RIGHT TO DEVELOPMENT AND PEOPLE OF AFRICAN DESCENT:
PROSPECTS AND CHALLENGES

Laurence Juma
Rhodes University

INTRODUCTION

In December 2013, the UN General Assembly adopted the resolution proclaiming the period between January 2015 and December 2024 to be the international decade for peoples of African descent.\(^1\) This was a culmination of efforts within and outside the UN to expose the conditions of millions of people of African descent around the world living in abject poverty, are marginalised and have limited access to quality education health services housing and social security. The proclamation affirms the commitment by the UN to engage elaborately with issues that sit at the heart of problems that affect people of African descent across the globe and sets in motion a process for actualising the promise of economic well-being and human rights protection that international cooperation should bring to this marginalised group. The theme of the decade, “People of African descent: recognition, justice and development”, broadly sets the agenda for international action in this regard. Given that we are at the beginning of this purposeful decade, an opportunity is presented to not only take stock of where we are, but to build on the efforts that have made thus far in in uplifting the conditions of this marginalised social group, while projecting on the future.

Development is one area that is clearly in need of attention. Across the globe, lack of commitment to address the development needs of people of African descent is pervasive. Speaking during the launch of the International Decade for People of African Descent, the UN General Secretary said that people of African descent were indeed “among the poorest and most marginalized around the world with limited access to healthcare, education and even employment”.\(^2\) It is no secret that the problems of poverty and marginalisation that the People of African Descent suffer correlates with the violations of their human rights. Thus, even as we

---

\(^1\) UNGA A/Res/68/237, 23 December 2013.

struggle to find ways of dealing with the serious development concerns abound, any programme of action that we propose must necessarily be informed by human rights values and norms. But placing human rights at the centre of development agenda raises challenges—the kind that we must confront to realise the promise of the UN Decade for People of African Descent. It is in response to this challenge that this paper proposes to summarise some of the issues that arise when development is projected as a human rights endeavour. While taking as its focal point, the UN Declaration on the Right to Development, the paper explores the nature of the right itself, the manner of its articulation relative to the developmental needs of people of African descent and the implementation challenges.

The paper begins by reflecting on the nature of the right to development (RtD) and critiquing the debates around its conceptualisation. It acknowledges that the right to development has been contentious, not just because it evokes apprehension as an acceptable “new” addition to the body of existing human rights, but also because it’s utility as a right is limited by unresolved implementation challenges. It is argued, nonetheless, that the contentious nature of the right should not obscure the benefits of RtD. The paper then examines what development and the RtD should mean for people of African descent, drawing on experiences from the Americas, Europe and Africa. It suggests that the implementation of RtD and rights based approaches may provide some avenue for redressing the development needs of marginalised communities and discusses some of the key international and regional human rights instruments that the approach may rely on to deliver on its promise. The paper concludes by identifying some areas that may be of interest in maximizing the benefits of a rights based approaches to development, such as increasing participation, normative interventions, the use of special measures and international collaboration.

THE UN DECLARATION ON THE RIGHT TO DEVELOPMENT

The first debates regarding the right to development took place in the UN Commission on Human Rights way back in 1977. But it wasn’t until December 1986, when the UN General Assembly finally adopted the Declaration on the Right to Development. The Declaration is thus a culmination of a long period of political negotiations spanning over five years. By so doing, the UN not only responded to the most urgent issue of the today’s world and to the

---

3 Some might trace the origins of the right to earlier events such as the 1972 International Conference on Human Rights, where Keba M’baye, an African diplomat from Senegal, first articulated the need for the right to development.

values, aspirations, and traditions of the marginalised groups, but also affirmed the linkage between development and human rights. This step opened up space for a whole range of new ideas and discussions around the meaning of the right and what has been referred to the rights based approaches to development. At the UN level, the discussions and efforts to implement RtD have not been without controversy. The whole idea of development acquiring a normative force has been a source of contestation between developed and developing nations. In addition, since the Declaration has no binding force, issues of implementation have had to be regulated and translated into some policy frameworks.

