turn should have the effect of respect for all human rights and greater social justice. The Declaration of the Right to Development itself bears this out as it enjoins states to take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social, and cultural rights.⁵⁰

⁴⁸ For example, Article 28 of the UDHR states that: ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized’

⁴⁹ Weeramantry, the Right to Development, 25 IND. [J.INT’L L.](#) 482, 1985

⁵⁰ Bedjaoui M., The Right to Development in International Law: Achievement and Prospects 1177, 1182, Mohammed Bedjaoui, ed., 1991

Brief History of the Right to Development

The right to development has its foundation in the provisions of the Charter of the United Nations through which Member States undertook to "promote social progress and better standards of life in larger freedom" and pledged "international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."⁵¹ Secondly the right to development also has its foundation in the Universal Declaration on Human Rights which places importance, to the promotion of social progress and better standards of life and recognizes the right to non-discrimination, the right to participate in public affairs and the right to an adequate standard of living and as well as everyone's entitlement to a social and international order in which the rights and freedoms stated in the Declaration can be fully realized.⁵² Finally the right to development draws its foundation on the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and cultural Rights which codify the principals in the Universal Declaration of Human Rights.⁵³

Several factors are responsible for the emergence of development as a human right. These include the splitting of the codification of the rights identified in the Universal Declaration of Human Rights into two separate covenants, one on civil and political rights, and the other on economic, social and cultural rights. As a result of the separation of these rights, therefore there has always been a lingering quest to bridge the two covenants by emphasizing the interrelatedness of the two sets of rights.⁵⁴ The second factor is the newly independent nations

⁵¹ Article 3 of the Charter of United Nations

⁵² Under article 56 of the UN Charter, member states commit themselves to "take joint action" in co operation with the United Nations in order to achieve the purposes of Article 55. These include realization of human rights as well as conditions of economic and social progress and development as well as solutions to these issues.

⁵³ Articles 2-5 of the International Covenant on Economic, Social and Cultural Rights makes provisions for progressive realization of rights without discrimination

⁵⁴ The Proclamation of Tehran 1968 and the Declaration on Social Progress and Development both emphasized the interdependence of these two sets of rights

that entered in to the United Nations system in the 60s and 70s and their attempt to bridge the areas of development and human rights.⁵⁵ These states were the first to articulate the concept of the right to development in the early 1970s, in the context of the New International Economic Order (NIEO)⁵⁶ arguing for a fairer economic order before it was given further impetus by experts, academics, and civil societies. The Right to Development also got prominence in the mandate of the High Commissioner for Human Rights, when the United Nations General Assembly asked the High Commissioner to establish “a new branch whose primary responsibilities would include the promotion and protection of the right to development.”⁵⁷ In addition the right to development was given a push by regular mention in the Declarations of International Conferences and Summits and in the annual resolutions of the General Assembly and the Commission on Human Rights.

After a decade and a half of struggle by the developing nations in the United Nations for reforms that would lead to a new economic order that would be fairer to developing nations, and after examination and much debate on the different aspects of the right to development, the United Nations adopted the Declaration on the Rights to Development.⁵⁸ It is important to note however, that the African Charter on Human and People's Rights was the first treaty to guarantee the right to development although the Declaration on the Right to Development deals with the concept of development in greater detail.

⁵⁵ Cornwall, A. and Nyamu-Musembi, C. “Putting the ‘Rights-Based Approach’ to Development into Perspective”, *Third world Quarterly*, Vol 25, No 8 (2004) pp 1415 – 1437 also at <http://www.jstor.org/stable/3993794>

⁵⁶ Sengupta, Arjun. *On the Theory and Practice of the Right to Development Human Rights Quarterly* 24, the Johns Hopkins University Press (2002) 837–889 © 2002

⁵⁷ Sengupta, Arjun, 2002

⁵⁸ The Declaration on the Right to Development, adopted 4 Dec. 1986, G.A. Res. 41/128 U.N. GAOR, 41st Sess., at 3, Annex, U.N. Doc. A/Res/41/128 Annex (1987)

With regard to the elements of the right to development, a study commissioned by the United Nations Secretary General at the request of Human rights Commission⁵⁹ identified the following elements as forming part of the concept of development; The realization of the potentialities of the human person in harmony with the community should be seen as the central purpose of development and the human person should be regarded as the subject and the object of the development process. The study also found that development should satisfy both material and non-material basic needs and that respect for human rights is fundamental to the development process as are the principles of equality and non-discrimination. Finally, the study found that the human person must be able to participate fully in shaping his or her own reality and that development should lead to the achievement of a degree of individual and collective self-reliance must be an integral part of the process.⁶⁰ These are the principles that inform the right to development. It is noteworthy that centrality of the human person to development and development process came out clearly from the study. It is also important that to note that development must fulfil basic human material and non-material need as well development process must respect human rights.

From the foregoing it must be noted that the right to development is not threatening to a country like Kenya that has traditionally “feared” the issue of human rights usually on grounds that human rights activists threaten status quo.⁶¹ Certain elements of the right to development are today coded in the constitution the most basic being the realization of human potential. For example the purpose of the Bill of Rights comprising chapter 4 of the Constitution is to

⁵⁹ A study undertaken by the UN Secretary-General on "the international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and fundamental human needs," submitted and considered by the Commission on Human Rights at its thirty-fifth session in 1979.

⁶⁰ U.N. ESCOR, 35th sess., Agenda Item 8, Para 27, U.N. Doc. E/CN.4/1334, 1979.

⁶¹ Before the coming into force of the Constitution of Kenya 2010, human rights activists were regularly arrested and detained without trial for criticising the government on human rights abuses.

recognize and protect human rights and fundamental freedoms and to preserve the dignity of individuals and communities as well as promote social justice and the realization of the potential of all human beings.⁶² There should therefore be no fear of fully recognizing and implementing development a right.

The Declaration of the Right to Development

Article 1 of the United Nations Declaration on the Right to Development states that development is “inalienable” a concept which is normally used in traditional human rights and provides that “The right to development 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.” It is therefore clear that the right to development encompasses is economic and social rights as well as political and civil rights and yet it is broader than these. Some scholars have referred to development as the bridge between the people and their rights, while others have referred to the right to development as “the right of all rights.” Yet others have argued that the Declaration on the Right to Development has cured the division between the civil and political rights on the one hand and the economic, social and cultural rights on the other which was created at the codification of the two sets of rights. Since the right to development draws its foundation on the Declaration of Human Rights which draws its foundation on natural rights it is possible to link the Right to Development to natural right.

The Declaration of the Right to Development⁶³ in its preamble defines development as a “comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals, on the basis of

⁶² Article 19 (1) and (2) of the Constitution of Kenya 2010.

⁶³ Declaration on the Right to Development, adopted 4 Dec. 1986, G.A. Res. 41/128 U.N. GAOR, 41st Session, at 3, Annex, U.N. Doc. A/Res/41/128 Annex, 1987.

their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.”⁶⁴ This definition is much welcomed as it contextualizes development thus taking it out of the realm of the criticism that development is “everything” and therefore one cannot claim “everything” as a right. The definition thus brings development in a manner that it can be claimed as a right. At the same time the definition is also important as it cover all aspects of life economic, social, cultural and political, thus bringing the aspect of wholesomeness of development. Because of what good is economic development alone in the face of political oppression for example?

Having clarified what constitutes development, the Declaration of the Right to Development, confirms development as an “inalienable human right” entitling every human person and all peoples to participation in, contribution to, and enjoyment of economic, social, cultural and political development, and so to fully realize all human rights and fundamental freedoms⁶⁵

The Declaration of the Right to Development not only recognizes the right to development as a human right, and equally important, it also recognizes the “process of development” as a human right expressly providing that it is a process “in which all human rights and fundamental freedoms can be fully realized.” since development is not instant and its objective is the steady improvement of well-being of the human, it is very relevant that both development and the process of development are made human rights. Thus the process of development must have all attributes of human rights. That means respecting the idea of equity and participation, refraining from violating human rights, clearly identified obligations and responsibilities, creating culpability and includes mechanism for monitoring and correcting the failures⁶⁶. As Sungupta points out succinctly the fact that there are many processes through which a country can develop, for instance increase in gross domestic product (GDP), industrialization, or increase in export

⁶⁴ Paragraph 2 of the Preamble to the Declaration on the Right to Development, 1986.

⁶⁵ Article 1 of the Declaration on the Right to Development, 1986.

⁶⁶ Sengupta, A. On the Theory and Practice of the Right to Development 2002.

industry. However economic growth, in the presence of increased inequalities, disparities concentrations of wealth and economic power in the hands of a few and without any improvement in indicators of social development, education, health, gender balance and environmental protection respecting the human rights standards and, if such growth is linked with any violation of civil and political rights, as often happens in the case of Kenya, cannot be said to fulfill the human right to development. He asserts that the nature of human right to the process of development is centred around the concept of equity and justice, with the majority of the population, who are currently poor and deprived, having their living standards raised and capacity to improve their position strengthened, leading to the improvement of the well-being of the entire population.⁶⁷

The Declaration of the Right to Development put the human person at the heart of development stating that “the human person is the central subject of development and should be the active participant and the beneficiary of the right to development,”⁶⁸ Under the right to Development all and every individual counts, not only as “peoples” but individuals are the beneficiaries. The Declaration of the Right to Development gives states responsibility for implementing the right to development stating that states have the right and duty to formulate must “aim at constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from”.⁶⁹ This means that the state must put in place policies, laws and institutions that facilitate the promotion and fulfilment of the right to development and if the state cannot do so alone, the Declaration provides that the State should create national and international conditions favourable for the realization of the right to development⁷⁰

⁶⁷ Sengupta, A. On the Theory and Practice of the Right to Development 2002.

⁶⁸ Article 2 Para 1 of Declaration of the Right to Development.

⁶⁹ Article 2 Para 2 of Declaration of the Right to Development.

⁷⁰ Article 3 Para 1 of Declaration of the Right to Development.

The Declaration of the Right to Development makes it state obligation to take steps to eliminate “massive and flagrant” violation of human rights⁷¹ and also spells out more specifically that in taking steps to realize the right to development, states shall ensure “equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income,” and take effective measures to ensure “that women have an active role in the development process,” as well as carrying out “appropriate economic and social reforms . . . with a view to eradicating all social injustices.”⁷² The Declaration of the Right to Development also require states “to take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social, and cultural rights,” since the fulfilment, promotion and protection of those rights are necessary for realizing the right to development.

Noting the complex and multifaceted aspects of development, Declaration of the Right to Development makes all aspects of the rights spelled out in the Declaration of the Right to development “indivisible and interdependent” while each of the rights must be considered in the context of the whole.⁷³ This means that to placing undue emphasis on some aspects, like on economic growth which is important, while ignoring other aspects, like equality and non-discrimination which are equally important cannot be said to fulfill the human right to development.

Finally the Declaration makes the realization of the Right to Development progressive stating that “steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at national and international levels.”⁷⁴ The term progressive while

⁷¹ Marks P. Stephen, Friedrich Ebert Stiftung, June 2011.

⁷² Article 8 of the Declaration of the Right to Development.

⁷³ Article 9 of the Right to Development.

⁷⁴ Article 10 of the Right to Development.

understandable in the context of development can be abused since “progressive” can be context specific. In the Kenyan case progressive has sometimes been used to delay implementation of rights that need not be delayed. For example with regard to equality of opportunity, High Court of Kenya in a petition filed by women’s rights organization against the Judicial Service Commission (JSC) to enforce the Constitutional requirements on gender equity in the appointment of Supreme Court Judges, ruled that the implementation of the not more than “two third gender rule” was to be undertaken “progressively”.⁷⁵ Similarly the Supreme Court ruled that it would be impractical to implement the Constitutional principle of “not more than two-thirds gender proportions rule in the 2013 General Elections.”⁷⁶ These two cases illustrate the restrictive view adopted by the courts and point out how the courts would deal with progressive realization of the right to development.

However, the main issue with regard to Declaration on the Right to Development is that it is not legally binding and it has no monitoring or enforcement mechanism leaves it at the whims of the policy makers who may themselves be ignorant of the concept of development as a human right and who may be influenced by other factors other than human wellbeing when making development policies. This means that for countries like Kenya, the Declaration on the Right to Development remains a distant international declaration unknown to and far removed from citizens who should benefit from it.

The aim of development is not only economic and financial efficiency and improvement of the principal macroeconomic indicators, such as gross national product and the balance of trade and payments which are undeniably important. The according to the Declaration of the right to development the aim of this complex process is, in substance, to increase the active participation of the population as a whole. An individual’s, or a people’s, right to development places an

⁷⁵ Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR.

⁷⁶ Supreme Court Advisory Opinion No. 2 of 2012 [2012] eKLR.

attendant duty on the state to ensure for each individual the full and free right of participation and benefit from the development process of society as a whole.⁷⁷

The United Nations has observed that development ought to promote social change centered on people. It should lead to a democratically controlled system of production. It must be designed to satisfy human and social needs. The desired progress must be measured in terms of social justice, equality, well-being, and respect for the fundamental dignity of all individuals, groups, and peoples.⁷⁸

Contestations to Development as a Human Right

Despite the right to development having its foundation in the Universal Declaration of Human rights, there are many contestations to the right to development in the global arena, mostly led by the United States but also several developed countries and even some developing countries. Opponents of the right to development have criticized the concept of the right to development in that it is not definite and therefore lacks specificity and coherence. Others argue that the right lacks legitimacy and is not justiciable. Stephen Marks⁷⁹, referring to the United States objections categorize the contestations or objections into five main categories namely ideological, conceptual, and jurisdictional, regulatory and the relation between the Right to Development and economic, social, and cultural rights.⁸⁰

⁷⁷ Ved Nanda, *Development and Human Rights: The Role of International Law and Organizations, Human Rights and Third World Development* 301 (G.W. Shepherd, Jr. & Y.P.Nanda eds., 1985).

⁷⁸ The United Nations Human Rights Commission.

⁷⁹ Marks P. Stephen, *The Politics of the Possible: The Way Ahead for the Right to Development, International Policy Analysis, Dialogue on Globalization*, Friedrich Ebert Stiftung, June 2011.

⁸⁰ Marks P. Stephen, *Friedrich Ebert Stiftung*, June 2011.

With regard to ideological contestation based on political economy, the proponents argue that the success in development in developed world was built on self-reliant, entrepreneurial efforts without any reference to a right to development. They further argue that the developed world has been built into great nations and that responsibility to develop was imposed on their people by their own capabilities and by their new ideas about political economy.⁸¹ Although the proponents of this argument are mostly from the developed world, it is not difficult to see opponents to the right to development making the same argument. It is possible to see similar arguments being advanced in Kenya. This is because despite poor economic and human developed performance, Kenya is still doing better than its neighbours within the East and Central Africa Region. The opponents to the right to development in Kenya are thus likely to site this argument to say that development that has happened in Kenya so far have happened without any reference to the right to development.

With regard to objections to the Right to Development right based on its relationship with Economic, Social, and Cultural Rights, proponents of this thought argue that the right to development (RTD) is not a “fundamental,” “basic,” or “essential” human right and that in any event the realization of economic, social and cultural rights is progressive and therefore should not be view as “entitlement” with correlated legal duties and obligations and therefore the state should not be obligated to provide guarantees for implementation of purported right to development.⁸² Although at international level Kenya is a part of the third world countries pushing for the right to development, at local level Kenya is likely to use the very same argument used by developed world that development although necessary, is not fundamental or basic and should be realised progressively. Indeed the Constitution stipulates that certain socio economic rights should be achieved progressively.⁸³ With regard to conceptual objection to the right to development, the proponents of this argument protest that meaning of the right to

⁸¹ Article 43 of the Constitution of Kenya 2010

⁸² United States Government, Statement at the U.N. Commission on Human Rights, 59th Sess., Comment on the Working Group on the Right to Development (Feb. 10, 2003).

