

ARTICLE

Realizing the right to development: Some reflections

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Abstract

From its inception into the human rights discourse, the right to development (RTD) has been contentious. Nevertheless, as result of various activities including the adoption of the UN Declaration on it, the RTD is now “a fait accompli.” This article reflects on what should be done for its effective realization and sustainability. The article finds that at the national level, states should adopt constitutionalism characterized by separation of powers and respect for rule of law and adopt human centered development policies. At the international level, states should cooperate in adopting responsive development policies and ensure that these policies as well as the international environment at large are conducive to the realization of the RTD. Similarly, transnational companies should play their role. In these endeavors at the global level, given the reluctance of the global powers to the RTD, China should use its influence in the G8, G20, and the BRICS to persuade other powerful stakeholders to give effect to the RTD.

1 | INTRODUCTION

The right to development (RTD) is the most controversial human rights of our time. As such, it is the subject of disagreement between scholars. For some (Andreassen & Marks, 2006; Bedjaoui, 1991; M'baye, 1972; Sengupta, 2001; Sengupta, 2005; Solomon, 2008, p.17), the RTD is an important right. For others (Donnelly, 1985; Bello, 1992; Whyte (2007); Vandenbergaeerde, 2013), it is a mere dream to be forgotten. Opponents of the RTD are of the view that the RTD is *lex feranda* or law as it should be in opposition to being *lex lata* or law as it is (Kamga, 2018, p. 29). They argue that issues raised under this right are included in the International Covenant on Economic Social and Cultural Rights and that the RTD adds no value to the human rights discourse. Of course, the RTD is made of civil and political as well as socioeconomic rights, which are both interdependent. Nevertheless, as correctly argued by Neuman (2003, 1863), “overlapping and interrelated restatements of human rights are characteristic of the historical and political

contexts within which the negotiation of human rights instruments takes place.” Put differently, the RTD adds value to the development of the human rights discourse.

The notion of inclusive development the RTD in the sense that it requests the development of all countries without discrimination. This means equal participation of all countries in developing global development policies. It entails the operationalization, the principle of sovereign equality of states, achieving a win-win international cooperation between states to achieve a better life for their people (Yi, 2016). This also borders the notion of sustainable development which emphasizes the necessity to securing the ecosystem for this generation as well as future generations (Yi, 2016).

At the same time at the national level, inclusive development should be participatory with strong emphasis of the most vulnerable. So at this level, it is the other human face of development.

The controversy also filters down between diplomats at the United Nations (UN). Nevertheless, due to intensive activities by the global South and China, the RTD ascended to the human rights arena through the adoption of the Declaration of the right to development (UNDRTD).¹ This advent was a victory for the proponents of the RTD. Nevertheless, the question at the heart of this article is how to move beyond the Declaration and ensure that the RTD becomes a reality for all. In answering this question, the article examines the role of the state as duty bearer of the right, the role of the international communities which comprises global institutions as well transnational companies.

The article is divided into four parts including this introduction. The second part of the article presents a brief history of the RTD, the third part focuses on measures for its realization and safeguard, and the fourth part provides concluding remarks.

2 | BRIEF HISTORY AND OVERVIEW OF THE RIGHT TO DEVELOPMENT

This section starts with a brief examination of the notion of development, before doing a similar exercise on the RTD.

2.1 | The notion of development: A snapshot

Before getting to the RTD, what is “development”? Although the later does not have a universal definition, in its early days, it was related to assimilation of wealth (Ekeke, 2017, p. 305). Over time, the concept has evolved to include many concerns. It also progressed to be associated with the notion of sustainability that pays a specific attention to the environment for the well-being of current and future generation (The Rio Declaration on Environment and Development, 1992). Moreover, Rios (2001) describes development to be a notion that seeks to increase the quality of life of all with attention to the most vulnerable. This is the human dimension of development, which can be linked to the notion of “development as freedom” advanced by Sen (1999) with the ultimate end to improve human capabilities. This article subscribes to the definition provided by the UNDRTD (preamble) which reads

development is 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 their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

