



Justiciability of the Human Right to Development: Depolarizing the Polemics of Power and Resistance for Post- Pandemic Recovery in Nigeria

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Abstract:

The Human Rights Council in January 2020 published a proposed draft Convention on the legal status of the right to development as a human right. However, since 1972 when the Senegalese jurist Keba M'baye, advanced it, and since 1986 when the United Nations adopted a Declaration on it, the right to development has remained a troubled concept, engaging stakeholders in an extensive debate. The contention is on whether a legal right to development actually exists to a large extent, bothers on the justiciability of such right. This paper articulates the philosophical perspective to the right to development considering it as possessing the defining characteristics of human right concept and determining the extent of its justiciability. It is argued here that, owing to the juristic understanding of the right to development, the polemics of power and resistance surrounding it has persisted, thereby tending to depict the right as non-justisable. This paper also argues that such polemics could be resolved by understanding the notion of particularization of human right concept. Since particularization of human right is inevitable both at the international and national levels, it makes no sense understanding any human right as a *jus cogens*, an understanding that dissolves citizens' belief in proper justiciability of the right to development under local jurisdictions. Understanding particularization of Human right concept, this paper maintains, will not only enhance its justiciability, but render it amenable for post-pandemic recovery as both nationally and internationally, people would be motivated to initiate development drives. In addition, such understanding will sustain citizens' confidence in state laws and minimize the rate of agitations, militancy and insurgencies witnessed in most developing countries of the world. This paper recommends A reforming the juristic understanding of the right to development to reflect the fact of particularization of human right concept such that it could be justiciable even in local jurisdictions, is advocated by this paper.

Keywords: Depolarizing, Human Rights, Justiciability, Power, Resistance, Post-Pandemic.

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1. Introduction

The right to development which was articulated by the developing countries that happen to be members of the United Nations, originally, was not conceived as an inalienable right which individuals could claim against their states like the specific human rights entrenched in the Universal Declaration of Human Right of 1948. Rather, it was envisaged as a people's right in that its aim is to enhance the emancipation of colonized territories from their colonial masters. In recent times, the right came to be understood, especially by the so-called developing countries, as a human right claimable by them against the so-called developed countries of the world. Thus, the right to development positions the developing countries to claim, as inalienable, the right to receiving aids from the developed countries. It equally places as inviolable, the duty to aid the developing countries, on the developed countries. Whether the right to development has been understood as a right-imposing and duty-imposing right, is still of debate today. The justification of the right, in terms of its implementation, as well as the polemics of power and resistance, with respect to the right, hinge on the confusion concerning the nature of the right to development compared to other specific rights regarded as human rights. Also problematic, though associated with the concept of human right in general, is understanding the right as possessing the characteristics of human right concept, namely, inalienability, immutability, inviolability, and absolutism.

The philosophical understanding of the right to development is crucial to its implementation and realization especially at the present era when the Covid-19 pandemic has triggered large developmental crisis leading to a range of inequalities within and across countries. Post-pandemic plans are crucially development plans and the right to development is intrinsically linked to the Sustainable Development Goals, which actualization is now threatened by the pandemic.

This paper aims at articulating the right to development in line with the characteristics of human rights concept with the objective to resolving the hydra-headed problem of its justifiability and depolarizing the polemics of politics and power surrounding its implementation. The paper is divided into five sections which include the introduction and the conclusion. Section two, which follows the introduction, will focus on the articulation of the right to development as a human right. In section three, the issues surrounding the justification of the right to development will be discussed. Then, section four, which precedes the conclusion, will centre on depolarizing the polemics of politics and power for proper and effective implementation of the right to development.

2. The Right to Development as a Human right

The right to development is coherently articulated by Articles 20-22 of the African Charter on Human and Peoples' rights as follows:

Article 20:

1. All peoples shall have the right to existence. They shall have an unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance to the states parties to the present Charter in their liberation struggle against foreign domination, be it political. Economic or cultural.