⁸³ Article 43 of the Constitution of Kenya 2010.

development is not clear and that there is no internationally accepted agreement as to what exactly comprises the Right to Development and that there is still much confusion over the definition. They argue that the Right to Development is a “synthesis of rights, without any particular additional cement”⁸⁴This argument although championed by US is likely to find favour among the Kenyan opponents of the right to Development who in any event argue that ‘development is everything’ Independent Expert however argues that “the right to development is not just an “umbrella” right, but is a composite right to a process of development. He sees the Right to development as a “vector” of human rights comprising several parts representing the various economic, social and cultural rights as well as the civil and political rights. According to him, the realization of the right to development requires an improvement of this vector, such that there is improvement of some, or at least one, of those rights without violating any other.”⁸⁵

In addition to the above objections there is argument at international level championed by the United States that the Commission on Human Rights currently tasked with spearheading the Right to Development lacks of jurisdiction of over matters of trade, international lending and financial policy, activities of transnational corporations, and other aspects of globalization. In Kenya’s case, it is debatable the extent to which it takes her international obligations seriously and in this cases the jurisdiction of the Commission on Human Rights over her development which she would consider a purely internal matter. Related to the jurisdictional objection to the right to Development is the regulatory objection. According to this objection, the provisions contained in the right to development are merely principles, and there should not be legislated into rules in the manner of the New International Economic Order (NIEO) So far this objection has carried the day and prevailed in the final text.

⁸⁴ UN High Commission for Human Rights, Draft guidelines for a Human Rights Approach to Poverty Reduction Strategies, available www.uncr.ch/development/povertyfinal.html, 2002.

⁸⁵ Fifth Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, Submitted in Accordance with Commission Resolution 2002/69, at 5, 6, U.N. Doc. E/CN.4/2002/WG.18/6 (2002).

The right to development is also contested on legal grounds, one of the legal contestation is, whether the right can inhere on states as beneficiaries in the same sense as ‘humans’ and are rights not attached only to humans with human souls or can Kenya, for instance, successfully plead that though it is not human, its human right to development has been violated by say Norway or by the international community and if by the latter who is the ‘international community for serving summons, for instance. In such circumstance the opponents to the right to development argue that a state cannot be a beneficiary of human right and another state or the international community cannot be a duty bearer of “the right to development” *viz a viz* another state.

It must be noted however that evens those who oppose the right to development like the United States opposition to the RTD has not been systematic. For example at the World Conference on Human Rights in Vienna, when the Vienna Declaration and Programme of Action was adopted by consensus and included the following statement: “The World Conference on Human Rights [hereinafter Vienna Declaration] reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.”⁸⁶

The Added Value of Constructing Development as a Right

Despite contestations, the human rights approach to development does add value. Cornwall and Musembi⁸⁷ identify three broad categories under which the value of the right to development

⁸⁶ Vienna Declaration and Programme of Action: Note by the Secretariat, World Conference on Human Rights, Part I, Para10, U.N. Doc. A/CONF.157/23 (1993).

⁸⁷ Cornwall, A. and Nyamu-Musembi, C. “Putting the ‘Rights-Based Approach’ to Development into Perspective”, Third world Quarterly, Vol 25, No 8 (2004) pp 1415 – 1437 also at <http://www.jstor.org/stable/3993794>

can be justified. These are the normative value, the pragmatic value and the ethical value.⁸⁸ Quoting Hauserman, they argue that using human rights approach is different in that it works by “setting a vision of what ought to be” and that it provides a “normative framework to orient development,” thus bringing an ethical and moral dimension to development. Further that since it is underpinned by international law, it can give a stronger foundation for people to make claims against their governments and hold them accountable for their duties to enhance the access of citizens to realize their rights as well as participate in development process. Although referring to development assistance and cooperation, the justification can be brought to the way in which development is implemented within the country, county, and constituencies, districts and down to the lowest levels. The *Endorois* case (dealt with below in detail) in which the community used the right to development to claim their entitlement supports this point that normative framework of the right to development can strengthen the foundation on which people can claim the right to development.

With regard to pragmatic reasons for using the rights based approach to development, Cornwall and Musembi identify several justifications including new demand for ensuring accountability of the recipient state and other non-state actors and global actors, and likelihood of putting in place policy measures for implementation thus ensuring a higher possibility of success. In addition, the rights based approach to development can provide an opportunity to identify and address power dynamics which come to play in the practice of development not only with regard to states that receive development assistance but also other actors like donors, international community, international and national NGO and others whose actions have an impact on development. As summed by the UN Commission for Human rights “rights imply duties and duties demand accountability”⁸⁹ (although traditionally human rights are between states and its citizens with the state as the duty bearer of rights to its citizens).

⁸⁸ Cornwall and Musembi 2004, p 1416

⁸⁹ UN High Commission for Human Rights, Draft guidelines for a Human Rights Approach to Poverty Reduction Strategies, available www.uncr.ch/development/povertyfinal.html, 2002.

As for normative justification Cornwall and Musembi argue that rights based approach to development has is based on state obligations, requires equitable sharing of available recourses and enables marginalized people to assert their rights since it has legal force (as opposed say to needs based approach where the needs can be met by charity). Arjun Sengupta supports this view stating that human rights approach to development adds genuine value to the fulfilment of human development in that it aids in establishing accountability and possibly culpability (for the mistakes or failures in implementing the policies) by setting out the duties and obligations of the different parties, especially of those of the state and of the international community. He goes further observing that the corrective actions have to be enforceable either through legislation or others suitable monitoring mechanisms with accountability leading to culpability.⁹⁰ Here again the Endorois case supports the state has an obligation and recipients of development have a right that can be legally exerted.

Finally, Van Boven observes, the human rights approach to development can add value by strengthening the relevance of human rights in the development process, serve the recognition of the human person and the human factor as central in development efforts, provide a sound political, legal, social and moral basis for development cooperation, and lend itself to effective use. In this way, it will be a suitable yardstick in the development of human rights dialogue between developed and developing nations.⁹¹

In sum, the added value of recognizing the right to development also lies in the fact that since Human rights set universal standards of achievement and norms of behaviour for all states, civil societies, and the international community and impose inviolable obligations on all of them to make those rights achievable, recognizing the right to development as a human right raises its

⁹⁰ Sengupta, Arjun, *On the Theory and Practice of the Right to Development Human Rights Quarterly* 24, the Johns Hopkins University Press (2002) 837–889 © 2002.

⁹¹ Van Boven, T. “Human Rights and Development: The UN Experience in FORSYTHE” p 124.

status to one with universal applicability and inviolability.⁹² Recognizing the right to development also spells out a standard of action for the people, the institution or the state and international community on which the claim for right to development is made, confers on the implementation of that right a first-priority claim to national and international resources and capacities and obliges the state and the international community, as well as other agencies of society, including individuals, to implement that right.⁹³

Conclusion

In this chapter, I have attempted to show that development is critical to humanity as it enables human beings to enjoy human rights. World over the importance of development is acknowledged. Development as a concept has progressed over the years and has come to mean much more than industrialization or economic. Development has today has a wide scope which covers economic growth, human rights, health, education. Being as wide as to encompass just about everything has posed a big challenge particularly when it is claimed as a right thus making it subject to much contestation ranging from conceptual, ideological, political, legal objections. However, despite the wide scope, and the contestations surrounding development, properly construed development as a right reveals the interconnectedness of civil and political rights on the one hand and economic, social and political rights on the other hand and attempts to bridge the two sets of rights. Thus after much struggle the United Nations adopted Declaration on the right to Development which recognizes the right to development as an inalienable human right and the same has been confirmed in many international conferences and United Nations General Assembly Resolutions. The Declaration of the right to Development clarifies the definition of development; make human beings the subject and the object of development, places obligation on states and international community to cooperate in helping people to realize the right to development. Kenya and other countries that have been putting in place strategies that focused

⁹² Sengupta, A. On the Theory and Practice of the Right to Development, 2002.

⁹³ Sengupta, A. On the Theory and Practice of the Right to Development, 2002.

on economic growth and emphasizing on ventures that would lead to high economic advancement with the assumption that this would better the quality of life for all the population. The way in which development has occurred in Kenya shows that it is important to pay specific attention and implement holistic development that places human wellbeing at the centre of development process in order to achieve both human and economic development.

Chapter Three

The legal and Policy framework for development in Kenya

The Constitution of Kenya 2010

Legal protection of the right to development in Kenya is weak. Indeed it is arguable whether the right to development in Kenya is a legal right having equal footing with other human rights guaranteed in the Constitution. Components of the right to development can be gleaned from several sections of the constitution but there is no specific protection of the right to development in the constitution despite the fact that development is crucial to human well-being and despite Kenya's aspiration for development since independence. The national values and principles of governance enshrined in Article 10 of the Constitution of Kenya 2010 are the same and are derived from the universal principles enshrined in the Universal Declaration of Human Rights (UDHR). These are the same principles that underpin the human rights in development process; they are the principles of equality, non-discrimination, participation, inclusion, accountability, transparency, the rule of law.⁹⁴

Sustainable development is a national value and principles of governance⁹⁵ supposedly on equal footing with democracy and participation of the people, human rights and social justice, as well as good governance, transparency and accountability. However closer look at the situation of these values in the constitution, shows that all other values are dealt with in substantive provisions in the Constitution, while “sustainable development” is only referred to in respect of environment and natural resources. This can give an initial impression that development as a human right is not sufficiently protected in the Constitution. It can be argued however, that sustainable development should be construed in its widest terms and not narrowly. The Rio

⁹⁴ Article 10 of the Constitution of Kenya 2010.

⁹⁵ Article 10 (2) (d) of the Constitution of Kenya 2010.

Declaration for example defines sustainable development widely to include equity, economic prosperity as well as development that meets generational need. It states that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations and identifies economic prosperity, social equity and environmental protection as three integral and mutually reinforcing pillars of sustainable development.⁹⁶ This definition although comes close to the right to development, is still in the realm of environment.

In Article 69 (2), the Constitution places an obligation on everyone to “cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resource” the article however is in the chapter on the environment and natural resources and is subtitled “Obligations in respect of the environment.” This thus limits the scope of the article in terms of its applicability to development in general and it is debatable whether this article actually guarantees the right to development sufficiently. One therefore can come to the conclusion that the Constitution of Kenya 2010 does not go far enough to take a holistic to the right to development. However, using the Rio Declaration principles, the right to sustainable development should be construed to include not only environmental protection but also social equity and economic prosperity. This means that even though sustainable development is dealt with in the environment chapter, wider interpretation can help expand the way in which the policy makers and the courts in Kenya construe the right to sustainable development.

When it comes to the protection offered to right to development the Constitution of Kenya is weak compared to some constitutions that protect the right to development in Africa. For example in the Constitution of Malawi (1994) unambiguously that “all persons and all peoples have a right to development and therefore to the enjoyment of economic, social, cultural and

⁹⁶ Principle 3 of the Rio Declaration.

political development ...”⁹⁷ Although in Malawi, it is a ‘peoples’ right, not a personal right’. This is a limiting factor insofar as the individual right to development is concerned. However also recognizes vulnerable groups, and gives them special consideration, placing an obligation on the state to take necessary “measures for such development”. It is possible to argue that if it is only appearing as a right of ‘vulnerable groups’, then the ‘universality’ as a right is lost. However, such an argument cannot hold water because the constitution of Malawi protects “peoples” right to development and this is not exclusive to any group of people. In addition it makes it the states responsibility to “respect the right to development and to justify its policies in accordance with this responsibility”.⁹⁸ The Constitution of the Federal Republic of Ethiopia (1994) is even more explicit in stating the right to development assigning to the State the responsibility to protect the right to development. This means that with regards to the people of Ethiopia, the state bears the duty to protect the right to development. The Constitution of the Federal Republic of Ethiopia guarantees the peoples of Ethiopia the “right to improved living standards and to sustainable development”, it guarantees Ethiopian national the right to “participate in national development and be consulted” in policies and projects affecting them and it obligates the states to ensure that agreements it enters internationally protects Ethiopians right to sustainable development and very importantly, it places humans at the centre of development stating expressly that “the basic aim of development is to enhance the capacity of citizens for development and to meet their basic needs. This means that even where Ethiopia is dealing with richer nations, the state is still duty bearer with regards to the Ethiopian people.

It can be seen from these examples that the two constitutions are explicit on the contents on the right to development, they spell out the ultimate duty bearer who is the state, they proved unambiguously the beneficiaries who are the people and the outcome which is the enhanced capacity of the people to meet their basic needs. It is important that the right to development is protected in these constitutions and now it behoves Malawi and Ethiopia to implement their

⁹⁷ Article 30 of the Constitution of Malawi (1994).

⁹⁸ Article 30 (1-4) of the Constitution of Malawi (1994).

constitution. On the other hand South Africa from whose constitution Kenya has borrowed heavily has only weak provisions regarding the protection of the right to development and like Kenya sustainable development is dealt with in the context of the environment while devolved structures are said to bring development to the people.⁹⁹ To its credit however it has a strong bill of rights and strong protection of civil and political rights as well as components of economic, social and cultural rights and has some of the principles on which the right to development are based.

In the Kenyan case, other aspects of the right to development can be gleaned from several other articles in the Constitution particularly in the Bill of Rights. The Constitution terms the Bill of Rights as “the framework for social, economic and cultural policies”.¹⁰⁰ Article 19 (2) of the Constitution, for example, expressly states that “the purpose of recognizing and protecting human rights and fundamental freedoms [in the Constitution] is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings” this can be interpreted to mean conformity with the “The realization of the potentialities of the human person in harmony with the community should be seen as the central purpose of development;” and also to mean that economic policies, for example, should take into account human rights and fundamental freedoms. In practice however, conception of development policies and particularly their implementation has not placed emphasis on human rights.

International Law that Support principles of the Right to Development

In addition to the Constitution, the right to development is guaranteed in human rights treaties to which Kenya is a party and also to the soft law adopted by the international community which includes Kenya.

⁹⁹ Article 52 of the Constitution of South Africa.

¹⁰⁰ Article 19 (1) of the Constitution of Kenya.

Universal Declaration on Human Rights

The Universal Declaration on Human Rights (UDHR) to which Kenya subscribe as a member of the international Community. The Universal Declaration makes equity a fundamental concern asserting that “all human beings are born free and equal in dignity and rights¹⁰¹.” UDHR obligates states to eliminate obstacles to development that result in failure to observe human rights. Article 25 of the Universal Declaration states that everyone has a right to an adequate standard of living for health and wellbeing, including food, clothing, housing, medical care, and necessary social services, without mentioning that it should be equitable.

The Constitution of Kenya 2010 makes International law a source of the country’s laws. The Constitution provides that the “general rules of international law shall form part of the law of Kenya”¹⁰² and further that “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”¹⁰³ Further the Constitution also mandated the state to “enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.”¹⁰⁴

Kenya ratified the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), Kenya accede to these on 1st May 1972. Subsequently Kenya has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified on 24th August 1984; and the Convention on the Rights of the Child (CRC), ratified on 30th July 1990. These international treaties are very closely intertwined with the right to development firstly because the right to development derives its foundation on the interconnectedness of all rights (civil and political as well as economic, social and cultural rights) and secondly from the fact that development is

¹⁰¹ Article 1 of the Universal Declaration on Human Rights (UDHR) 1948.

¹⁰² Article 2 (5) of the Constitution of Kenya 2010

¹⁰³ Article 2 (6) of the Constitution of Kenya 2010

¹⁰⁴ Article 21 (4) of the Constitution of Kenya 2010

needed to realize the rights civil and political as well as economic, social and cultural rights. It is development that enables human to enjoy civil and political rights as well as economic, social and cultural rights.

The African Charter on Human and Peoples Rights (ACHPR)

Within the Africa Region, Kenya has ratified the African Charter on Human and Peoples' Rights, and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (in 2005) and thus accepted the jurisdiction of the African Court for Human Rights (all be it without accepting its jurisdiction on individual complaints). Kenya has also ratified the African Charter on the Rights and Welfare of the Child and the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (all be it with reservations).

Under the African Charter on Human and Peoples Rights (ACHPR) [hereinafter 'the African Charter'], the first obligation of the State, made in Article 1 of the African Charter, is to recognize the rights enshrined in the Charter and to give effect to the rights. This means that Kenya, like other state parties to the African Charter is under obligation to respect, protect, promote and fulfill the rights in the Charter including the right to development.