2.2 | The right to development

The UNDRTD and the subsequent Vienna Declaration and Programme of Action (1993) affirm development as a human right. Nevertheless, this was the outcome of many activities. After the World War 2, the international community adopted the UN Charter to ensure that the atrocities of the war never happen again and to guarantee a better standard of living for mankind. This was codified through the 1948 Universal Declaration which unambiguously prohibits discrimination² and provides for a better standard of living for all in these terms:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control, including food, clothing, housing, medical care and other necessary social services.³; and [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.⁴

These provisions aiming to ensure freedom from fear and from want are the initial building blocks of the RTD. They basically urge the international community to respect all human rights, civil and political as well socioeconomic rights alike with the well-being of human kind as paramount.

Yet after their independence and their incorporation into the community of nations, developing countries realized that the world order was not conducive to their development. The latter was delayed by trade barriers, lack of sovereignty over their wealth and natural resources, lack of financial resources, and severe debt burden, to name a few of their challenges. Consequently, they gathered through the G77, and later joint by China, they requested the establishment of a New International Economic Order (NIEO) to enable them achieve their development. This request was highlighted on 15 June 1964, at the G77 inaugural meeting when member states emphasized that the United Nations Conference on Trade and Development (UNCTAD) in which it was launched was a "significant step towards creating a new and just world economic order" (G77 Declaration, 1964), and they urged the international community to create a conducive environment to enhance the living standards of people in the developing world and ensure that global trade policy is consistent with development needs of the global South.⁵ This was further elaborated at the first Ministerial Conference of the G77 in Algiers in 1967 where member states stood for their "economic and social development" linked to the establishment of a new world order (Charter of Algiers, 1967). Moreover, at the same forum, the term "right to development" was articulated for the first time when the foreign Minister of Senegal unequivocally declared (Meillan, 2003):

Our task is to denounce the old colonial compact and to replace it with a new right. In the same way that developed countries proclaimed individual rights to education, health and work, we must claim here, loud and clear, that the nations of the Third World have the right to development.

The RTD was echoed by the call for a NIEO. This call was responded by the international community in 1974 which adopted the Declaration on the establishment International Economic Order⁶ as well as the Charter on the Economic Rights and Duties of States⁷ which echoes the need for a world order in which all states are equal. A world characterized by equal sovereignty of states, sovereignty over resources, self-determination, international cooperation, and equal participation of states in world affairs.

Subsequently, in 1972, Keba Mbaye, then Chief Justice of Senegal, elaborated the notion of RTD in the academia through his address in 1972 at the International Institute of Human Rights in Strasbourg, France. On this platform, M'baye (1972) articulated development as a human right. This idea cascaded down to the UN, and with the strong support of China, the Resolution 4 (XXXIII) in 1977 was adopted (without vote) by the Committee on Human Rights, which urged the UN Secretary-General to start research on the international aspects of the RTD. Subsequently, the RTD became the topic of political battle at the UN, and in 1986, the G77 and other countries in the group of Non-Aligned Movement (NAM) voted tremendously for the adoption of UNDRTD.⁸ Afterward, the feature of development as a human right was reiterated in the Vienna Declaration and Programme of Action.⁹ According to the UNDRTD, the RTD is an inalienable right that cannot be bargained away; it is a process in which all human rights (civil and political as well as socio and economic) and fundamental freedoms should be realized, an individual and collective right, and a right that secure self-determination of people and full sovereignty over their natural wealth and resources.¹⁰

In terms of duty bearers, whereas nation states have the primary responsibility for the realization of the RTD of their citizens who are the beneficiaries.¹¹ The international community is also obliged to secure a conducive environment and act through international cooperation for the achievement of the right.¹² Therefore, the RTD is a holistic

human centered concept underpinned by the establishment of national and international environments in which every individual and all people or groups freely enjoy a sustainable improvement of the economic, social, cultural, and political well-being.