Article 22:

1. All peoples shall have the right to their economic, social and cultural development with the regard to their freedom, and identity and the equal development of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The Declaration on the Right to Development states unequivocally that the right to development is a human right. It was first officially recognised by the UN Commission on Human Rights in 1977 (Vienna Declaration and Programme of Action 1003). The then Commission acknowledged the right to development as a human right and recommended to the Economic and Social Council that it should invite the Secretary-General to undertake a study on the subject. With the creation of a Working Group of Government Experts on the Right to Development in 1981, the debate on the right became topical in the UN agenda. The Declaration on the Right to Development was subsequently adopted by the UN General Assembly in 1986 in an almost unanimous vote, the United States (US) as the only dissenting voice and eight other States abstaining (United Nations (UN) 1003:26). The right was also recognised in politically significant conferences of world leaders, and, in 1993, the World Conference on Human Rights reaffirmed it in line with its formulated in the 1986 Declaration, as a universal and inalienable right and an integral part of fundamental human rights. Thus, a consensus was reached among developed and developing countries that the right to development is indeed a human right. In 2000, world leaders attending the UN Millennium Summit reached an agreement on a set of goals and targets for fighting extreme poverty, environmental degradation, disease, hunger and discrimination against women, which later became the Millennium Development Goals. The Summit Declaration included a pledge 'to making the right to development a reality for everyone and to freeing the entire human race from want' (Commission on Human Rights 2003:83).

On the Nature of the Right to Development, the Declaration on the Right states 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 and contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised." It then follows that the United Nations recognizes the existence of a human right that is called the right to development, and that is inalienable. Consequently, there is a process of economic, social, cultural, and political development which is recognised as a process in which all human rights and fundamental freedoms can be fully realised. The Right to Development (RTD) is a human right, by virtue of which "every human person and all peoples are entitled to participate in, contribute to and enjoy" that process of development. Further clarifications of the nature of this process are made in subsequent articles of the Declaration. They also elaborate on the principles involved in the exercise of the right to development. Article 1, for instance, recognises that the beneficiaries of this right include "every human person" and "all peoples" and also recognises the right of peoples to self-determination. It should be pointed out that this simultaneous provision for "peoples' rights" and "every human person's right" does not in any way presuppose that the former is contrary to or in contradistinction from the former nor that the two should be seen as mutually exclusive. It is also categorically stated in the Declaration that it is the 'human person' who is the central subject of development, in the sense of the "active participant and beneficiary of the right to development". It is therefore trite to argue that, even if 'peoples' or collectives of 'human persons' are entitled to some rights, such as full sovereignty over the natural wealth and resources

in terms of territory, it is still the individual human persons who must be the active participant in and beneficiaries of this right. The Declaration further states that the process of development, "in which all human rights and fundamental freedoms can be fully realised" would lead to '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 their fair distribution of benefits resulting therefrom'. Thus, the Declaration is so clear on the nature of the right to development that even the measures and standards for realising the right are stipulated to be only those that will ensure "equality of opportunity for all" in their access to basic resources, education, health services, food, housing, employment and in the fair distribution of income. The realisation of the right would also require that the vulnerable groups, such as women, be allowed to play an active role in the development process, and that "appropriate economic and social reforms be carried out with a view to eradicating all social injustices".

Concerning the subjects and the duty bearers of the right to development, initially, advocates, principally the developing countries, believed that this right inhered only in the State. This is probably as a result of a very restricted understanding of Article 1 of the Declaration. However, the current general view on the subjects of the right to development is that, depending on the context, different categories of entities may be the subjects, including, individuals, peoples and states. All these parties are inhered with rights as well as duties. Hence, Arjun Sengupta, maintains that, to realise this process of development to which every human person is entitled by virtue of his right to development, there are responsibilities to be borne by all the concerned parties: "the human persons", "the states operating nationally," and "the states operating internationally" (2001). The Declaration provides that "all human persons have a responsibility for development individually and collectively" and they must take appropriate actions, maintaining "full respect for the human rights and fundamental freedoms as well as their duties to the community." So, as much as individuals are the central subjects of the right to development, they also have a duty to promote and protect an appropriate political, social and economic order for development. Every human person, therefore, has the duty to be able to develop his or her personality which development would enable him or her to lead a worthy and dignified life. Individuals also have an added duty to help their families and the larger community to ensure the realisation of the right. Thus, one of the striking and unique features of the African Charter is its provision for the individual and collective duties of Africans to the respective communities from which they come. Then Article 22 expressly incorporates this right. In fact, it is the first and only legally-binding international document containing an express recognition of the right to development. The logical implication of this, therefore, is that individuals should be active participants in development planning as well as in all the processes of its implementation. Human persons are, therefore, seen to function both individually and as members of collectives or communities and to have duties to communities that are necessary to be carried out in promoting the process of development.