The right to development is recognized under the African Charter as a legal right on the same footing with other human rights all be it held belonging to "peoples" thus making it a collective right. Article 22 of the African Charter states that "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."¹⁰⁵ The African Charter makes States individually or collectively the duty bearer with the obligation of to ensuring the exercise of the

¹⁰⁵ Article 22 (1) and (2) of the African Charter on Human and Peoples' Rights 2003.

right to development.¹⁰⁶ Being an Africa Region treaty the charter does not address the global dimension of the right to development and neither does it address the none state actors. The African Charter goes together with the African Charter on the Rights and welfare of the Children which obligates States Parties to ensure, “the survival, protection and development” of the child “to the maximum extent possible”.¹⁰⁷ In addition the Protocol to the African Charter on Human and Peoples’ Rights on women in Africa 2003, ratified by Kenya in 2010 enshrines women’s right to sustainable development adding the concept of sustainability to the right to development. Specifically the African Women Protocol places a duty on the Member States to introduce gender perspective in the national development process and ensure participation of women and access by them to productive resources.

Case Law on the right to development in Kenya

The *Endorois* case is a good example for illustration of the right to development. The case¹⁰⁸ involves a complaint filed by the *Endorois* Community with the African Commission (ACmHPR) against the government of Kenya. The facts of the complaint are that The *Endorois* community’s complaint was that the government of Kenya, in 1973, compulsorily acquired their land, evicted some 400 families of the community, and removed them from their sustainable livelihood to make way for a game reserve. It was the community’s complaint that they were not consulted, adequately compensated or involved in the management of the game reserve. More importantly, although revenue was raised from the game reserve, no part of the accrued resources was used to standards of living for the community. As a result they were subjected abject poverty from which they did not recover. In 1997 after enduring poverty for many years they brought a case in the High Court of Kenya. The court did not find for them; instead the High Court found that the establishment of the game reserve had nationalized the resource and placed

¹⁰⁶ Article 22 (2) of the African Charter 2003.

¹⁰⁷ Article 5 (2) of the African Charter on the Rights and welfare of the Children 1990.

¹⁰⁸ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Communication 276/2003).

it outside the direct control or enjoyment of the community. They appealed but their appeal took unduly long to determine. They filed a complaint to African Commission in 2003, requesting their socio economic rights under the African Charter namely, restitution and compensation and in 2010, the ACmHPR made a finding in favour of the *Endorois* Community.

The *Endorois* case was became the first case in which the Commission deliberated and delivered judgment that unequivocally affirmed the right must be equitable, non-discriminatory, participatory, accountable and transparent.¹⁰⁹ Further the Commission established the development needs to lead to the empowerment of the *Endorois* community and held that both the choices and the capabilities of the *Endorois* had to improve in order for their right to development to be realized¹¹⁰.

Under Article 21 of the African Charter, all peoples have the right “to freely dispose of their wealth and Natural resources” and they may not be deprived of it. In case of dispossession people have a right to recover their property and to have adequate compensation;¹¹¹ State parties have a duty to ... “enable their peoples to fully benefit from the advantages derived from their national resources” as obligation to involve communities in decisions that affect them. In the *Endorois* case, the Commission found violations of the right to development in that the *Endorois* people were not involved in the decisions that affected them and they did not receive adequate compensation and therefore the people needed to be compensated.

The Commission’s decision is also important and can inform the right to development with regards to extraction industries especially with the discovery of oil and other mineral recourses in various parts of Kenya. For example on the question of the ownership of rubies located on the Endorois ancestral land, the Commission was cautious not to grant such ownership but

¹⁰⁹ Para. 277.

¹¹⁰ Para. 283.

¹¹¹ African Charter Article 21 (2).

acknowledged that the cultural and economic survival of indigenous peoples generally depended on their access and use of the natural resources in their territory,¹¹² and held that an indigenous community was entitled to reasonably participate in the benefits (including royalties) derived from any concessions.¹¹³ Further the Commission stated that limitations on the prerogative of the State are most likely to apply when the extraction of one natural resource affects the use and enjoyment of other resources that are necessary for the survival of the indigenous community.¹¹⁴ The Commission emphasized that any form of resource extraction required-at a minimum-effective consultation of the *Endorois*.¹¹⁵ This included the obligation to allow the community to perform or supervise any EIA or SIA prior to the commencement of the project.¹¹⁶ Finally, the case *Endorois* affirmed the right to development in the finding by the African Commission that the communities were entitled to benefit by way of sharing proceeds from their resources. The African Commission emphasized that development should lead to empowerment, holding that the choices and capabilities of the *Endorois* must improve for their right to development to be realized.¹¹⁷ In sum, the African Charter enshrines the rights which were recognized by the African Commission in the *Endorois* cases the right of the people to freely dispose of their natural resources, the right to a satisfactory environment suitable for development as well as the right to development.

The Human Rights Committee also expounded on the States duties which they observed to entail positive as well as negative duties which Kenya as a state party to the African Charter on Human

¹¹² Endorois case paras. 266-268.

¹¹³ Para 264.

¹¹⁴ Para 264.

¹¹⁵ Para. 266 and Recommendations 1(c) and 1(d) at p 80.

¹¹⁶ Para 260.

¹¹⁷ Para 277 – 278.

and Peoples Rights (ACHPR) has the states' obligations. In an earlier case¹¹⁸ (Nigeria) the Commission dealt with the duties of the state regarding the right to development and obligation of the state and used the occasion to clarify the duty of the state as regards the right to development which includes respecting, protecting and fulfilling the right. To "respect" the right to development creates an obligation on the state not interfere directly or indirectly with the enjoyment of the right, and enjoins the state to respect the "rights holders, their freedoms, autonomy, resources, and liberty of their action".¹¹⁹ The obligation to "protect" the right to development obligates the state to protect the rights holder against others for example through legislation and appropriate remedies and to take measures to protect the rights and prevent political, economic and social interferences as well as to create conducive atmosphere for realization of these rights. Related to this is the state's obligation to "promote" the enjoyment of rights which involves adopting promotional measures like creating awareness of the existence of the right, promoting tolerance and putting in place necessary infrastructure.¹²⁰ The obligation of the states "fulfils" the rights creates positive expectation and requires states to "move its machinery towards actual realization"¹²¹ of the rights contained in the charter and may entail provision of basis needs or resources.

It is important to recognize that even though the Kenya government has been reluctant to implement the recommendations of the African Commission, without the right to development being enshrined in the African Charter, it would have been difficult for the *Endorois* to claim and obtain their right. In the *Endorois* case the normative value, of the right to development came to the fore giving a strong foundation under which the *Endorois* people were enabled to make claim

¹¹⁸ Social and Economic Rights action Centre (SERAC) and Another vs. Nigeria (2001) (Ogoni case).

¹¹⁹ SERAC and Another vs. Nigeria (2001) case Para 45.

¹²⁰ SERAC and Another vs. Nigeria (2001) case Para 46.

¹²¹ SERAC and Another vs. Nigeria (2001) case Para 47.

against the government and to hold the government accountable for its obligation to enable the *Endorois* to realize their rights as well as participate in development process.

There is a legal foundation for the right to development in Kenya which if implemented, can lead to the realization of development rights. For example the recommendations of the Commission in the *Endorois* case if implemented, there would be qualitative and quantitative improvement in the standard of living of the people as well as improvement in the quality of life in terms of income and resources which can be used for better education and better health services as well as employment and wealth creation and has the potential in increasing participation by people in the governance and decision making of their society as well as empowering the people to take control and action in order to overcome obstacles.

The National Development Policies

Development as a whole is mainly dealt with in the National Development policies. These policies have political moral force and cannot ground a right; nevertheless they form the strategies that inform development processes. These policies can be divided into periods, the period before independence which will not be given more than a cursory mention, the period immediately after independence, the second regime 1987 to 2002, the third regime 2003 – 2008 and the period from 2008 to date.

The 1965 Sessional Paper No. 10 of 1965

1965 Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya aimed at achieving “high growing per capita income” that would be equitably distributed. It expressly stated that the “state has an obligation to ensure equal opportunities to all citizens, eliminate exploitation and provide needed social services such as education, medical care and social security,” giving the state an important role in the process of growth and development. Its

implementation saw the Kenya register economic growth in the post-independence period between the 1960s and early 1970s which measured Gross Domestic Product GDP growth of 6.6 per cent. After this period however, due to poor governance the country saw economic decline, marked with poverty, unemployment, widening inequalities.

The 1965 Sessional Paper No. 10 of 1965 stated that planning was to be expanded to the administrative units such as the provinces, districts and municipalities so as to ensure that there was progress in each of these units. Some efforts were made towards this end and a secretariat was established under the then Ministry of planning and National Development and some plans were put in place at the provincial levels. However the development intention was not realized due to lack of implementation. It must be noted that progress expressed in the Sessional Paper made more emphasis on economic progress than human development progress. Further it must also be noted that during this period (from independence in 1963 up to the 80s) it was estimated that 80 per cent of the population which had by the 80s reached 30 million, lived in the rural areas, thus expansion of development to the rural areas may have been beneficial to more people. Indeed the Report of the Commission of the Inquiry on Public Service Structure (Ndegwa Commission) observed that to realize accelerated development in the rural areas, both planning and implementation of development plans must be extended to lower levels such as districts and divisions “where the Government comes into contact with local realities”.¹²² The Commission thus recommended among other recommendations the establishment of the District Development Offices (DDO) with the mandate of ensuring coordination of development activities in the districts. The Commission also recommended that the district be made the focus of rural development. It can be seen here that although the recommendations of the Commission of enquiry were sincere, they focussed on district which are administrative units and not the people in those areas and as will be seen later this had its own inherent problems.

¹²² Report of Republic of Kenya Commission of Enquiry on Public Service Structure, (Ndegwa commission), 1971.

District Focus for Rural Development (DFRD)

Further attempt at implementing the Sessional Paper No. 10 and the recommendation of Commission of Enquiry of 1971 saw the appointment of District Development Officers (DDOs), the establishment of the Rural Development Fund (RDF) as well as the launch of the District Focus for Rural Development (DFRD) by 1983. District Focus for Rural Development strategy was introduced presidential directive in 1982 pursuant to advice of the Working Party on Government Expenditure 1982 and became operational in mid-1983. The aim of the strategy was to make “each district as the basic operational unit ...for design and management of rural development.”¹²³

Studies on the strategy however, showed that rural development goals were not achieved because although it was intended to be participatory, the local communities were not made aware of it as it was dominated by civil servants¹²⁴ who were posted to the various districts by the Public Administration then under Office of the President and the line Ministries. In addition the strategy emphasized empowerment of civil savants (who were not members of the communities in which they were working and were not familiar with the issues affecting the local communities) working in the “field”. In the end the strategy did not facilitate the process of empowering the local people to make decisions concerning their development neither did the local people own the process.¹²⁵ Being dominated by different levels of civil servants, development projects, like most projects during that period (70s and 80s) become more like ‘government centred development’¹²⁶ and thus defeating the objective of development in the districts.¹²⁷ Moreover,

¹²³ Government of Kenya presidential speech (President Daniel arap Moi), Kenyatta Day 20th October 1982.

¹²⁴ Makokha 1985.

¹²⁵ Kibua N. T and Mwabu, G (Eds) Decentralization and Devolution in Kenya: new approaches, University of Nairobi Press 2008 reprinted 2013 p 35.

¹²⁶ Kibua and Mwabu 2008, 2013, p 37.

the implementation of the strategy was riddled with skewed allocation of funds as well as lack of transparency and accountability in the use of funds.¹²⁸ In addition, allocation of development budget was riddled with favouritism, wastage, misappropriation and political control by way of reward and punishment¹²⁹ leading to inefficiency, inequality and lack of tangible development outputs.

Development from a rights perspective obligates the state to create a conducive atmosphere for realization of these rights and must take measures to protect the rights and prevent political, economic and social interferences, the appropriate conditions for realization of the right to development was totally lacking in the manner in which Rural Development Fund and as the District Focus for Rural Development were implemented. Finally, the District Focus Development strategy morphed into a political tool that was used by the (Moi) Government to extend government political control, human rights abuses and underdevelopment of the rural communities through Provincial (Public) Administration.¹³⁰ It is important to take noted that over centralization of decision making and skewed development process are some of the major reasons why Kenyans clamoured for a new constitution with properly devolved structures. It should also be noted also that this period was marked with severe underdevelopment due to insufficient allocation of funds, lack of appropriate institutional structure as well as lack of political will¹³¹ leading to a situation where 56 per cent of the population of Kenya lived below poverty line a dollar a day.¹³²

¹²⁷ Chitere, P. O. and Monya, J. “Decentralization for Good Governance and Development: the Case of Kenya District Focus approach” in African Administration Studies No. 32, 1989.

¹²⁸ Kibua N. T and Mwabu, G, 2008, 2013, p 38.

¹²⁹ Kibua and Mwabu 2008, 2013, p 331.

¹³⁰ Thostensen and Scott, 1987.

¹³¹ Kibua and Mwabu 2008, 2013, p 40.

¹³² Kibua and Mwabu 2008, 2013, p 40.

Evaluated against human rights standards, it is clear that Rural Development Fund and the District Focus for Rural Development did not lead to the realization of the intended development goals. There was no qualitative and quantitative improvement in the standard of living of the people. There was virtually no improvement in the quality of life in terms of income, employment, reduction in death rates, unemployment or health services. The only exception perhaps was in education. However there was no increased participation by people in the governance and decision making of their society in fact there was great suppression of the people who became disempowerment and were not able to take control and action in order to overcome obstacles like poverty, hunger and unemployment.

The Economic Recovery Strategy for Wealth and Employment Creation (2003-2007) (ERSWEC)

The 2003 Economic Recovery Strategy for Wealth and Employment Creation (2003-2007) (ERSWEC) was adopted after a period of consistent growth decline in the economy. From 1983 to 1994, economic growth rate declined to 3.5 per cent, by 1997 the economic growth rate had slipped to 2.3 and further dipped to 1.4 per cent in 1999 and finally plunged to negative growth level of 0.03 per cent in the year 2000.¹³³ The poor economic performance during this period contributed to deterioration in the welfare of Kenyans¹³⁴ particularly in the face of growing population and increasing unemployment, wealth disparity and poverty. For example apart from the increase in the numbers of people living in poverty from 49 per cent in 1990 to 56 per cent in 2002, life expectancy declined from 57 years in 1986 to 47 years in 2002.¹³⁵ It was at this period when the Economic Recovery Strategy for Wealth and Employment Creation (2003-2007) was put in place with the objective of restoring economic growth, creating employment and “social development”. The implementation of the Strategy saw improvement of the economy from 0.06

¹³³ Kenya Demographic and Health Survey (KDHS) 2008-2009, p 2.

¹³⁴ Kenya Demographic and Health Survey (KDHS) 2008-2009, p 2.

¹³⁵ Adam C.S., Collier P. And Ndungu S. N., Kenya: Policies for Prosperity, 2010 pp 39, 41.

in 2003 to peak at 7.1 in 2007,¹³⁶ only to slow down again to 1.7 per cent in 2008 following the post-election violence at the end of 2007 and the beginning of 2008. In 2008, however, the Government put in place Kenya Vision 2030 with its Medium Term Plan (MTP) with the aim of consolidating earlier gains and realizing the transformation of Kenya into a “newly industrialized middle income country by the year 2030.

Constituency Development Fund (CDF)

Before examining the vision 2030, it is important to mention the Constituency Development Fund. Whereas many of the strategies for development have been introduced by the government under the advice of World Bank or other development partners, the concept of Constituency development Funds is considered as a home grown¹³⁷ initiative for the purpose of uplifting the living standards of the people. The Constituency development Fund (CDF) has a legal basis having been established by an Act of Parliament in 2003.¹³⁸ The Act obligates the government to put a sum not less than 2.5 per cent of the annual national revenue into Constituency Development Fund to be distributed to all 290, (formerly 210) constituencies across the country on the basis that three quarters is divided equally to all the constituencies while the remaining quarter is shared on the basis of national poverty, multiplied by the constituency poverty index, meaning that the constituencies with higher level of poverty get slightly higher portion of the fund.

Constituency Development Fund is administered at national level by the Constituency Development Fund National Management Committee unlike the funds District Development Funds which were administered through the Public Administration or Line Ministries. This was

¹³⁶ Kenya Demographic and Health Survey (KDHS) 2008-2009, p 2.

¹³⁷ Kibua and Mwabu 2008, 2013, p 330.