3 | TURNING THE RIGHT TO DEVELOPMENT INTO REALITY

In line with the UNDRTD, which vests the responsibility to implement the RTD on the state and the international community, the RTD will be realized at the national as well as global levels.

3.1 | At the national level

3.1.1 | Reliance on legalism/constitutionalism

As the primary duty bearer of human rights, the nation state should be at the forefront for the realization of the RTD for its citizens. This in line with the Maastricht Guidelines (article 6) that compels the states to protect, promote, and fulfill human rights. Accordingly, the government should establish a constitutional framework characterized by the separation of powers where the executive, the legislative, and the judiciary play their respective role without interference. This arrangement provides the enabling environment needed at the local level for the realization of civil and political rights as well as socioeconomic rights without which the RTD cannot be achieved (Ghai, 2006). This arrangement also includes the establishment of independent institutions for the protection of human rights such as the Ombudsman or the Public Protector and the National Human Rights Commission for example to ensure that good governance informed the activity of the state (Kamga & Heleba, 2012, p. 82).

Furthermore, there is a need to explicitly insert the RTD in the bill of rights or the binding part of the constitution. Even though the constitutionalization of the RTD in countries such as Ethiopia (Constitution of Ethiopia, 1994), Malawi (Constitution of Malawi, 1994), and Cameroon (Cameroonian Constitution, 1996) is yet to lead to implementation, these countries are good examples as far as standard setting is concerned. Nevertheless, it could be argued that the RTD remains dormant because the international environment characterized various inequities (Tandon, 2015) which hinder its realization in these countries. Even though endogenous factors such as corruption cannot be ignored, proceeds of corruption are generally hidden in Western Banks which are safe heaven for illicit financial flows from the continent (OECD, 2014).

In any event, after the express or explicit insertion of the RTD in the constitution, based on this constitutional provision, the state should develop non-discriminatory policies to eradicate poverty, empower people, and ensure their livelihood. In this endeavor, citizens should be consulted and participate meaningfully in the design and sharing of benefits of development project. In the *Endorois* case,¹³ the African Commission on Human and Peoples' Rights was of the view that the exclusion of the beneficiaries of a development project or lack of consultation with them was tantamount to violation of their RTD. This position was reiterated by the African Court on Human Rights in the *Ogiek* case¹⁴ which was the first RTD-related case in front of the court. Manouchehr Ganji, in his studies *The Realization of Economic, Social and Cultural Rights* argued that

The basic principle governing the question of human rights in development should be the participation of the people in deciding their own style of individual and corporate life in general, and in particular their participation in decision-making in connection with development programmes, in the implementation of those programmes and in the benefits derived from them (United Nations Publication, part 6, para 122).

3.1.2 | Reliance on local context

In all development endeavors, the well-being of citizens should be paramount. Given that human rights are expression of people's cultures and realities, the government should also tap into its local culture, or into what Zwart

(2012) called “the receptor approach” to give effect to human rights in general and the RTD in particular. This entails approaching the grassroots to ensure respect for human rights from below as people will identify with the right, own it, and contribute to its actualization. In this vein, while China should be allowed to rely on Confucianism to give effect to global human rights, African countries should also be allowed to rely on their humanitarian philosophy known as Ubuntu. The ultimate objective should be to give effect to human rights in general and the RTD in particular. The receptor approach is necessary because, not only it enables communities to participate in development policies affecting their lives, it also legitimizes such policies which are not imported and as such are respected and implemented by the beneficiaries. This suggests that positive initiatives taken within the local context under the leadership of traditional leaders for example should be recognized as steps necessary to implement human rights. In other words, whenever indigenous knowledge systems can be relied on to supplement legalism to give effect to human rights and the RTD in particular, local communities should be allowed to rely on this knowledge, and this should be accepted at the national, regional, and international level.

3.2 | At the global level

At the global level, in general, it is imperative to transform global relations.¹⁵ In this context, UN member states and global institutions are key players.