3. Justiciability of the right to development

Justiciability of the right to development is about its validity as an instantiation of positive law, which its violation could be adjudicated on by competent courts of law. Theoretically speaking, legal positivists believe that formal validity is a fundamental feature of every right. The major opposition mounted against the right to development comes from the allegedly non-justiciable nature of the right. This position is further strengthened by the fact that the right appears to be comprehensive in nature and declaratory in its normative content. It is argued from the legal perspective, that it was adopted only as a declaration of the General Assembly and does not have a binding

nature as is the case with a multilateral treaty (Alston 1988:20-22). Critiques point out that, in other international human rights instruments, state parties have obligations to protect, respect and fulfil different categories of rights. John Donnelly, one of the most prominent critics of the right to development, characterises the right as a 'search for the unicorn' and contends that it is pointless within the framework of international legal argument (2003). He laments that the language of the right to development confuses rights with moral claims without indicating specific right holders and duty bearers.

The right to Development is validated by the principle of international law whereby an act or conduct that has been accepted and repeatedly practised by a wide range of states over a long period of time develops into a rule of accepted customary usage and, so, creates a binding legal obligation on states. It has been contended that the series of resolutions and declarations on the right to development have transformed it into a norm of *jus cogens* that creates a legal obligation on states. This seems to be the view of Dugard, who asserts that 'an accumulation of declarations and resolutions on a particular subject may amount to evidence of collective practice on the part of States and hence, may constitute a customary rule. Despite the series of debates and controversies that greeted the adoption of the Declaration on the Right to Development, several declarations and resolutions were subsequently made on it and several states voted in favour of them. Hence, Bedjaoui strongly argues that "the right to development is, by its nature, so incontrovertible that it should be regarded as belonging to a norm of *jus cogens*' (2000). It is, therefore, obvious that subsequent declarations, resolutions and decisions of UN human rights bodies and international conferences confirm a major consensus emerging to respect the principles of the right to development. Despite the legal apparatuses towards implementing the right to development at the international level, there is still little *locus standi* for matters on the right to development in local jurisdictions.

4. Depolarizing the Polemics of Power and Resistance for Post-Pandemic Recovery in Nigeria

The polemics of power and resistance with respect to the right to development manifests in the argument on linking development and human rights, as well as in arguments contesting the right to development.

One of the major obstacles bedevilling the recognition and implementation of the right to development is the divergence in the political inclinations of the various state parties to the Human Rights Declaration. This conflict of opinions between the West and the East which was at its peak during the Cold War period led to the creation of the two different covenants on human rights. This divide has been carried over to issues concerning the right to development. The political discourse of the various working groups on the right and the Commission on Human Rights is often characterised by predictable posturing of political positions rather than practical dialogue on its implementation. Arguments linking on human right and development is rooted on the fact that there was little reference to development in the early debates at the United Nations leading to the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 as much of the declarations focused on civil and political rights. On the other hand, arguments contesting the right to development is based on the nature of the right as a collective right as against the individual human rights.