¹³⁸ Constituency Development Fund (CDF) Act 2003.

intended to eliminate the problems which bedevilled the District Development Funds particularly the overwhelming recurrent government expenditure which had reached 80 per cent of the Government budget, leaving little for development. Since the government was not meeting its development obligations the Members of Parliament as the peoples' representatives were left with the burden of trying to meet basic needs of a population in which poverty and lack of employment was widespread.

Constituency development Fund (CDF) was thus intended to take development to the people at the grassroots and have the people drive their own development, address the burden felt by the Members of Parliament (and other leaders) and to institutionalize and encourage communities to preserve the Kenyan concept of communities pooling together for community development commonly referred to as "*harambee*".

To acknowledge that the CDF was well intentioned does not mean that it was well implemented. The manner in which the fund is managed by Members of Parliament at constituency level has raised many developmental, legal, policy and political concerns. The implementation of CDF funds has been riddled with abuses of the right to development. Kibua and Mapesa¹³⁹ observed that Members of Parliament were accused of having exclusive powers over the funds and using the funds whimsically, choosing their handpicked relatives and supporters to sit in the CDF Committees and using the funds as campaign tools to reward areas where they has support and funding "politically selected" developments and well as using the funds to abuse human rights of their political competitors.¹⁴⁰ Moreover the portion of the fund that was allocated in direct response to poverty situation in the constituency did not reach the intended beneficiaries.

¹³⁹ Kibua and Mwabu, 2008 revised 2013, 333.

¹⁴⁰ Kibua and Mwabu 2008, 2013, 333.

As a primary concern the fund has been questioned as to whether Members of Parliament should be implementers of development projects and whether this does not infringe on the principle of separation of powers. The worst omission from human rights perspective however is that Constituency Development Fund has suffered the same fate as the District Development Funds in that there is limited involvement of the intended beneficiaries in deciding on their development and lack of transparency and accountability in the use of the funds. In addition, no adequate monitoring and evaluation is undertaken at the end of the Parliamentary term every 5 years to ascertain whether the Constituency Development Fund has actually facilitated sustainable development in the constituencies and whether the development has empowered the intended beneficiaries to enjoy their rights and freedoms in other words there is no way of telling whether the goal of development has been met.

Finally it must be observed that Constituency Development Fund is just one of the funds that are constituency based. Other development based funds that that are disbursed directly to the constituencies (and districts) include Local Authority Transfer Funds (LATF) introduced in 1998, Poverty Alleviation Fund introduced in 2000, Roads Maintenance Fuel Levy Funds introduced in 2000, Free Primary Education Fund introduced in 2001, School Bursary Fund introduced in 2003 as well as the Constituency HIV/AIDS Fund introduced in 2001 although this fund is not drawn from the consolidated fund. Although these funds are intended to “bring development” directly and effectively to the people and meet the needs of the people where they are, the realization of the intended purpose has not been achieved due to the manner in which they are conceived and implemented.¹⁴¹

Other recent efforts to “spread” development funds include the *Uwezo* Fund meant to enable women and youth access money for enterprise and the presidential decree that 33 per cent of government tenders will be reserved for women and the youth which are the development efforts which target humans “women and youth” and this is laudable, however as set up without

¹⁴¹ Kibua and Mwabu 2008, 2013, 330.

a policy that looks at these funds from a human rights perspective, current efforts will just as the previous efforts that benefit the well-off and well-connected and may not achieve sustainable development.

From the foregoing it appears that there has always been recognition of certain elements of the right to development. This can be seen in the attempt to devolve some funds to enable projects to be undertaken at constituency or district levels and half-hearted attempt to involve the people for whom the projects were intended. However what was missing in the process of achieving the intended development is that they lacked the attributes of human rights. These projects are often implemented in a manner that does not respect equity and participation, or implemented in a manner that violated human rights, and without clearly identified obligations and responsibilities, creating culpability and includes mechanism for monitoring and correcting the failures. The projects rather than people were at the centre of most of the devolved development funds. Usually they were not accompanied by feasibility studies that would say how the projects were going to affect the lives of the people they were intended for, and no monitoring was undertaken to see if all the intended beneficiaries were benefiting or only some people were benefiting and at the end no evaluation was done to determine to determine and correct failure, hold the implementers accountable and help design the next phase.

The 2008 Vision 2030

Currently Kenya's long-term strategy for development which is under implementation is Vision 2030, which was launched in the year 2008 with its Medium Term Plan with the objective of transforming Kenya into a newly industrialized middle income country by creating prosperity, global competitiveness and high quality of life by the year 2030. The strategy has three pillars. The first is the economic pillar which had sought to achieve and sustain Gross Domestic Product of 10 per cent per annum by the year 2012, (but which has been missed). In addition economic growth in Kenya as illustrated above has not always translated to improvement in the lives of the majority of the population and it is not apparent that the vision 2030 will overcome

this weakness. The economic pillar targets the traditional economic growth in the areas of tourism, agriculture, wholesale/retail trade, manufacturing, information technology enabled services, and financial services. The second is the social pillar, which aims at “improving the quality of life for all Kenyans” and targets human and social welfare programs, specifically: education and training, health, environment, housing and urbanization, children and social development, and youth and sports. The Third pillar is the political governance with the goal of a unified country with a democratic system that is “issue based, people centered, results oriented, and is accountable to the public” this pillar targets “The rule of law – the Constitution of Kenya, electoral and political processes, democracy and public service delivery, transparency and accountability, and security, peace building and conflict management” Although Vision 2030 does not mention the right to development, certain elements of the objectives and target areas express the tenets of the right to development, but as with the previous policies, the challenge lies in its implementation and from a human rights perspective, there is a challenge in the fact that development strategy are not tightly tied to a human rights-based approach.

The main criticism which has been levelled against the Vision 2030 is that although Kenya is a highly unequal country, the vision does not address structural determinants of inequality such as urban rural divide, the policy of favouring high productivity areas, as well as regional, ethnic and sex discrimination, which if not addressed will only increase.¹⁴² In addition the Vision acknowledges that gender inequality is a key challenge to development yet, it does not put in place measures to achieve gender equality on the economic pillar leaving such measures only in the social pillar. The measures to achieve gender equality as well as regional equality should be across all the three pillars. There is need to seriously monitor and evaluate the Strategy, this is because despite these impressive plans, Kenya is still plagued by regional and gender disparities.¹⁴³ Further despite implementation of Vision 2030 for the past 5 years (2007 to 2013),

¹⁴² Adam C.S., Collier P. And Ndungu S. N., Kenya: Policies for Prosperity, Oxford University Press, 2010 p. 2,3.

¹⁴³ <http://www.worldbank.org/en/country/kenya/overview>.

Kenya still rates poorly in many economic and social indices while poverty levels have remained constant during the six years that it has been in force.¹⁴⁴

Vision 2030 latest status report (October 2013) on the achievements of the so far does not mention poverty alleviation or the word “poor” or “poverty”. Instead it is argued that poverty will be tackle broadly through programmes such as infrastructure development, which are expected to propel economic growth to 10 per cent per annum and that the economic growth will translate to poverty reduction. The World Bank however, assessing historical growth of the gross national product per person, projects that Kenya’s poverty levels will stand at 30 per cent of the population in 2030.¹⁴⁵ Such high levels of poverty will be in gross violation of the populations’ right to development.

The Kenya National Policy on Gender and Development (NPGD), 2000 expresses the policy of Gender mainstreaming and empowerment of women. The policy gives a framework for mainstreaming gender in all policies, planning and programming in Kenya and it is explicit that “it is the right of women, men, girls and boys to participate in and benefit equally from the development process.” The National Policy on Gender and Development is one of the most ignored policies in Kenya. Although the National Policy on Gender and Development attempts to put in place institutional mechanisms for ensuring that the policy is effectively implemented, development process in Kenya is still not gender sensitive and many segments of the society especially women have not been fully embraced in the development process or its benefits. For example, although social and economic disparities in Kenya are well acknowledged, gender inequality patterns have continued at the same pace, despite putting in place the NGP. The

¹⁴⁴ <http://www.worldbank.org/en/country/kenya/overview>.

¹⁴⁵ <http://www.worldbank.org/en/country/kenya/overview>.

Kenya Demographic Health Survey 2008/2009 documents inequality between women in education, literacy, employment, occupation and earnings.¹⁴⁶

The Kenya Demographic Health Survey 2008/2009 survey shows only marginal improvement in factors that enable men and women to increase opportunities in life. For instance in attainment of education, men are more educated than women (30 per cent men have completed secondary school or higher while only 22 per cent of women have completed secondary school or higher) while the proportion of women who are illiterate is double that of men (14 per cent of women have no formal education compared to 7 per cent of the men who have no formal education).¹⁴⁷ With regard to employment, the Survey shows that 57 percent women and 86 per cent men between ages 15 and 49 are employed, however according to the Survey, more than three out of every five working women (62 per cent) are self employed mostly in petty trade or small agricultural holdings.¹⁴⁸ Fortunately there is now impetus in that the Constitution of Kenya 2010 now makes provision some gender quotas.

Conclusion

In this chapter I have attempted to show that the constitution of Kenya does not expressly enshrine the right to development. The constitution does contain some elements of the right to development that are common to other human rights. These are elements like equality and non-discrimination, transparency and accountability as well as inclusivity and participation as well as some political and socio-economic rights and some provisions in the Bill of rights as well as environmentally sustainable development. However the constitution does recognise development holistically as a right and it does not expressly protect the right to development. Further the provisions of the international law which Kenya has ratified can also be used as a legal basis for claiming some elements of the right to development common to human rights as mentioned above. These become part of the laws of Kenya since the constitution makes them a source of

¹⁴⁶ Kenya Demographic and Health Survey (KDHS) 2008-2009, p 32-41

¹⁴⁷ Kenya Demographic and Health Survey (KDHS) 2008-2009, p 31,32

¹⁴⁸ Kenya Demographic and Health Survey (KDHS) 2008-2009, p 41

Kenyan law. As a whole however it can be concluded that the legal protection of the right to development as a whole is missing. Case law by the African Commission however has affirmed the right to development in the case of the *Edorois* people of Kenya based on the African Charter. When it comes to policies, these too are not structured in a manner that support the right to development holistically but at best supports only some aspects. In the final analysis one can conclude that both the law and the policy in Kenya are not sufficiently geared for the realization of the realization of the right to development.

Chapter Four

Obstacles to the realization the Right to Development in Kenya

Development is much sought after in Kenya and is largely perceived as a national, community or individual endeavour as opposed to human right. Development is widely discussed as political party manifestos promise development, the political party candidates lure the electorate with promise to “bring “development and there is generally widespread discussion on “development” among the populace in popular sources like newspapers, radio, television. Within government ministries and departments, there are strategic plans for realizing national development objectives. Despite much discussion and strategy around the concept of development, the legal articulation of the right to development has not received due attention in discourse. The realization of the right to development has been elusive to a large proportion of the population who have not been able to participate actively and meaningfully or benefit from development due to a number of obstacles, which include development policies, corruption and the fact that development is not yet accepted as a human right. This part highlights some of the obstacles to realization of the right to development from a human rights perspective.

Non-Acceptance of Human Rights as an obstacle to the realization of the Right to Development

Like in many African countries, acceptance of human rights generally has been a challenge in Kenya. For example international treaties that enshrine human rights have been signed and not implemented. Promoting human rights is sometimes viewed as promoting foreign ideals and a challenge to vested beliefs and practices.¹⁴⁹ For example during the nineties and early 2000s human rights advocates were routinely arrested, tortured and detained without trial or jailed after

¹⁴⁹ Adar, K. G., "Human Rights and Academic Freedom in Kenya's Public Universities: The Case of the Universities' Academic Staff Union". *Human Rights Quarterly*, 21(1) (February 1999): 187.

sham trials. ¹⁵⁰ Political leadership has often viewed human rights and human rights activists with much suspicion even when advocating for implementation of international treaties which that Kenya has ratified. It is only with the passing of the constitution of Kenya 2010 that discourse of human rights is now coming to the fore.

The fact that development is largely viewed as a national, community or individual endeavour and not a human right to which every individual and all peoples are entitled to participate and enjoy the benefits has implications on the way development is undertaken. Both the populace and the policy makers are generally unaware of development as a right. There is generally low awareness of human rights generally due to the fact that the International treaties entered are not usually published or popularised. For instance at independence in 1963, Kenya was admitted to the United Nations family and she subscribed to the Universal Declaration of Human Rights (“UDHR”), Kenya ratified the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), in 1972, while at the regional level, Kenya has ratified the African Charter on Human and Peoples’ Rights, and the Protocol to the African Charter on Human and Peoples’ Rights all which are precursors to the Declaration on the Right to Development. Yet most aspects of these instruments have only been given prominence in 2010, when the new constitution was passed. This shows that rendition of human rights instruments from global level to local level has been extremely slow and this can constitute an obstacle to the realization of human rights.

From the legal perspective, however, when it comes to accepting development as a right, the general attitude of the government can be seen from the *Endorois* case, when in complete oblivion to the *Endorois* right to development, the Government compulsorily acquired their reserved and forcefully evicted over 400 families from L.Bogoria area without any consultation, or adequate compensation to make way for a Wildlife Sanctuary. The *Endorois* were quite cognisant of the fact that they had an entitlement and that it was not right for the government to acquire their land in the manner that they did. Having unsuccessfully pleaded with the local

¹⁵⁰ Kenya Human Rights Commission, Quarterly Repression Report, October- December 1995. Nairobi: Kenya Human Rights Commission and Kenya Human Rights Commission, Quarterly Repression Report, July-September 1996. Nairobi: Kenya Human Rights Commission, 1996.

authorities, then the Kenyan Wildlife Service and ultimately the Kenya government, to stop their eviction from their land or give them adequate share of the tourism and revenues generated by the reserve, they moved to the High Court, seeking the court's interpretation of its right to the lands as beneficial owner viz a` vis the local Authorities and fiduciary duty bearers. The High court too was oblivious to the *Endorois* right to development. Despite the fact that failure by the government to adequately compensate them with grazing land to sustain their livestock, or to involve them in the management and benefit-sharing of the reserve resulting in persistent abject poverty, the Court declined to assess the duty of a Local Authority towards the beneficiary community and instead found that the establishment of the reserve had nationalized the resource, and thus placed it outside the direct control or enjoyment of the community.

This finding raises the question as to whether nationalization of recourses is intended to deny such a community all and every type of benefit arising from the recourse or whether in deed there is no contradiction in undertaking development that creates poverty. This kind of interpretation goes against the tenets of the right to development. It ignores the right consultation, participation or enjoyment of benefits by "peoples" and very importantly, it ignores the duty of the government as the duty bearer vis a` vis the *Endorois* as the beneficiaries to respect, protect and fulfil their right to development. One may argue that it is just as well that the Appeal became subject of much delay because there might not have been a different outcome. Still it would have been interesting to see how the Court of Appeal would have given credence to the right to development. Finally, it took the African Commission to find a violation of the right to development.¹⁵¹ The *Endorois* knew they were entitled to their land or at least fair compensation. They also knew that since the sanctuary was generating money, they were entitled to share in it. But somehow neither the local authorities, nor the government or the courts were cognisant of the *Endorois* right. This shows that although there is widespread discussion on 'development' inside and outside of the government, including in popular sources like newspapers, radio, TV, development as a right is still a strange discourse. More importantly, this shows that looking at development from a rights perspective can help communities and peoples to realize the right to development.

¹⁵¹ Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of the *Endorois* Welfare Council) v. Kenya, 2003.

In reality, the *Endorois* case could be said to be the “tip of an iceberg” having come to light because it has been adjudicated. Many such violations of the right to development go un noticed and have not been adjudicated upon, yet local communities have been left poor or poorer than they were, when in violation of their right to development, their recourses are ironically acquired for “economic progress.” A sample of other places that can be mentioned here include the coastal areas, Taita Taveta, Olkeria of Rift Valley, the Sondu-Miriu River in the West part of Kenya to mention but a few. For the future, it is necessary to watch if the recent discovery of oil in Turkana region of the North Eastern part of Kenya is going to balance economic progress with a strategy for human development.