3.2.1 | The role of UN member states and global institutions

Whereas article 1 of the UN Charter compels the international community to establish mechanisms to promote and ensure economic and social development of the entire world, article 56 of the same instrument urges states to cooperate in order to improve the standard of living of all human beings over the world. This is further reiterated by the UNDRDT.¹⁶ However, for this prescription to be meaningful, it is imperative to move from mere declaration to adopt a global convention on the RTD. From this convention, partnership between states at the global and regional levels for the achievement of the RTD should be based on common and shared responsibilities. It should be informed by accountability of parties to the international community. This is vital to avoid an asymmetric partnership in which the stronger party prescribes the rule of the game for its exclusive self-interest and turn development from a right to simple charity. This underlines the needs to implement the principles of equality between states that posits that no state is more important than the other.

In addition, there is a need to have an international system in which the justiciability of the RTD is a reality. In this respect, the international system should learn from the African regional system where the RTD is binding and its justiciability proven through the *Endorois*¹⁷ and *Ogiek*¹⁸ cases referred to earlier. Furthermore, as the secondary duty bearer of the RTD, the international community has the obligation to establish a conducive environment for the realization of the right. This entails ensuring fair trade rules that consider the development needs of developing countries. This also prohibits the violation of the sovereignty of country. In other words, every country should be allowed to enjoy its self-determination over its territory as well as over its resources. This was the position of the African Commission in the case of *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*,¹⁹ the first inter-state Communication in front of the Commission. In this case, the Commission held that the invasion of the DRC by the respondents and the killings of Congolese amounted to the violation of their RTD (para 87). Furthermore, countries endowed with natural resources should be allowed to determine the price of these resources without external interference. Producers of these resources should be at the forefront of discussions related to price and other initiatives concerning the resources.

Unfortunately, this is not the case. On the contrary, trade, financial matters, and other development concerns of developing countries that have serious implications for the realization of the RTD are discussed away from them and outside the UN General Assembly where the right is debated. Such development concerns are often debated at the G8, G20, at the World Bank, the World Trade Organization (WTO), and the International Monetary Fund (IMF). These intuitions are often driven by global powers where developing countries either have a weak voice or no access all

together. To drive the point home, it could be argued that developing countries are administered medication for development ills in their absence and without prior consultation of the patients that they are. There is therefore a need to turn global institutions into a platform for the implementation of the sovereign equality of states principle, which is at the heart of international law.

However, China, one of the fearless advocates of the RTD, is a global power and has a huge role to play in getting it to the agenda of the G8, G20, BRICS, and BASIC (Brazil, India, China, and South Africa) where it enjoys considerable influence. In this perspective, China should insist that global institutions such as the WTO and the IMF as well as other powerful clubs ensure that their activities do not hinder development objectives of the developing world. This entails that the World Bank and IMF policies related to loans, debts reliefs, and development investments are underpinned by equity and respect for human rights.

The challenge however is whether China would advance its strategic interest in these fora or will be the voice of the voiceless. While this question remains on the table, it can be argued that China's interest is not necessarily different from the interest of developing countries. For instance, the RTD is the most important human rights in China that has been at the forefront in the fight for its global recognition (Guangjin, 2017). This suggests that China is well in position to advance the interest of the global South without disregarding its own strategic interest.

3.2.2 | Fostering the responsibility of business

The other important issue to address for the achievement of the RTD is the following. Considering the preeminence of the private sector in general and TNCs in particular in determining development policies in some host states (Kamga & Ajoku, 2014), any significant development program should consider the effect of the private sector on human rights and the RTD. It is imperative to ensure companies' liability for human rights violations wherever they operate. This is important to ensure that companies do not undermine efforts made to secure the RTD. The measures should go beyond the current non-binding principles such as the 1976 Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy Reform, the UN Global Compact launched in 2000 and the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, and the Ruggie framework,²⁰ which is the latest UN attempt to compel TNC to respect human rights. The Ruggie framework originated from the failure of measures which preceded it. As a result of this failure, in 2005, Professor John Ruggie was appointed as the Secretary-General (SRSG) on Matters of Human Rights and Transnational Corporations and other Business Enterprises.²¹ His mandate included the obligation to "identify and clarify the standards of corporate responsibility and accountability for business enterprise with regard to human rights; elaborate the role of states in effectively regulating and adjudicating the role of TNCs with regard to human rights; and to explain the implications for TNC of concepts such as 'complicity' "²² (Kamga, 2018, p. 67). The ensuing report in 2008 known as the 2008 framework is based on three pillars and guiding principles for the realization of the pillars which are the following²³:

- 1) the state duty to protect human rights;
- 2) the corporate responsibility to respect human rights; and
- 3) access to remedies.

The first pillar compels the state to protect its citizens against the might of TNCs through regulations and other policies measures. Unfortunately, this does not work because states are "reluctant or unwilling" (Kamga, 2018, p. 68) to hold the mighty TNCs (Aguirre, 2008, p. 124) accountable for human rights violations. As result, victims are abandoned to themselves with no solutions and their RTD violated (Bilchitz & Deva, 2013, p. 14).

However, the guiding principle relating to first pillar empowers states to enforce extra territorial obligation or responsibility "to regulate the conduct of their domestic businesses when they operate internationally." Nonetheless,

this principle is watered down by another provision that explicitly exonerates states from their responsibility. Accordingly, “states are neither prohibited nor required to regulate the extraterritorial operations of companies domiciled within their territory or jurisdiction” (Bilchitz & Deva, 2013, p.14). This simply means that TNCs have green light to violate human rights and the RTD in particular.

As far as the second pillar is concerned, the corporate responsibility to respect human rights obligations is expressed in the form of negative obligation. This means that in line with national law, TNCs have the obligation to do no harm to human rights and to act with “due diligence” or meticulously to avoid violating human rights and the RTD. Unfortunately, there is no tool to force companies to respect this non-binding pillar. At the end of the day, it all depends on the political will of the TNCs that remain almighty.

Under the last pillar that provides for access to remedies, states should set up institutions such as the judiciary to enforce human rights.²⁴ At the same time, TNCs should also establish complaint mechanisms and take part in these mechanisms to provide appropriate remedies to individuals and groups affected by their actions.²⁵ Unfortunately, although at the first sight this principle seems to be able to shield individual from human rights violation by TNCs, the later remains the strongest link in the equation. There is no consequence for failure to establish remedial mechanisms by TNCs. In reality, it could be argued that in spite of its good intention, the Ruggie framework is weak and unable to foster the realization of the RTD by TNCs. Similar to earlier initiatives to address the violation of human rights by TNCs, the Ruggie framework is another toothless bulldog. Kinley and Tadaki (2003–2004: 949) sum up the inefficiency of the business and human rights regime as follows.

The current scope of what might be loosely called the international human rights law duties of TNCs is wide but spread thinly and unevenly. It encompasses examples of supposed customary international law, treaty obligations, and so-called soft-law codes of conduct, guidelines, and compacts. The actual legal cover these initiatives provide is meager or non-existent. The legal (or quasi-legal) duties imposed on corporations have some potential authority, but as yet they remain ill-defined and ineffective. In short, the rudiments of an international legal framework may be discernible, but the legal content of the law is almost wholly absent.

Notwithstanding the weakness of the business and human rights regime, civil society organizations and activists should keep putting pressure on companies as well as states to make sure companies do not violate human rights and the RTD. Companies that violate human rights should be named and shamed in order to tarnish their brand. In addition, campaigns should be led to guide company to understand that compliance with human rights and the RTD will result in good business characterized by a good reputation, which will increase profit. Although some companies would argue that they discharge the human rights mandate through corporate social responsibility (CSR), this argument is weak because CSR is not compulsory but voluntary and this does not increase the prospect for the RTD.

4 | CONCLUSION

The aim of this article was to reflect on what needs to be done for the RTD to become reality. After a brief history and clarification of the right under discussion, the article found that measures should be taken at the national as well as at the international levels.