The Declaration and Program of Action of the New International Order (NIEO), adopted by the sixth general session of the U.N. General Assembly in 1974 was essentially a manifesto addressing specific concerns about trade and development assistance raised by developing countries. Among other things, it called for an increase in official development assistance from the North to the South and the establishment of mechanisms for the transfer of technology to developing countries separate from direct

capital investment. Whether in the form of the NIEO agenda, the right to development, or the more recent emphasis on rights-based development, Southern discourses have focused on demanding radical change in the international economic order. The dominant Southern view is that the right to development requires wide-ranging changes in extant international economic regimes to ensure that they contribute to furthering the right to development in at least two ways. Firstly, by encouraging, rather than, constraining conditions permitting the realization of the right to development within a country. Secondly, by ensuring that, inter-country inequalities in terms of access to natural and other resources, are reduced as much as possible. This in turn requires an international economic system that provides greater flexibility of macroeconomic policy to individual countries, but also ensures that there is some international control (Karimova 2016). It is within this context of international economic obligations and entitlements that the discourse on the right to development and development as a human right has been deployed both as a language of resistance and a strategy of opposition. The discourse becomes more than simply a debate about individual and collective economic empowerment, but also an extension of the polemics of power and resistance played out at both intellectual and diplomatic levels and shaped by historic and contemporary conditions.

Most critics of the right to development contend that the conception of a group or collective right, collectively inhering in a group of humans and to be collectively enjoyed by the said group, is absurd. Thus, according to Jack Donnelly the UDHR clearly and unambiguously conceptualises human rights as being inherent to humans and as being universal and held equally by all, not as the product of social cooperation (47). In this paradigm, human rights are conceived as only personal rights, based on negative freedom, imposing only negative obligations on the duty-bearers. The implication is that any right which imposes positive obligations on the duty-bearers does not qualify as a human right. It is also argued that any purported right which does not have a corresponding duty-bearer is not a right.

However, from the philosophical perspective, the human right concept depicts a right as qualifying to be human right if it possesses the defining characteristics of inalienability, immutability, inviolability, and, therefore, absolutism. Any right that retains these characteristics in the instance of its implementation cannot but be said to be a human right. Despite the reason given by legal actors and theorists from other disciplines, as responsible for the polemics of power and resistance as concerns the right to development, it could be argued that the major problem posing as obstacle to justiceability of the right to development is lack of understanding of what Lucky Akaruese refers to as 'particularization of human right'. Akaruese first notes concerning John Locke's natural right concept that particularization of natural right concept, and by implication, human right concept, makes the civic society a prerequisite for protection of human rights and that such line of thinking as Locke's sloughs from his conception of natural right, "such principles that constitute the defining characteristics of natural right concept" (2011:133). Particularization of natural right, and by extension, human rights, therefore follows from a diminutive understanding of the nature of human right concept as a right characterized by inalienability, immutability, inviolability and absolutism. Hence, Akaruese argues that:

One no doubt notes the problem inherent in any attempt at tempering with the defining characteristics of natural right in order to make such suit existential realities or the imperious and necessary demands of the world of sense experience. In such an attempt, natural right concept will automatically lose its ontological value, especially, its assumed naturality and absolutism, particularly the fact that it is assumed applicable and inherent in all human persons with equal sameness (134)

Even the Universal Declaration of Human Right is subject to the flaw of particularization. Articles 29 and 30 of the Declaration make the determination of human rights subject to state legal instruments, thereby highlighting the problem of particularization which occurs once the articulation of human rights in terms of its practicability and implementation are designated state function. This dissolves the distinction between human rights and state-centric rights such that human rights are reduced to state-centric rights. Akaruese observes that:

...we consider as 'science infested' contemporary conceptualizations of human right notion, the knowledge-claim in relation to the particulars (i.e. 'rights'), assumed to constitute human right, has variedly been identified and articulated, especially in the juristic, social, and political discourses, and the 1948 Universal Declaration of Human Rights, including associated United Nations Resolutions, remain central in this direction (203).

Akaruese's philosophical perspective on human right notion makes it obvious that any declaration on human rights could be regarded as inadequate for both the understanding and realization of human right concept.

The right to development, as a particular in human rights charters that recognize it, like the African Charter on Human and Peoples' Rights, cannot be exempted from the problem of particularization. Article 1 of the Charter specifically stipulates that:

The Member States of the Organization of African Unity, parties to the present Charter, shall recognize the rights, duties and freedoms enshrined in this Charter, and shall undertake to adopt legislative or other measures to give effect to them.