To illustrate how the right to development is often violated in the process of “economic progress,” and may continue over and over unless deliberate policy is put in place to twin economic progress with human development, is the case of the Sondu-Miriu River project. In the Sondu-Miriu River Hydro-Electric Power Project in Nyakach Escarpment, Kisumu County of western Kenya, the Africa Water Network which assessed the impact of the project on the local community and established that the project local communities’ human rights. It also found that the implementation of the project on the ground breached what was outlined in the pre-feasibility and feasibility studies.¹⁵² According to the Africa Water Network, the community was promised electricity and irrigation which the generating company later declined on grounds that it was not within its mandate. The river water which the community depended on for domestic and agricultural purposes was diverted and tunnelled without adequate alternative, while over 1000 households were inadequately compensated for their arable land. Further, there was no adequate consultation or participation as the communities were involved in the last stages merely to endorse the plans of the generating company. Many people who were using the river to derive a living lost their source of income when the river was dammed but were outside the compensation scheme. For example the boat operators who were operating on the river but outside the “areas covered” by the project lost their livelihood in the process of “development”. Finally, women being the main water users were adversely affected but were completely

¹⁵² The Impacts of Sondu-Miriu River Hydro-Electric Power Project on the People of Nyanza: Africa Water Network, Wednesday, December 22, 1999.

marginalized as they were not involved in consultations, participation, employment opportunities or any other benefit¹⁵³. Clearly there is need for all parties to be aware of the right to development. In this case, the power generation company needed to be aware of the communities' right to development so that it could respect so as not violate it, while the community needed to be aware of its right to development so as to be able to claim it and in case of violation, take steps for redress. Most importantly the government needed be aware of the communities' right to development so as to protect the right from being violated by others.

With the passing of the Constitution of Kenya 2010, there has been increased discourse on civil and political rights as well as socio-economic rights, but not holistic right to development, the legal articulation of the right is still missing in the discourse of development. That the legal articulation of the right to development has not started in earnest in Kenya three decades after the Declaration on the Right to Development is itself problematic in that very important principles contained in the Declaration are being missed out on in the conceptualization of national development. It must be conceded however, that some of the elements of the right to development that are common to the other human rights treaties and are entrenched in the Constitution. These include principles like equality and non-discrimination, equity, participation of the people, transparency and accountability and leadership with responsibility which are already in the national discourse. Vision 2030, the current development strategy now has economic pillar, social pillar and political pillar as its framework. Yet there are still many obstacles to the realization of the right to development which are further dealt with below.

Policies and Model of Development That Do Not Put Humans at the Centre of Development

Economists like Collier and Ndungu accept that “the development strategies since the 1960s seems to have failed, or rather did not produce desired results”.¹⁵⁴ Kenya inherited a restrictive

¹⁵³ The Impacts of Sondu-Miriu River Hydro-Electric Power Project on the People of Nyanza: Africa Water Network, Wednesday, December 22, 1999.

¹⁵⁴ Adam C.S., Collier P. and Ndungu S. N., Kenya: Policies for Prosperity, Oxford University Press, 2010.

model of development that focused on growth of gross national product rise in personal income, industrialization and social modernization. ‘Economic growth model’ is important and has had both direct and indirect human rights effects like employment, thus fulfilling the right to employment and through that education of their children and through payment of taxes by participants/companies to the state the latter creating enabling environment for some opportunities and rights again education, health care. However, a crucial element of expanding human freedoms was missed out or at best only assumed. This is well illustrated by the case of the Coastal areas and has been a cause for much tension.

Despite the fact that a lot of national wealth is generated in the Coastal areas, through tourism and through the ports of Mombasa and Malindi, poverty and illiteracy are still the major aspects life and the local people feel that they are left out of meaningful participation, decision making and benefits. For example, the Coastal region is the main hub of tourism which is a major contributor to foreign exchange earnings. Yet human development indicators for the Coastal are remains poor showing that only one third of the region has education beyond primary level and only 7 per cent possess post-secondary education, and as a result of poor education 55 per cent of the people from the Coastal area earn less than Sh10,000/= per month, which means over 50% work for less than the minimum wage. With regard to land, only 44 per cent possess title deeds to the land that they occupy 41 per cent have no title deeds and are often referred to as “squatters.” This is an illustration of where economic progress from a region that has not translated into human development.¹⁵⁵

Amartya Sen observes that Growth of Gross National Product and personal incomes are all important “as means (to expanding the freedoms enjoyed by members of the society)”¹⁵⁶ but not as a goal of development. The focus of development ought to be on “on people and their quality

¹⁵⁵ Survey conducted by Ipsos Sinovate in January 2013.

¹⁵⁶ Sen, Amartya, “Development as Freedom”, Oxford University Press, New Delhi, 1999.

of life”.¹⁵⁷ The model of focussing on economic growth with the assumption that economic growth would lead to human well-being did not work to an extent that by 2003, coupled with poor governance, growth became slow and poverty inflicted over 50 per cent of the population so that Kenya had to put in place a strategy for poverty reduction strategy in 2003. It is important to be clear about the objective of development because generation of income and wealth and does not automatically convert into human well-being. A great deal depends on how or even whether the country uses the wealth generated to enhance human development, for instance, by provide quality basic social services. Equally important is to bear in mind that human beings are not homogenous even within a country of even a district. It is important to consider the aspects of gender, ethnicity, marginalised groups as well as other factors that deny equal opportunities to people and produce disparities. “Income is important as a means, not as a goal of development”.¹⁵⁸

To begin with, Policy makers are unaware of human rights and do not make policies in reference to them. This includes policies that do not consider essential things like internal geography. Yet economists like Collier and Ndungu¹⁵⁹ agree that internal geography matters and because of previous policies, country faces “acute socio-geographic sensitivities” and that opportunities for growth should be broadly spread across the country.¹⁶⁰ They recommend putting in place multifaceted strategies to cater for areas with different geographic characteristics. However whereas they take note of different geographic characteristics, they do not talk about the human rights to development of the people in those different geographic area and improvement of their standards of living should be specifically taken into account in the process of growth. From the foregoing it can be seen that much as it is trying, the government is not yet fully committed to enhancing the human well-being in a meaningful and sustainable manner. Suitable and implemented policies that support the realization of the right to development are not yet in place.

¹⁵⁷ Sen, Amartya, 1999.

¹⁵⁸ Sen, Amartya, “Development as Freedom”, Oxford University Press, New Delhi, 1999.

¹⁵⁹ Adam C.S., Collier P. And Ndungu S. N., “Kenya: Policies for Prosperity”, Oxford University Press, 2010 pp 26.

¹⁶⁰ Adam C.S., Collier P. And Ndungu S. N., “Kenya: Policies for Prosperity”, Oxford University Press, 2010 pp26.

The government has not yet taken seriously its duty to create space and conditions necessary for the whole population to realize their right to development because it does not think about development as a right. Although the government has started to take issues of education, health services, housing and other social services seriously, the 2013/2014 budget allocated Kshs. 34.7 billion to health, Kshs. 130 billion to Education and Technology and Kshs. 55.4bn for environment, water and irrigation and housing, which is very important thinking about development as a human right requires not only that education, health and housing are thought of as human rights, but it also includes an effective government functioning at all levels.¹⁶¹ It is only when the Government is functioning effectively at all levels and having effective policies that services can be delivered to the population in a manner that raises the living standards of the people. Thus the first imperative of development policy makers whether or not they are aware of human rights should be to raise the living standards of the whole population and not only some people or some regions. This has been done successfully, though not perfectly, in Vietnam (a single party communist state) and Singapore (a liberal capitalist state).¹⁶² Secondly and closely related to the first imperative is that the policy makers must put in place policies that are geared to achieving the right to development. Once the right policies are formulated, they should be implemented effectively. This includes building institutions that are necessary to ‘efficient functioning of a competitive state and to the delivery of quality service to the people’.¹⁶³ The third imperative of the state or the policy makers is to put in place proper environment and space for “responsible” economic growth while reducing social inequality.

Corruption- a Multi Thronged Obstacle

In the 2008 Corruption Perceptions Index, issued by the anti-corruption organization, in 2008, Kenya ranked 147th out of 180 countries by Transparency International.¹⁶⁴ This means that 146

¹⁶¹ MillsMills, G., *Why Africa is poor and What Africans Can Do About It*, Penguin Books, 2012 37.

¹⁶² Mills, G., *Why Africa is poor and What Africans Can Do About It*, 2012 p 76.

¹⁶³ Mills, G., *Why Africa is poor and What Africans Can Do About It*, 2012 p 76.

¹⁶⁴ *Corruption Perceptions Index*, Transparency International 2008.

countries are perceived to be less corrupt than Kenya, and only 33 countries are perceived to be more corrupt. By the year 2011 Kenya had slid further and was ranked 154 out of 183 polities in Transparency International's 2011 Corruption index, meaning that it was the 26th most corrupt country in the world and only ten countries in Africa were considered more corrupt than Kenya.¹⁶⁵ Corruption has serious costs and other consequences on development in that it slows down the economy, increases inequality, affects access to services¹⁶⁶ and it affects democracy as it decreases the effectiveness of the government putting into question stability as well as political legitimacy¹⁶⁷ Further democratic institutions become weak since as they lose public trust and support (both for politicians as well as public servants). In addition corruption impairs trade, discourages investment as many companies avoid investing in Kenya due to fear of corruption¹⁶⁸, puts the environment at risk and generally results in abuses of human rights¹⁶⁹ thus frustrating livelihood of many Kenyans. For example Kenyan firms spend an average of 4 per cent of their income on bribes; this has been estimated to be enough money to employ one all the unemployed youth in the major urban areas.¹⁷⁰

If corruption is bad, it is made worse in that it takes away money that would otherwise be invested in human and economic development within the country to other countries. Corruption¹⁷¹ is a big impediment to the realization of the right to development. It is estimated

¹⁶⁵ Corruption Perceptions Index, Transparency International 2011.

¹⁶⁶ Kenya Anti-Corruption Policy 2011.

¹⁶⁷ Tavits, M., "Causes of Corruption: Testing Competing Hypotheses" 2005
<http://www.nuffield.ox.ac.uk/politics/papers/2005/Tavits%20Nuffield%20WP.pdf>.

¹⁶⁸ Wolfgang F., "realizing the Kenyan Dream" April 2013 p 35.

¹⁶⁹ Kenya Anti-Corruption Policy 2011.

¹⁷⁰ Wolfgang F., "realizing the Kenyan Dream" April 2013 p 35.

¹⁷¹ Under the Anti-Corruption Policy, corruption is interpreted very broadly and includes improper use of power/privileges/office for benefit to any person(s); bribery, theft, embezzlement, fraud, tax evasion; practicing of nepotism, tribalism, clanism, discrimination on the basis of religion, gender or disability; inversion and distortion of social values, soliciting for and giving sexual and other favours as well as negligence of professional ethics.

that Kenya is losing nearly a third of the annual national budget to corruption and wastage. In the year 2010, for example, it was estimated that Kenya Shillings. 336 billion (USD 4 billion) was lost in corruption and wastage.

The Kenya Anti-corruption policy recognizes that corruption has the effect of deepening poverty by distorting political, economic and social life and that in corrupt circumstances decisions are not taken for the benefit of the public but are taken to serve private interests.¹⁷² The issues addressed in the Kenya Anti-Corruption Policy are essentially hindrances to the right to development. In recognition of endemic problem that corruption poses, the Constitution of Kenya 2010 outlaws corruption¹⁷³ and mandates parliament to enact legislation to establish the ethics and anti-corruption commission. In addition to the Anti-Corruption Commission, there are many pieces of legislation that have been put in place to deal with corruption in Kenya¹⁷⁴ as well as myriad sets of regulations¹⁷⁵ yet in practice attempts to combat corruption have encountered lack of goodwill particularly the successive governments as a result the measures put in place have failed to check corruption.

The anti-corruption laws and policies have to a large extent not worked. Despite the admission of the Government that corruption is a serious problem in Kenya and despite Kenya scoring poorly year after year in Corruption Perceptions Index, prosecution particularly of grand commission committed by high government officials are rare while convictions are even less. For instance between for 10 years between 2003 and 2012, only 51 people have been convicted of corruption

¹⁷² Kenya Anti-Corruption Policy 2011.

¹⁷³ Chapter 6 of the Constitution of Kenya 2010.

¹⁷⁴ For example the Public Service Commission Act Cap 185 (revised); Public Officer Ethics Act, 2003; Public Procurement and Disposal Act 2005; Anti-corruption and Economic Crimes Act 2003 and Ethics and Anti-Corruption Act, 2011.

¹⁷⁵ For example the Public Service Code of Regulations; Financial Regulations and Rules; Code of Conduct and Ethics for the staff of the Ministry and Resource Manual for Corruption Prevention in the Public Service.

offences¹⁷⁶. However no minister of high profile official has been convicted of corruption despite many allegations of corruption.

To suggest that there is no will in all the three arms of the government to address high level corruption decisively¹⁷⁷ is a gross understatement. Anti-corruption efforts are actively fought and frustrated at many levels. All Arms of the Government have often actively thwarted efforts to fight corruption. These include the parliament that is supposed to represent the people. For example the in 2007, the parliament passed the Statute Law (Miscellaneous Amendments) Act. One of the objectives of the amendment was to restrict investigations by the Kenya Anti-Corruption Commission to offenses committed prior to May 2003, effectively granting “an amnesty for corruption” to perpetrators including those involved in the Goldenberg and some Anglo-Leasing scandals.¹⁷⁸ Another example of how the parliament has thwarted anti-corruption efforts is in 2011, when the Kenya Anti-Corruption Commission Chairperson was suddenly removed from office when he reopened the two major corruption scandals the Goldenberg and Anglo-Leasing, in which many 50 senior officials of the government and parliamentarians and yet another vice President were to be investigated. The parliament that is supposed to represent the people has disbanded two the Anti-Corruption Commissions on flimsy grounds when it was apparent that the commission the disbandment was because the Commission threatened their interest.

The Attorney General, who previously had the mandate of prosecuting offences including corruption cases was constantly criticized for lack of prosecution of corruption particularly those of high level. Despite the fact that corruption architect are known, and anti-corruption courts exist, prosecution for major scandals are rare. In the last government, for example, several ministers were suspended over allegations of corruption only to be reinstated after some months.

¹⁷⁶ freedom house, 2012.

¹⁷⁷ Bertelsmann Foundation, 2012.

¹⁷⁸ Anglo-Leasing corruption occurred in 2005. It involved procurement abuse of lease finance or supplies credits to finance security related project. The corruption scam revealed the corrupt awarding of contracts for a new passport printing system in which government contracts worth hundreds of millions of dollars were awarded to non-existent firms.

Prosecution of corruption cases is further complicated by the fact that investigations are undertaken by the anti-Corruption Commission while the prosecution is undertaken by the Director of Public Prosecutions¹⁷⁹ so there is always a ready excuse for lack of prosecution of mega offenders as the Commission blames the Prosecution for lack of prosecution while the prosecution blames the commission for shoddy investigation, this way cases of mega scandals have stalled for long periods of time.

The case of Goldenberg corruption had on the economy, illustrates just to show how much anti-corruption efforts are fought at every level. Goldenberg corruption involved government subsidizing exporters of non-existent gold and diamond over 25 per cent of the foreign currency earnings cost the country over 10 per cent of the annual GDP and devastated the economy if the country in the 1990s. Despite the fact that the Goldenberg corruption devastated the economy, it was largely ignored until a new government came in place when in 2003, the President appointed a Judicial Commission of Inquiry comprising a Judge of Appeal as Chairman, a Judge of the High Court as Vice-Chairman (later replaced by Justice of the COMESA Court of Justice) as has happened in several cases of corruption. The idea of the enquiry, which was very costly to the economy became of little value in terms of fighting corruption other than to placate the public.

After three years The Commission produced and presented its report on 3rd February, 2006 to the President. Just to show how difficult it is for even the most senior people in the judiciary to decisively address corruption, the Commission observes as at paragraph 846 of its report that “Regarding those persons whose acts are in our view, contrary to the law, and are in criminal in nature we have agonized over whether or not to recommend prosecution. We have, however, decided against such recommendation as there are many imponderables on what the Attorney-General considers before deciding to prefer criminal charges against any person or group of people. In view of that we will list names of those who in our view were in one way or another, responsible for those acts and omissions for the attention of the Hon. the Attorney-General for any possible criminal or civil action.” This raises the question as to why it was so difficult for the

¹⁷⁹ Prior to 2010 prosecutions were done by the Attorney General’s Office. Since the Attorney General sat in the Cabinet most of the scandals involving Cabinet members went unprosecuted.