At the national level, government should establish a strong constitutionalism characterized by the separation of powers and establish strong independent monitoring institutions to ensure that the rule of law prevails and guides the government's activities. In addition, it was found that it is necessary to explicitly insert the RTD in the binding part of the Constitution. It was also noted that it is important to ensure the non-discriminatory participation of beneficiaries of development project.

Furthermore, the legalism echoed through constitutionalism should be supplemented by reliance on indigenous knowledge systems that can also advance the achievement of human rights and the RTD specifically.

At the global level, UN member states as well global institutions have to play their role in making the RTD a reality. As far as member states are concerned, it is imperative to adopt a binding convention on the RTD. It was also

found that within the framework of the RTD, partnership for the achievement of the right should be based on common interest and shared responsibility with clear accountability mechanisms.

Furthermore, it was observed that China should use its power to get the RTD agenda on the table of the G8, G20, the BRICS, and even the WTO and advocate relentlessly for this agenda to be considered in policies and other development initiatives. At the same time global institutions should be the platform where sovereign equality of states is reflected.

In addition, it was also found that the RTD will not become a reality if transnational companies are allowed to violate human rights without accountability. Hence, the need to establish a binding mechanism to ensure that companies take responsibilities for human rights violations. In sum, in spite of the challenges for realizing and safeguarding the RTD, it is imperative to keep the discussion on the table as it helps the concept to ascend into international customary law, which is also important for its realization.

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ENDNOTES

- ¹ UNDRTD, Resolution 41/128 of 1986.
- ² Articles 2 and 21.
- ³ Article 25.
- ⁴ Article 28.
- ⁵ G77 Declaration 1964: para 2.
- ⁶ Res 3201 (S-VI).
- ⁷ GA Res. 3281 (XXIX).
- ⁸ UNDRTD (Resolution 41/128 of 1986).
- ⁹ Vienna Declaration and Programme of Action 14–25 June 1993, UN General Assembly A/Conf.157/23 12 July 1993.
- ¹⁰ UNDRTD, article 1; also Preamble, para 2.
- ¹¹ UNDRTD, article 3 (1).
- ¹² UNDRTD, article 3 (2), article 4 (1).
- ¹³ *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya* (Communication 276/2003).
- ¹⁴ *African Commission on Human and Peoples' Right v. Republic of Kenya*, judgement in Application 006/2012.
- ¹⁵ As a result of space constraint, I cannot fully engage with the transformation of global relations for the RTD; however, I have allocated a full article to this issue. See Kamga (2016) "The G77 and the Transformation of Global Relations for a Just World: Challenges and Opportunities" *Africa Insight*, vol 46(1), pp 71–88.
- ¹⁶ UNDRTD, article 3 (2), article 4 (1).
- ¹⁷ *Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois) v Kenya* Comm 276/2003: 27th Annual Activity Report of the African Commission, annex 5.
- ¹⁸ *African Commission on Human and Peoples' Right v. Republic of Kenya*, judgement in Application 006/2012.
- ¹⁹ Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* Annex IV, 20th Annual Activity Report of the African Commission, 111.
- ²⁰ "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including The Right to Development" Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie; A/HRC/8/5 7 April 2008.
- ²¹ Human Rights and Transnational Corporations and Other Business Enterprises, Commission on Human Rights Resolution 2005/69, adopted on April 20, 2005. The decision to create the position was endorsed by the Economic and Social Council in its decision 2006/273, adopted on 25 July 2005.
- ²² Human Rights and Transnational Corporations and Other Business Enterprises, Commission on Human Rights Resolution 2005/69, adopted on April 20, 2005. The decision to create the position was endorsed by the Economic and Social Council in its decision 2006/273, adopted on 25 July 2005.

²³ 2008 Framework, para 9; Guiding Principles, General Principles.

²⁴ SRSG 'Guiding Principles', principle 25.

²⁵ SRSG 'Guiding Principles', principles 15, 29.

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