Hence, the polemics of power and resistance revolving around the right to development and which has continued to bedevil its implementation and realization could be blamed on the non-philosophical understanding of the right as one which its implementation rests on state apparatuses. During the pandemic, for instance, the third world countries were relying on the developed countries for assistance in terms of high technological innovations for manufacturing of drugs, sanitizers and incubators, for cushioning the devastating effects of Covid-19. However, the developing countries that were most affected by the pandemic were also battling with the means of curtailing it. The rate of aid flow from the developed countries to the developing countries dwindled considerably posing global threat to Goal 17 of the Sustainable Development Goals which stipulates strengthening the means of implementation and revitalization of the Global Partnership for Sustainable Development. Although no concrete enforcement mechanism has yet been established for the right to development under a treaty-based system, there is no reason why states cannot have proper jurisdictions on the right to development as it concerns tribes and individual citizens. Also the fact that development is not only about fiscal indices, but also incorporates individual moral development should render implementation of the right to development not just an international affair. Now that the Covid-19 pandemic has placed a heavy load on both the so-called developed countries and the developing countries (the burden of post pandemic recovery), particularization of human rights concept could be the basis of enhanced development efforts at the grassroots. If justiciability of the right to development is enhanced in local jurisdiction, individuals, tribes and groups would intensify efforts in making developmental initiatives.

Whether in international law, or in state laws, particularization of human rights subjects human right concept to a nature diminutive of its conceptual meaning. An understanding of this fact will build citizens' confidence in local jurisdictions handling matters on the right to development, be it the implementation or violation of such rights. Thus, understanding particularization of human rights would dispel the

ignorance of people in thinking that such rights as the right to development can only find legal support under the auspices of international law, and that cases of its violation should be left for the international court of justice. Such thinking is behind most the arguments as to which countries should be the duty-bearers and which countries should be the subjects of the right. It strengthens the view that all states (countries, states and individuals), are duty-bearers and subjects with respect to the right to development.

Particularization of human rights makes human rights state-centric, both at the international and state jurisdictions. It whittles down the recognition of the right to development as a *jus cogens* and makes modalities for protection and exercise of human rights are necessary both at the local and international levels. Thus, nothing prevents states and their component units from providing legal frameworks for realizing the right to development. Likewise, citizens can have confidence in local legal apparatuses put in place for implementation of the right to development. Most of the agitations and insurgencies witnessed in African countries are based on the belief that states and their component units lack the capacity to properly adjudicate on matters of violation of right to development. Such thinking follows from an understanding of the right to development to be *jus cogens* (that is a moral right not justiciable under state laws or positive laws and should be under international law which is not strictly speaking, positive law see Hart.) However, particularization of human right concept depicts human rights even under international law, as stripped of the defining characteristics of human right. Hence, it makes no significant difference whether the right to development is made international or state affair.

Whenever there is the political will, a binding international human rights treaty may be devised within the framework of the right to development. Moreover, the Working Group, through the Special Task Force, serving as a supervisory organ for different development actors, including developed countries, international financial institutions and other inter-governmental organisations complying with the principles of the right to development, could extend its supervisory role to local jurisdictions.

5 Conclusion

Although no concrete enforcement mechanism is yet to be established for the right to development under a treaty-based system, there is no reason why states cannot have proper jurisdictions on the right as it concerns tribes and individual citizens. Again, the fact that development is not only about fiscal indices, but also incorporates individual moral development should render implementation of the right to development not just an international affair. Now that the Covid-19 pandemic has placed a heavy load on both the so-called developed countries and the developing countries (the burden of post pandemic recovery), particularization of human right concept could be the basis of enhanced development efforts at the grassroots. If the justiciability of the right to development is enhanced in local jurisdiction, individuals tribes and groups would intensify efforts in making developmental initiatives. They can equally believe that they can hold the government accountable for development drives both at the state and community levels. Whenever there is the political will, a binding international human rights treaty may be devised within the framework of the right to development. Moreover, the Working Group, through the Special Task Force, serving as a supervisory organ for different development actors, including developed countries, international financial institutions and other inter-governmental organisations complying with the principles of the right to development, could extend its supervisory role to local jurisdictions to ensure proper dispensation of justice on matters bordering on the right to development.

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