Commission which was specifically appointed to looking into the corruption scandal to hit the nail on the head and recommend prosecution of the culprits. Nevertheless the commission listed among others found the then Vice president, the Governor of central Bank and a businessman.

Not being satisfied by the sorry and apologetic excuse from the Commission, the then Vice President (by then a Minister) immediately moved to the High Court and had the court remove all 28 clauses that mentioned his name adversely from the record.¹⁸⁰ The High Court in a three judge bench granted his order and expunged from the record all twenty eight paragraphs essentially clearing him from any wrong doing, on grounds that the commission had acted without good faith or fairness and that it was biased. As for the business man involved despite fighting many corruption cases, regarding Goldenberg, he was finally acquitted by the High Court in early 2013. This shows how the government, commissions and the judiciary, the attorney General appear powerless to address corruption. Yet these are the duty bearers when it comes to fulfilling the right to development. It has proved difficult for Kenya to hold perpetrators of corruption accountable and so the culture of impunity continues to thrive making a few people rich and powerful enough to take large chunks of money and keep it in foreign lands, but it has impoverished and disempowered a large number of people and denied them any semblance of realization of the right to development.

The judiciary itself under currently investigation on allegations of corruption by Ethics and Anti-Corruption Commission started in the last week of October 2013 has not fared better than the other two arms of the government on the issue of corruption. Although currently undergoing transformation to enable it deliver on its constitutional mandate, according to the Chief Justice, the Kenyan judiciary has been from endemic corruption and other problems that beleaguer like excessive bureaucracy, understaffing, poor remuneration and these have create a fertile environment for corruption to thrive. According to CGB 2011 data, 43 % of the respondents that had contact with the judiciary reported paying a bribe 12 months preceding the survey.

¹⁸⁰ Misc. Civil Application No. 102 of 2006 Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair, Justice of Appeal S.O. Bosire & Peter Le Pelley S.C. Ex-parte George Saitoti.

It is impossible for a people to realize the right to development in the face of rampant corruption simply because there is little money and little will left to devote to development. For example in the national audit undertaken for the annual budget of year 2011/2012 financial year the Auditor-General's Annual Report showed that accounting officers did not properly explain how Kenya Shillings 304 billion (USD 4 billion) equivalent of 33 per cent of the Kenya Shillings 920 billion national budget for the period was used.¹⁸¹ As a result the Auditor General could not establish whether or not expenditures were incurred lawfully and in an effective way as required by the Constitution.¹⁸² Yet as in the previous years when the Auditor General's Reports have highlighted wastefulness and corruption, there has been no action.

Poor Governance and poor Leadership

Apart from corruption but related is the obstacle of poor leadership and poor governance generally. Soon after independence, politics that influences development was conducted with tribal consciousness.¹⁸³ Although multiple parties is a component of democracy, the way in which politics influenced development from independence is that opposition areas were discriminated against and "punished" with reduced government spending while areas that supported the ruling party were favoured with increased public spending,¹⁸⁴ this type of poor governance has persisted through successive governments making "tribalism" one of the key reasons why many Kenyans have not realized their right to development.

Because governance is simply the way in which decisions are made and the way in which they are implemented. From the top leadership, each successive government has had its own tribal

¹⁸¹ Annual Report of the Auditor- General tabled in Parliament on Tuesday 8th October 2013.

¹⁸² Article 229 (6) of the Constitution of Kenya 2010.

¹⁸³ Leys, Colin 'Under development in Kenya; The Political Economy of Neo-colonialism' (James Currey and University of California Press, 1975) p 204.

¹⁸⁴ Leys, Colin 'Under development in Kenya; The Political Economy of Neo-colonialism' (James Currey and University of California Press, 1975) p228.

“kitchen cabinet” to help it make decisions. Consequently Kenya has become tribally polarised as development policies lie unimplemented or at best not properly implemented.

According to Gregg Mills, Africa is poor leaders mainly because its leaders have made bad choices at the expense of millions.¹⁸⁵ citing the fact that although the solution to development of Africa lies in Africa its leaders are have constantly avoided responsibility with assistance off donors who look aside when leaders ignore their responsibility to the populace.

The constitution of Kenya 2010 dedicates a whole chapter to Leadership and integrity explicitly spelling of responsibility of leadership to the people including, respect and service to the people, financial probity as well as accountability to the public for decisions and actions.¹⁸⁶ However, this chapter on leadership and integrity is one of the most ignored chapters of the Constitution. Kenya like many countries in the developing world lack effective and committed leadership among the various stakeholders required to make the right to development realizable to the whole population. Often leaders have a problem of putting their political and financial interests before the well-being of the people and a tendency to confuse party political and public interest.¹⁸⁷ Although committed leadership is essential at all levels especially the top government level and through the whole of the government bureaucracy including the legislature and judiciary, enlightened committed leadership is lacking as evidenced by inability to meet the three goals set at independence of freeing the population of poverty decrease and ignorance.¹⁸⁸ As Kumar observes, “The adoption of a rights approach calls for enlightened and committed leadership among different stakeholders in society”. Leaderships must be courageous and the choices made must be informed by human rights rather than narrow interests. Leadership must be committed and courageous enough to improve transparency and accountability and put in place policies that enable human and economic development which include technology, capital, skill and expertise.

¹⁸⁵ Mills, G., *Why Africa is poor and What Africans Can Do About It*, 2012 p305.

¹⁸⁶ Article 73 (2) (c) of the Constitution of Kenya 2010.

¹⁸⁷ Mills, G., *Why Africa is poor and What Africans Can Do About It*, 2012 p305.

¹⁸⁸ Sessional Paper No. 10 of 1965.

The leaderships are not always transparent. Decisions are not always taken or enforced in a way that follows laid rules and regulations which are often ignored. Often there is blatant disregard for the constitution. Information is often not freely available or accessible to the beneficiaries. Currently there are efforts to gag the media. While institutions and processes do not serve all stake holders equally. Although legal frameworks are in place, there is often breach of the rule of law as the legal frameworks are not enforced impartially as both the judiciary and the police are corrupt. The leaderships are not always transparent. Decisions are not always taken or enforced in a way that follows laid rules and regulations which are often ignored. Often there is blatant disregard for the constitution. Information is often not freely available or accessible to the beneficiaries. Currently there are efforts to gag the media. While institutions and processes do not serve all stake holders equally. Although legal frameworks are in place, there is often breach of the rule of law as the legal frameworks are not enforced impartially as both the judiciary and the police are corrupt.

Poor governance and leadership can impact negatively on participation of the people and result in none-inclusion and non-participation of all Segments of the Population. For example good governance requires that the governed participate in determining the policies that govern them. However this is not always the case as has been seen above even in developments which are specifically targeted at communities. Frances Steward and Michel Wang who reviewed the experience of participation with regards to the preparation of the Poverty Reduction Strategy Paper (PRSP), although finding significant variations, in who participated, how they participated and the issues in respect of which they participated, found that important actors including representatives of the people like members of Parliament, trade unionists, woman's organizations and marginalized groups were left out. They further found that there was not enough time for consultation and often particularly in the case of civil society organizations, they were given pre-prepared drafts to comment rather than having an opportunity to participate. In the end "participation" did not result in any changes to the International Finance Institutions prescribed policies. Although the study was carried out in several countries, it aptly describes how participation often happens in the occasions when it occurs. Similar finding was made in the African Peer Review Country Report for Kenya.

Although the constitution of Kenya 2010 mandates participation either direct or through elected representatives for example, once represented the representatives tend to forget about the people and pursue their own narrow interest and this does not augur well for realization of the right to development. Although effective participation requires be informing and organizing, awareness and organizations is often lacking leading to loss of benefit of participation. This means freedom to associate freely, express oneself freely as well as be free to organize as in civil society.

Kenya inherited colonial economy that focuses on high potential areas and instituted this in the post-colonial policies¹⁸⁹ urban areas while rural areas were not given sufficient attention. This problem has continued to date. Currently despite rural urban migration, roughly three quarters of the population of Kenya live in the rural areas, depending mostly on small holder agricultural form of production. Yet since independence, despite growing population there has been stagnation in agricultural yields due mostly to poor policies which have been termed “anti-agrarian”¹⁹⁰ since they prioritize urban population while discriminating against rural population leading to persistent urban - rural inequality. Even in the current 2013 2014 budget the attitude of unequal allocation is evident as the sum of Kenya Shillings 38.1bn for agriculture and rural development which is relatively small considering that 75 per cent of the population still live in the rural areas and depend on agriculture to produce food for the whole country subsist on and make income, compared to say Kshs.78.5 billion which is allocated for Energy. Persistent failure to adequately address the needs to the rural population has resulted to a situation where large parts of the population feel excluded from the mainstream of society, yet the well-being of a nation or a community requires that the whole population should feel that they have a stake and are not excluded.

Resource Constraints and Unequal Allocation of Public Resources

¹⁸⁹ Ochien’g W. R. and Maxon R.M., An Economic History of Kenya Edited by and 1992, p. 269;

¹⁹⁰ Mills, G., Why Africa is poor and What Africans Can Do About It, 2012 p89.

As with many parts of the developing countries, limited financial resources has been a big challenge in realizing the right to development. Many projects that would bring services that would enhance peoples' lives are not implemented due to scarcity of resources. That said, scarcity of resources is brings with it other attendant problems, particularly when the limited resources is allocated in a manner that does not respect human right [to development] in skewed allocation. As long as resources remain too scarce to meet basic needs, skewed allocation, discrimination and failure to promote equitable sharing will remain. In Kenya this manifests itself in favouring some tribes (usually the ruling tribes and the cooperating tribes) over other tribes usually opposition areas in allocating public resources. This will in turn creates “tribal favouritism”, social tensions and corruption both which have negative effect on the realization of right to development.

There is often a challenge of the rights which should take precedence over others or whether some groups of people like the poor and vulnerable rights should get precedence over others. Although the constitution of Kenya 2010 proposes some criteria for allocation at national level, in Kenya the situation has hitherto tended to be solved by ethnicity that is the ethnic group in power tend to prioritize their region and their issues. For example the regions that have produced the president are the regions that are most developed in terms of infrastructure, education, health services etc. Further, limited resources have to be allocated for the fulfillment of ‘competing’ and complementary rights and the question comes as to whether some rights get precedence over others or whether the rights of some groups (the poor) get precedence over the rights of others. While even at international levels this discourse has not yielded an effective criteria for making decisions as to which competing right takes precedence.¹⁹¹ It is widely acknowledged that posts election violence of 2007/2008 where over 1000 people died 600,000 people were displaced and so much property destroyed was partly a result, discontent which has been brewing due to inequality which hindered a large segment of the society from realizing their right to development.

¹⁹¹ Shiva Kumar, A. K. “MDGs and the Right to Development: Issues, Constraints and Challenges”, Draft Paper prepared for the Office of the High Commissioner for Human Rights as a background paper for the high level Task Force on the implementation of the right to development, 2004.

Agenda 4, one of the Agenda items of the National Accord Reconciliation Agreement (NARA) signed February 2008, in a bid to end the post-election violence and political impasse after the December 2007 disputed presidential elections, recognized that there were many underlying issues that had to be dealt with in the long term in order to realize sustainable development, peace, and harmony. These included legal and institutional reforms, land reform, addressing poverty, inequitable, distribution of resources, addressing perceptions of historical injustices and exclusion of segments of the Kenyan society, youth unemployment, transparency, accountability and addressing impunity which caused recurrent social tensions, instability and cycle of violence especially during elections. [Agenda No. 4 National Accord Reconciliation Agreement (NARA)]

In addition to ethnic factor in allocation of public expenditure, there are the powerful influences which skew expenditure against the interest of the poor and the vulnerable. For example expenditure on the military and in recent cases top echelon of public service has become has some of the highest income. MP and Commissioners and top State Officers' salaries have become a sore point in Kenya and have resulted to several public demonstrations. The high salaries of the top state officers in the face of about half the population living in poverty have the double effect of concentrating money that would be used for development in too few hands and further increasing inequalities.

Kenya's Budget for financial year 2013/14 whose theme is "transformation for shared prosperity" is Kshs. 1.6 trillion (US\$ 19.3 Billion). The budget allocates Kshs. 34.7 billion to health, Kshs. 125 billion to Transport, Kshs.78.5 billion to Energy, Kshs. 9.5billion to ICT, and Kshs. 130 billion to Education and Technology. Kshs. 38.1bn for agriculture and rural development which is quite small considering that 75 per cent of the population still live in the rural areas and depend on agriculture for subsistence and income. Kshs. 19.0bn for parliamentary reform was allocated to Parliamentary reform while a relatively lower sum of Kshs. 16.1bn was allocated for judicial reforms. The budget was hailed at being pro poor but since it had special allocations for marginalized groups for example Kshs. 3.4 billion for Equalization fund to the counties, Kshs. 903 million was allocated to the provision of ARVs, Kshs. 300 million allocated for provision of land for resettling the Internally Displaced Persons,

while Kshs.200 million was allocated for the Slum upgrading programme. There was also allocations for billion allocated for doubling the number of orphans and vulnerable children covered by cash transfers, doubling the coverage of those with extreme disability as well as for doubling the number of other disabled persons under coverage of cash transfer while Kshs. 100 million for persons with albinism and Kshs. 356 million allocated for urban food subsidy. For implementation of the budget to succeed, there is need for transparent and accountable systems. Out of the Kshs. 1.6 trillion (US\$ 19.3 Billion) budget, the total expected receipts (including loans and grants), is Kshs.1,284.0 trillion this leaves an overall deficit of Kshs. 356.9 billion.

Under Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) State undertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant 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. This means that the international Community has an obligation to come in and help Kenya to finance her budget. However the international community has always considered the obligation under Article 2 of the International Covenant on Economic, Social and Cultural Rights as a moral obligation as opposed to a legal obligation. Moreover the issue of international cooperation has not always been smooth as will be seen below.

Complexities of International Aid

There are two schools of thought on says that international aid does more harm than good, the other says that it does more good than harm.¹⁹² Whichever way one looks at international aid it does some good and some harm. Like other African countries international aid has flowed into Kenya intermittently but the amount of aid which has come to Kenya since independence is substantial enough to raise questions as to why Kenya is still among the poorest and unequal countries of the world, if indeed the intention of international aid is to alleviate poverty and spur

¹⁹² Mills, G., Why Africa is poor and What Africans Can Do About It, 2012 p314.

economic development.¹⁹³ Coupled with the question as to whether aid does more harm than good in Kenya or vice versa, is the issue of Kenya actually needs donors to finance its budget. Again opinion is divided here. There are those who hold that Kenya needs donors, and those Kenya does not really need international aid but can use the funds to strengthen its development. According to the World Bank, most of the public services are financed with Kenyan taxpayer's money while foreign-finance accounts for only 15 per cent of Kenya's public expenditure. [In other East Africa Community countries which aid accounts for more than 40 per cent]. It must however be acknowledged that international aid in Kenya has often been factored into the budget with a view to bridging the financial budget gap.

Nonetheless, there are several issues to be raised as to whether development aid actually aid in the realization of the right to development in Kenya. Firstly, development efforts proposed by international community as Mills¹⁹⁴ observes can be "complex and condescending" and do not place due consideration to local realities, values, cultural or political or even socio-economic nuances, which is often the more difficult path. In the Kenyan case, the relationship between the government and the development partners is often contentious. The development partners, maintain the system of project financing often "ring fencing" their funds around projects and often by passing the government, and leaving out budget support usually on the grounds of weak governance and weak public financial management in which corruption flourishes with impunity. Some have observed however, the same development partners have given budget support to countries with comparatively weaker governance, such as Afghanistan, Iraq or Burundi. ["Three myths about aid to Kenya" Submitted by Wolfgang Fengler On Mon, 11/14/2011] In turn the government remind its development partners of its sovereignty regularly, meaning that it is often uncomfortable with the manner in which development aid is undertaken in a manner that fails to recognise the states responsibility.

It must be conceded that some of the time it is not so much a question of paternalism or imperialism but a genuine demand for government to be responsible and accountable to the

¹⁹³ Moyo, D., *Dead Aid: Why Aid is not Working and Why There is another Way For Africa*, Penguin Books, 2010.

¹⁹⁴ MillsMills, G., *Why Africa is poor and What Africans Can Do About It*, 2012 p37

population. For example the international community has had to stop aid on several occasions on account of However, the fact that there is no clear line as to when state is being called to account as to when the development partner is practicing “moral ambivalence”, the government has often used such opportunity to castigate its developing partners while failing to implement policies that would enable the population to realize their right to development.

Kenya like other recipient countries resists “templates of external governance” whatever their benefits. Developed countries have been criticised for attempting to create recipient countries in “their image” of the Western liberal democracy,¹⁹⁵ bringing external solutions to internal problems. This usually creates a problem with donors dictating that their tax payers’ money must be spent in a certain way meaning that the action of development partners are based on their own interests or at best based on what they see as the development needs of the recipients. Foreign tax payers may not be seized of understanding of requirements of local circumstances, in this case the requirement for the realization of the right to development. This raises concern of the commitment of the development partners to the improvement of living standards of the population as the donors to move from funding one project to another in line with their home objectives even before the initial project takes root and this can be a big obstacle to the realization of the right to development.

Finally without exhausting all complexities attendant to development aid which poses a problem to realization to the right to development, there is need to understand the recipient countries. According to Mills, African countries like Kenya use aid to externalise their problems enabling leaders to escape their leadership responsibilities of putting in place and implementing sound policies. Moyo for example argue that international aid removes the link of accountability between the leaders and their populace,¹⁹⁶ yet accountability of the duty bearer to the beneficiary

¹⁹⁵ MillsMills, G., *Why Africa is poor and What Africans Can Do About It*, 2012 p37

¹⁹⁶ Moyo, D., *Dead Aid: Why Aid is not Working and Why There is another Way for Africa*, 2010

is one of the elements of the right to development. In addition and donor money institutionalises economic un-competitiveness,¹⁹⁷ yet competitiveness is one of the major growth drivers.

The Paris Declaration on Aid Effectiveness of 2005 and the Accra Agenda for Action of 2008 are attempts to make aid more effective by establishing principles for aid effectiveness which include harmonization of procedures, joint approaches and alignment of procedures and systems as well as mutual accountability. However, these have been criticized as being mere fine-tuning of approaches without going far enough to address the underlying conditions that can make aid work for the realization of the right to development.

Of late Kenya along with other developing nations having realized that the shortcomings of international aid in helping the recipient countries to realize the right to development have been calling for “trade not aid” but no “templates” are forth coming for this yet. As early as the sixties and the seventies, developing countries have been calling for fair trade conditions to help citizens them realize their right to development but there has been little international commitment to this solution which has the potential to be sustainable. In the final analysis, the international aid has been a cat and mouse game with Kenya causing donors of condescending attitude, withholding aid, changing goalpost while donors are accusing Kenya of not putting its house in order by increasing transparency and accountability and using this to control aid either limiting or withholding or changing focus. Finally it must also be observed that although the Kenya Government is not reliant on donor aid, the Non-Governmental organizations that supplement government’s development work while holding the government accountable are heavily donor reliant.

Conclusion

In this chapter some of the major obstacles that exist in the way of realization of the right to development in Kenya have been highlighted from human rights perspective. They include poor

¹⁹⁷ Moyo, D., *Dead Aid: Why Aid is not Working and Why There is another Way for Africa*, 2010

acceptance of human rights and models of development that focus more on economic attributes but without equal emphasis on human rights. In addition poor leadership and governance that is not transparent or accountable to the people and which persists at all levels, thus affecting the implementation of policies. Corruption has been highlighted as being by far the most notable obstacle to realization of the right to development with its multi-pronged effects including increasing poverty, weakening institutions and denying the economy means with which to increase wealth. The realization of the right to development is further constrained by the fact that a large population are excluded from effective active participation in development process and in enjoying the benefits that come with development thus creating a volatile environment that is not only unstable economically but also politically. Finally international aid and cooperation that would have played a significant role in the process of development has not always been undertaken in a manner that to help realize the right to development and there is need to improve aid delivery.

Chapter Five

Empowering the Whole Population to Realize the Right to Development

In the preceding chapter, some of the obstacles that constrain the realization of the right to development from a human rights perspective have been identified. The solution thus to a large extent lies in effectively addressing the obstacles.

Full Implementation of the Constitution of Kenya 2010

The constitution of Kenya 2010 is a good start because it contains certain of the elements of the right to development which were not guaranteed in the previous constitution. The constitution enshrines the values and principles of good governance, rule of law, democracy and participation of the people; human dignity, equity, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, integrity, transparency and accountability, social justice, sharing and devolution of power and sustainable development albeit only with regards to the environment¹⁹⁸ all which are relevant to the elements of the right to development. Furthermore, many foundational principles which run throughout the Constitution have a direct bearing on the right to development. Principles like good leadership,¹⁹⁹ independence of the judiciary, robust rights and fundamental freedoms,²⁰⁰ as well as the establishment of county governments.²⁰¹ In addition the Constitution creates institutions that can help ground the right to development of which the independent judiciary is most crucial but the executives and the legislature are no less crucial. Other institutions include the Kenya National Human Rights and Equality Commission.²⁰² Although the institutions are not at optimal level with regard to the implementation of the right to development, it is time these institutions woke up to their

¹⁹⁸ Article 10 (2)(a, b, c and d) of the Constitution of Kenya 2010.

¹⁹⁹ Chapter 6 of the Constitution of Kenya 2010.

²⁰⁰ Chapter 4 of the Constitution of Kenya 2010.

²⁰¹ Chapter 11 of the Constitution of Kenya 2010.

²⁰² Article 59 of the Constitution of Kenya 2010.

responsibilities with regards to as to the right to development. The first solution therefore lies with concerted, committed, courageous and faithfulness to implementation of the Constitution.

Redefining Development Model

There is need to redefine development models and use a model that works for Kenya today in the 21st century. Much has changed since independence, the population has grown, circumstances have changed, human rights have been given prominence and development theories need to change and adapted to changes sufficiently. Hither to development has focussed on economic growth. Economic prosperity as a goal of development has not led to good quality of life for much of the population. The focus should now change to human and human quality of life with economic prosperity as a means to attain good quality of life for humans. The focus must change from merely monitoring trends in economic variables (that are no doubt important) to tracking changes in the quality of people's lives.²⁰³ Failing to invest development in humans has led to a lot of challenges. As Mills observes so succinctly, part of the reason why leaders wield tribalism as a tool of distributing patronage instead of equitable transparent development is because of very low investment in the people as well as the political and physical infrastructure.²⁰⁴ [7]It is time to invest more and then in infrastructure and politics.

Even ardent pure development studies now urge for rethinking development and even within the discipline, theorists and practitioners' have shift their focus and the individual human has become the focus.²⁰⁵ Rapley for example also observes that even bodies like World Bank and International Monetary Fund now realize that development that does not improve lives of the

²⁰³ Shiva Kumar, A. K. "MDGs and the Right to Development: Issues, Constraints and Challenges", 2004

²⁰⁴ Mills, G., Why Africa is poor and What Africans Can Do About It, 2012 p305

²⁰⁵ Rapley, J., understanding Development: Theory and Practice in the Third World, 3rd Edition, 2007 p 200

poor can only provoke resistance and crisis.²⁰⁶ Focussing on human even within the field of development will mean setting standards based on human rights. It will mean putting in place human rights standards for assessing development and it will mean putting in place economic policies which combine economic growth with the concept of human development and respect for human rights.

Focusing on the on human at the centre of development means that development is undertaken first and foremost with the aim of improving the living standards of everybody without discrimination. It also means that everybody is entitled to take part in development and especially to be consulted and to have a say when development projects affect them or their community. It also means that the government has an obligation to remove all things that hinder development like corruption or discrimination against persons or groups of people. Further it means that when the government must put in place policies and laws that can make help women and men to development to improve their standard of living and maintain the standard of living without sliding back to poor standards of living. Finally putting humans at the centre of development means that the government must only entre agreements with other nations if that agreement is going to help in improving the living standards of the people of Kenya and help them improve their well-being intellectually as well as improve their environment.

Accountability by State and Non-State Actors

Accountability, along with good governance, integrity, transparency are some of the national values and a principle of governance²⁰⁷ which should inform interpretation of the constitution, enactment of laws as well as policy formulation and implementation. In addition the guiding principles of leadership and integrity include accountability to the public for decisions and actions.²⁰⁸ Accountability which often is sorely lacking from development process in Kenya is

²⁰⁶ Rapley, J., 2007 p 200

²⁰⁷ Article 10 (2) (c) of the Constitution of Kenya 2010

²⁰⁸ Article 73 (2) (c) of the Constitution of Kenya 2010

crucial to the realization of the right to development. Although usually associated with financial accounting, reporting and audit particularly in donor-recipient relationships, accountability from a human rights perspective is first and foremost accountability is to people and thereafter to financial institutions and donors. Accountability from a human rights perspective has to do with responsibility, not just accounting and it is intended to promote awareness, transparency and innovation.²⁰⁹ Enabling people to empower themselves to overcome obstacles to the realization of their socio economic rights. Accountability has potential to achieve positive transformation (of power relations among development actors) Asking the extent to which the affected become able to articulate their priorities and claim accountability.

Kumar Shiva also observes that looking at development projects from a rights perspective, the stakeholder should be sufficiently empowered to introspect why regarding the development initiative's success or failure by interrogating whether responsibility holders fulfilled their role and in case of failure to determine the causes like lack of commitment, lack of capacity, shortage resources, or negligence and even go further to assess whether sufficient 'voice' is accorded to vulnerable groups and how the failure was handled like by giving early warning signs as well as adequacy of the measures put in place to prevent collapse of the development project.²¹⁰

Creating Rights Awareness on the right to Development

Creating rights awareness has become a cliché in the human rights movement. It is repeated here because development as a right in Kenya is at best in the academic discourse at the stage of contestation where it is largely stated that development ought to be construed as individual and collective endeavour. Yet the Constitution of Kenya 2010 enshrines sustainable development as

²⁰⁹ Shiva Kumar, A. K. "MDGs and the Right to Development: Issues, Constraints and Challenges", Draft Paper prepared for the Office of the High Commissioner for Human Rights as a background paper for the high level Task Force on the implementation of the right to development, 2004.

²¹⁰ Shiva Kumar, A. K. "MDGs and the Right to Development: Issues, Constraints and Challenges", 2004.

one of the national values²¹¹ and guarantees many human rights that inform the right to development like equality, equity non-discrimination, participation of the people as well as the entitlement of the people to choose their development priorities. Still many people are unaware development as a right. People must wake up to their rights and claim them until they get them. A good example is with the devolved resources that have been introduced to improve people's standards of living. These funds have been abused with allocation often being made on the basis of local cronyism and corruption or at best arbitrarily, leading to the funds not achieved the intended objective of raising the living standards of the people. Yet not being aware of their rights the people has the effect of double disadvantage in that people will not been able to claim their rights or hold duty bearers accountable. There is need to build and strengthen the capacity of citizens to be able to hold duty bearers accountable over poor policies and for service delivery.

David Lewis and Nazneen Kanji observe that NGOs have usually been associated more with development practice than with development theory²¹² this can to some extent describe NGOs in Kenya although to their credit NGOs played a key role in contributing foundational ideas during the constitutional review process in Kenya. With regard to development, NGOs can advocate and actually demonstrate an alternative vision of development that put people at the centre and focuses on the whole population and expose the limitations of the current development theories and practice. In addition NGOs can actively contribute to development as a right by bringing in new ideas to the development discourse including new focus on the importance of say environment, gender and social development. Lewis and Gardner, for example argue that NGO community in the United Kingdom who advocated for a greater poverty focus in Britain and influenced the UK 1997 White Paper on International Development to emphasize poverty reduction. So it is not an impossible feat for the NGOs to influence a new vision for development in Kenya. In this regard, NGOs can became key in the formation of ideas about reforming the

²¹¹ Article 10 of the Constitution of Kenya 2010.

²¹² David Lewis and Nazneen Kanji: *Non-Governmental Organizations and Development*, Routledge Perspectives on Development, 2009, Can also be found at <http://personal.lse.ac.uk/lewisd/images/Non-Governmental%20Organizations%20and%20Development%20vouchers.pdf>

delivery of services that emphasized markets, incentives and targets, and that paralleled and in many ways reinforced the new policy agenda. NGOs can raised important issues for development NGOs in terms of the need for increased transparency, the need to see people as citizens rather than as passive beneficiaries of development (IDS 2003), participation and empowerment which involve elements necessary for realization of the right to development such as access to information, inclusion within decision-making, accountability of duty bearers to the people, and increased capacity of the people to resolve problems of common interest²¹³ and have a better standard of living.

Enhanced Participation of the whole population

The Constitution of Kenya 2010, the object of the devolution of government are to promote democratic and accountable exercise of power, foster national unity by recognising diversity; give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them and to recognize the right of communities to manage their own affairs and to further their development;²¹⁴ all which are relevant to the realization of right to development. The Declaration of the Right to Development affirms participation providing that every human person and all peoples entitled to participate in, contribute to, and enjoy economic, socio-cultural, and political development As Shiva Kumar observes partnerships and participation are essential to the rights approach. To realize the right to development, it is important to involve stakeholders all levels be it political or administrative levels.

The Constitution of Kenya 2010 in many of its articles enshrines participation of the people. Participation of the people is one of the national values and principle of governance. In addition the constitution provides for participation of the people in participation in the management,

²¹³ The World Bank's (2002a) 'sourcebook'.

²¹⁴ Article 174 (a,b,c and d) of the Constitution of Kenya 2010.

protection and conservation of the environment,²¹⁵ participation and involvement in the legislative and other business of Parliament and its committees,²¹⁶ Participation by people in the governance of counties urban areas and cities²¹⁷ and participation even in financial matters,²¹⁸ currently public participation is at best cursory. This is because most people are not aware of their right to participation and the public should be made aware of this and their other rights. Since participation central to the right to development, it should be stepped up modalities for effective public participation put in place.

In the discourse of participation of the people in the development process it is necessary to recognize gender issues. It is only in 1979 that Kenya amended the then constitution to outlaw some aspect of discrimination on the basis of sex and it is only in 2010 that discrimination on the basis of sex was wholly outlawed. In practice discriminations against women is still pervasive in the society. The Constitution of Kenya 2010²¹⁹ and the Convention on Elimination of all Forms of Discrimination against Women (the CEDAW Convention)²²⁰ both urge the state to take measures to ensure women's active role in the development process, and this must be implemented as development that leaves out women in all or any of its processes is only purported at best. Real development must give gender issues greater attention.[Stephen P. Marks]

It is proposed that one of the ways to step up public participation is to establish a public participation policy which institutionalizes modalities for public participation. Of course this

²¹⁵ Articles 69 (1) (d), and 69(2) of the Constitution of Kenya 2010.

²¹⁶ Articles 118 (1) (b), and 196(1) (b) of the Constitution of Kenya 2010.

²¹⁷ Article 184 (1) (c).

²¹⁸ Article 201(a).

²¹⁹ Article 27 of the Constitution of Kenya 2010.

²²⁰ Article 8 of the CEDAW Convention.

will not be without challenges the first one being that “the public” is not homogenous group and may have divergent and opposing views which may be difficult to implement thus stalling development but the main danger so far has been simply to ignore public view. A case in point is the Kenyan public demand that Members of Parliament stop increasing their salaries and benefits incessantly so as to free up money for national development which has fallen on deaf ears as parliament after parliament increases their salaries to levels inconsistent with national development. Still it is worth putting in place a national public participation policy so as to start inculcating the culture where people engage effectively and take action. This would ensure that stakeholders at all levels – political, administrative civil society organizations and particularly at the community level participate as this is crucial especially to the success of sustainable development in places where people live. This part cannot be complete without emphasizing women’s participation. The policy would have to ensure that women are meaningfully involved in matters of human development.

Ownership of Development

Related to participation of the people is the issue of ownership. Declaration on the Right to Development implies “ownership” of development. Ownership can be examined at different levels. At national level idea of national ownership is more complex than at community level because and yet ownership of ownership at national level is complicated by the fact that the it is often difficult to establish who in the government ‘owns’ the idea or the policy. This could be one of the reasons why people do not buy in to policies say like vision 2030. This is also offered as an explanation as to why despite signing and ratifying many human rights conventions, the country does little about their implementation. Yet it is important that the majority are made aware and have a “buy in” of the policies so that they can contribute to the successes of its implementation. One way of having the majority have ownership of development policies is if it addresses their human rights and not just money. Although ownership is emphasized, it has to be conceded that talking of public ownership (not just government) is complicated and often it is not possible for everyone uniformly endorse or own a policy. The good thing is that taking a dissention is essential for democracy and if viewed positively can help strengthen policies.

Although managing the ownership dimension at the national level can pose serious challenges, at the community level it is very suitable. As Okondo a former Minister of Government, observes, you cannot impose projects or project leaders on people and if the project is to take root among the people and be sustainable. This view is supported by UNDP's Development Effectiveness Report 2003 which argues that much of the explanation for slow and uneven development in many nations has to do with 'ownership.' The report identifies ownership with 'the degree of people's involvement in the policy formulation and implementation process.' The report further identifies strengthening stakeholder commitment, promoting decentralization and ensuring accountability as essential ingredients of ownership. In addition experience from many parts of the world reveals, that even a programme for essential services like water and sanitation can seldom 'succeed' without strong community involvement and participation. Many programmes and projects collapse due to the perception that they belong to the government, while a lot of money for projects is misappropriated on the perception that "it is donor money" or government money. Unfortunately this perception is not only held among the poor in the community but even among the high echelons of the society.²²¹ It is extremely important to build local coalitions around the MDGs and create a unified and shared vision for the future. Only if such a vision is 'owned' will prospects of attaining the MDGs improve.

Putting human at the centre of development requires changing the way in which development and challenges to development are viewed. For example Kenya's poverty levels currently stand at 46 percent, rather than focusing only on monetary growth, there is a shift to focusing on the relationship between the state and the individual or "peoples" and between the duty of the state and the corresponding entitlement of the individual or "peoples" as well as the consequence. This model of development requires identifying people whose rights have been violated and asking why the violation has occurred, who is responsible and the actions that can be taken for remedy. For example, currently 46 percent of Kenyans are living in poverty, development right

²²¹ Upon being asked to dismiss a Cabinet Minister who was suspected of misappropriating public funds, the former President declined to do so asking the people who were calling for his dismissal if the minister had stolen their mothers' goat

approach requires asking why they are not realizing their right to development and identifying whether it is because of discrimination which can be implicit or explicit. Usually explicit discrimination by practice and where some areas are neglected or ignored but it can also be by policy like where it is decided that public investments will be concentrated in high potential areas can prevent some part of the population from realizing their right to development. Yet the constitution and the international laws to which Kenya subscribe outlaw discrimination on the basis of descent, sex, ethnic origin, among other grounds. If violations are found to be the reason why people cannot realize their rights as is usually the case, then they must be detected and corrected. Using human rights analysis can help law makers and policy makers respectively in making laws and designing development policies and budgets that are appropriate and responsive.

Decisive Commitment and Courage to Deal with Corruption

Many people predict that development cannot be sustained with the level of corruption in Kenya. Not only must the Constitution be implemented, but other laws and policies which have been established must also be implemented. For example the Anti-corruption Act and Anti-corruption policies exist to deal with corruption, and the office holders should play their role in dealing with corruption. In addition there are many mechanisms for reducing corruption like simplifying and lessening, bureaucracy, using technology, improving transparency and generally removing the drivers of corruption and most importantly punishing corruption. However since corruption permeates all levels, it will require courageous, committed and determined political will.

Using Indigenous Home Grown Solutions and Strategies

Sungupta observes that the future of developing countries, like Kenya, will remain bleak as long as they continue to copy foreign patterns of development. It also behove the state to create an environment where use of indigenous home grown solutions and strategies responsive to Kenyan circumstances can thrive. From human development perspective, this could involve allocating sufficient funds for research into indigenous knowledge, skill and resources (like indigenous

medicinal plants, unique crops etc.) as well as assisting those with indigenous knowledge, skill or resources to make them viable for the realization of human and economic development.

From financial perspective Kenya has introduced some home grown solutions to enable vulnerable groups come out of poverty. For example Kenya has introduced Women's enterprise fund, Youth Enterprise Fund as well as Constituency development fund. If managed properly, and appropriate support programmes put in place for continuous monitoring and evaluation for continuous improvement and if the skills and capacity of the groups receiving the funds are built or increased and so that they undertake meaningful enterprises, resulting to greater freedoms, creativity, self-discipline, responsibility and material well-being then the funds solution can go a long way in empowering the groups towards the realization of the right to development.

Home grown solutions can also mean prudent budgeting and use of funds in a manner that empowers the population to find solutions to their development challenges, dealing with pressing needs as they arise and not waiting for them to escalate to unmanageable proportions, and generally prudent, transparent and accountable use of resources.

Kenya like other African countries is rich in Social capital "*Ubuntu*" to borrow the Southern African expression. Researchers must now research and find out ways in which Kenya's social capital can be preserved and enhanced so as to contribute to the realization of the right to development. Finally, there is need to for continuous research into home grown solutions to enable the country attains the right to development.

Appropriate International Cooperation

There is a saying among the *Luo* community of Kenya which roughly translate that free things have the effect of incapacitating people.²²² This means that Kenya must be very careful not to

²²² "*Ginonoranoji*" the direct translation is that free things turn people into "imbeciles".

kill her innovations on how to undertake her own development. Dealing with development aid require much diligence if the international is to achieve the goal of helping the people of Kenya to realize their right to development.

The Declaration of the Right to Development, though not binding provides that states have the duty to cooperate with each other in ensuring development and eliminating obstacles to development.²²³ International Covenant on Economic, Social and Cultural Rights (ICESCR) also provides for international cooperation.²²⁴ This means that there is an obligation on developed states to assist developing states like Kenya, and eliminating obstacles to development and to realize their right to development and international cooperation does not achieve that or instead achieves the opposite, should be construed as international cooperation instead ways should be found for dealing with aid that deny the people the right to development.

It must be observed that development trade is a crucial component of development. This means that if the international community is serious about international cooperation, then Trade barriers, that place countries like Kenya at a disadvantageous position in comparison with the developed and industrialized countries to start with, must be removed and along with changing the international division of labour so that greater opportunity given for industrialization to the less developed countries and a greater share in international trade to their industrial or manufactured products. As Sungupta observes, there is no value of encouraging free market economies in an interdependent world when would be developing-country exports are blocked by trade barriers. Meaningful international cooperation under these circumstances, would involve opening up the markets of wealthy states exports from the developing countries like Kenya. Coupled with removal of trade barriers is the need to stabilize world commodity prices at an equitable level.

²²³ Article 3(3) of the Declaration of the Right to Development.

²²⁴ Article 27 of the ICESCR.

There is also the crucial issue of Technology transfers since technology is necessary for economic and social development. Some people have attributed the deprivation and poverty suffered by developing countries like Kenya to a large extent to their technological dependence. Yet given the opportunity as has been demonstrated by the much lauded *M-pesa* innovation, in which money transfers can be made using mobile phones, countries like Kenya can go a long way in adapting technologies to advance development. Finally international cooperation must involve tracking the reasons for failure of the past co-operation efforts so as to avoid the pitfalls. It should also involve a concerted effort by the international community to help remove obstacles that hinder development in Kenya including fight corruption and particularly assist in the recover stolen monies that are held in accounts in the developed countries. In addition, bilateral treaties and agreements for development should have conditionality for implementation of the right to development.

Mainstreaming the Right to Development by enshrining it in the Constitution

As has been observed above, the right to development is not adequately protected in the Constitution of Kenya 2010 as the Constitution it only protects the right to “sustainable development” with reference to environmental right rather in the Chapter for land and environment rather than the “right to development”. This being so it is important to protect the right to development in the constitution. The justification for enshrining the right to development in the constitution is grounded on the importance of the constitution as the supreme law of the country which provides the legal foundation for the rights of the citizens and therefore constitutional protection of the right to development matters. The right to development if enshrined in the constitution should guarantee implementation which if undertaken properly can aid in improving living standards of the population and thus human dignity. Implementation will have two pronged benefits of entitling women and men the right to meaningful participation and in sharing benefits of development while at international level, implementation of the right to development will protect the people of Kenya from adverse global impacts including by establishing the duty of the state to “provide protection against violation of rights by third parties which can include foreign states, foreign investors or even intergovernmental organizations and harmful aid donors.

The constitution should thus have the following provision:

The right to development:

1. Every person and all peoples of Kenya have a right to development in which all human rights and fundamental freedoms can be fully realized.
2. The state has a duty to remove threats to development and to create conditions favourable to the realization of the right to development.
3. The state has a duty to eliminate extreme poverty and no person shall be subjected to extreme poverty.

Conclusion

In this chapter, I have attempted to show that for Kenyans to realize the right to development, the Kenya must adopt and implement new development models and put in place policies that twin human rights agenda with economic growth. In this regard, it is also important that capacity of the duty holders both the state and non-state actors must be strengthened so as to implement the new policies and it is also important to ensure political will as political will is a big driver of processes in Kenya. Economic policies must combine economic growth with the concept of human development and respect for human rights. In addition Kenya must to track the reasons for failure of the past development initiatives so as to put in place remedies and avoid future pitfalls. Participation of the people in realising their development is important at all stages from conceptualization, throughout the implementation as well as during monitoring and evaluation of development programs. Further Kenya must remove obstacles that hinder the populace from realizing the right to development including corruption and inequality in social and economic spheres. With regard to international co-operation, the same must be undertaken very prudently in a manner that is most beneficial and least harmful to the people and in a manner that empowers the people to realize their right to development. Finally, a constitutional amendment is proposed to enshrine the right to development in the Constitution so as to guarantee the women and men of Kenya the right to meaningful participation and equitable sharing of benefits of development while protecting them from adverse global effects.

Chapter 6

Conclusion and Recommendations

Using literature available on development as a right, International Conventions such as the ICCPR and CEDAW, the African Charter on Human and Peoples Rights, the Constitution as well as domestic legislations and policies and litigation which have a bearing on the right to development, I have attempted to answer the question to what extent can the application of rights based approach to development can aid in the realization of the right to developments in Kenya. In answering the larger question I have also attempted to look at the legal basis for the right to development in Kenya; the content of the Right to Development which the people of Kenya would benefit from if implemented; the extent are these rights not being realized in practice. I have also looked at the obstacles the realization of the right to development and attempted to make suggestions as to what can be done to rectify the situation using the tenets of development as a human right and also indigenous home grown based solutions and strategies responsive to Kenyan circumstances familiar to the people of Kenya.

Development is critical to humanity as it enables human beings to enjoy human rights. World over the importance of development is acknowledged. Many international Treaties urge states to cooperate with each other for the purposes of development. As a concept, development has progressed over the years and has come to mean much more than industrialization or economic growth. Development has today has a wide scope which covers economic growth, human rights, health, education. In addition there are many models of achieving development. Yet in being as wide as to encompass just about everything has posed a big challenge particularly when development is claimed as a right. Development as a right is subject to much contestation ranging from conceptual, through to ideological, political as well as legal objections. The definition of what constitutes the right to development is also not agreed particularly between developing countries and the developed countries. However, despite the wide scope of development and the many contestations surrounding development, if properly construed, ‘development as a right’ shows the interconnectedness of civil and political rights on the one hand, and economic, social and cultural rights on the other hand.

The importance of development in the lives of human has led to much struggle to recognise development as a human right, particularly by developing countries and reluctance from developed countries, Though many of the tenets of development as a right are contained in other human rights treaties, the United Nations in 1986, finally recognised development in its own right and adopted the Declaration of the Right to Development. The Declaration recognises development as an inalienable human right and the same has been confirmed in many international conferences and United Nations General Assembly Resolutions. The Declaration of the Right to Development defines development as a human right inherent in all people who are entitled to participate, contribute, and enjoy development. The Declaration further clarifies that development includes economic, social, cultural and political development and that the result of development is the full realization of all human rights and fundamental freedoms. Importantly, the Declaration also make human beings the subject and the object of development, places obligation on states and international community to cooperate for the purposes of enabling people to realize the right to development.

Apart from bridging the two sets of rights, the right to development can add value by setting clear norms and standards. Framing development as an entitlement guaranteed by law sets clear obligations of the duty bears and entitlements rights bearer. In addition viewing development as a right creates a different relationship between the rights holder and the duty bearers in which the rights holders and no longer beholden to the duty holder but can demand accountability not only of the state, but also other actors in development. In addition viewing development as a right create a suitable environment for participation and fair sharing of benefits of development as these will be enshrined in the law. Finally viewing development as a right opens more avenues to use the law in numerous strategic ways for realization of the right to development.

In Kenya the constitutional basis for claiming the right to development is at best very weak. There is no direct provision in the constitution that guarantees the right to development in Kenya. The constitution limits its guarantee to sustainable development of environment and natural resources. There are however certain principles of human rights like equality, non-

discrimination, good governance, the rule of law and environmentally sustainable development which are contained in the Constitution and these can be used to protect only some elements of the right to development.

Further the provisions of the international law which Kenya has ratified can also be used as a legal basis for claiming the right to development since the constitution makes them a source of Kenyan law, however, these have limited application to the right to development since they are specific either to civil and political rights or economic social or cultural rights.

With regard to development policies, Kenya has been putting in place strategies that focused on economic growth and emphasizing on ventures that would lead to high economic advancement with the assumption that this would better the quality of life for all the population without sufficient regard to human development. These have not succeeded in realization of the right to development of a large part of the population. Although the current development strategy, Vision 2030, is framed on economic, social and political pillars it does not go far enough in adopting holistic development that place the human wellbeing at the centre of development process.

In addition, to the inadequacies in the laws and policies, there are many obstacles to the realization of the right to development in Kenya. These range from poor acceptance of human rights in general and poor knowledge and acceptance of the right to development in particular. Implemented of human rights has been a challenge as development models continue to place more emphasis on economic attributes but without adequate emphasis on human rights attributes. Leadership has also posed a challenge in that at various levels, leaders have still not mustered courage and commitment to put in place policies and institutions capable of facilitating the realization of the whole population as the focus on narrow personal or regional interests persist. Corruption constitutes is a big obstacle to the realization of right to development as it compounds and complicates the problem of resource constraints. Finally international aid and cooperation that would help bridge the financial gap has been constrained by various factors leading to making it a “stop and go” affair and the aid delivery itself is in need of improvement.

Recommendations

Kenyans can realize the right to development. However, there is need the country to change the model of development and adopt and implement development policies that are consistent with the human rights agenda. Economic policies must twin economic growth with human development and respect for human rights. In addition the state must to track the reasons for failure of the past development initiatives and international co-operation so as to avoid the pitfalls. It is also important that the capacity of the duty holders both the state and non-state actors must be strengthened so as to implement the new policies. Of equal importance is the political will for adoption and implementation of new policies since political will is a big driver which determine of development processes in Kenya.

Participation of the people in realising their development is important at all stages from conceptualization, throughout the implementation as well as during monitoring and evaluation of development programs. Further the state must remove obstacles that hinder the populace from realizing the right to development. In this regard, the state must remove corruption, as well as exclusive social and economic policies that hinder participation of the people. In addition there is need a complete mental change in how the social structure is perceives with regards to wealth distribution and access. International co-operation can play an important role if undertaken in a manner that is most beneficial and least harmful to the people and in a manner that empowers the people to realize their right to development.

For Declaration of the Right to Development to take root in Kenya, there is need to make it known and accepted among civil society, policy makers, policy implementers, academics and the population in general and so to use its principles to inform policy formulation, implementation, monitoring and evaluation. Finally, it is important to continue to research to establish ways in the entire population can meaningfully and actively participate in and benefit from development process, in a manner that enables the whole population to full realize human rights.

Secondly Kenya should amend the constitution and enshrine the right to development in the constitution. Extreme poverty is the biggest threat to realization of the right to development. The constitution should be amended not only to guarantee the right to development but also to make

it the obligation of the state to eliminate extreme poverty. This will guarantee implementation, and implemented appropriately will lead to better standards of living with human dignity for the whole population as it will entitle women and men the right to meaningful participation and in the sharing of the benefits of development. With regard to international cooperation, implementation of the right to development will protect the people of Kenya from adverse global impacts by establishing in the constitution the duty of the state to “provide protection against violation of rights by third parties which can include foreign states, foreign investors or even intergovernmental organizations and harmful aid donors.

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