The key principles in the Declaration are, the RtD which is expressed as an “inalienable human right by virtue of which every human person and all people are entitled to…”\(^5\), participation and fair distribution of the benefits resulting therefrom\(^6\), and of course international cooperation. I shall discuss these principles in greater depth when dealing with the nature of the right to development as set out in the Declaration. But before doing so it is noteworthy to mention some of the “alleged” weaknesses of the Declaration as these have often been the basis upon which criticism have been raised. The first is the fact that some of its provisions are vague and imprecise. For example it is unclear whether the role of the individuals is that of a subject or a beneficiary of the RtD. Secondly, the principle of cooperation is not explicitly elaborated. There are patches of it here and there which are incapable of being comprehended. Thirdly, there is a view among some scholars that by incorporating all universal human rights and placing obligation on states on that basis, and also affirming the indivisibility of all rights, the Declaration has become diluted and adds no value. In my view however, one can only consider the veracity of these criticisms in light of the meaning of the right and the impact it has in the achievement of development goals.

**Nature of the Right**

The question whether there can be a right to development must first be answered because this has been a major stumbling block to the elaboration of the right and structuring of a proper implementation framework. This question arise because there is persistent disagreement among scholars and diplomats on the conceptual understanding of the right. The disagreement follows the familiar patterns of the North and South divisions over matters of economic nature. Predominantly, the developing countries of the south have always pushed for the recognition

\(^5\) Article 1.
\(^6\) Article 2(3).
of the right, while their counterparts in North have resisted it. The division has centred on two aspects: whether rights of a socio-economic nature should be regarded as rights or mere principles that states should aspire to achieve, and the general discomfort that the Northerners have towards legalising obligations over “discretionary foreign aid”. For example, the US failed to support the Declaration because it considered development to be a product of economic liberties and not a legal right. This position is backed by scholars who view rights in a positivist sense—that rights must be entitlements that are justiciable and constitute legal claims that can be enforced through judicial processes. These contests have not deterred the progressives—those who view the addition of “new” rights such as the right to development into the corpus of human rights as a good thing and a boost to the human rights agenda. They make a compelling point that time has probably come when we should view rights in a broader sense—beyond the justiciability framework.

The Declaration sets out the right to development in a manner that is recognizably different from what other international human rights instruments do, in the sense that it does not only state the right to be inalienable, but goes further to proclaim that every person is entitled to participate in the right. Article 1 of the Declaration 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...development.” This means that the right to development should be understood as embodying two aspects: the “inalienable right” itself, on the one hand, and the duty to “participate” in it, on the other. This is a remarkable departure from the familiar language of human rights instruments. Often international human rights treaties would simply proclaim the right and not encumber it with any expectations from the beneficiary of the right. In this case however, the duty element is perhaps the most elaborate. As far as the right goes, its enjoyment is made contingent upon the enjoyment and observance of other rights, such the right to self-determination, and a host of others. As regards the duty component, individuals (every person) are enjoined to participate in making development a reality. They are expected to “contribute to and enjoy economic, social, cultural and political development.” The duty also extends to states. They are enjoined to design appropriate policy measures that would ensure the improvement and well-being of their citizens and “allow for the full and meaningful participation in the development and in fair distribution of the benefit resulting therefrom” (art 3). In addition, they must ensure cooperation with other states and the international community,

---

2 See B Meir and A Fox, Development as health: Employing the collective right to development to achieve the goals of the individual rights to health (2008) 30 Hum Rts Q. 259 at 328.

eliminate all forms of human rights abuses that may impede the development (art 5), promote and strengthen international peace and security (art 7), and ensure equal access to resources (art 8).

Three key components can be distilled from the way in which the Declaration elaborates the right and the duty to participate in the right highlighted above. The first component that is readily apparent is the inclusivity of RtD. Notwithstanding the conceptual challenges, it is noteworthy that RtD is treated as a unifying right in the sense that it proclaims the unity of all rights. In this respect RtD echoes the fundamental principle in the relationship between the three generations of rights affirmed at the Vienna conference, which is the interdependence and indivisibility of human rights. Article 6 provides:

All human rights and fundamental freedoms are *indivisible and interdependent*; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic and social and cultural rights.

The interdependence and indivisibility of rights presents both a challenge and a benefit—a challenge because it places a heavy burden on lawyers and other professionals charged with the responsibility of framing the proper implementation modalities to bring this right to par with other human rights, and benefit because it widens the scope for employing human rights principles to facilitate development goals by asserting accountability across a wide spectrum of institutions. The second component is the principle of participation, which according to the Declaration involves the participation by the beneficiaries of the right in development as already mentioned, the requirement that the participation be active, free and meaningful, the involvement of women, and lastly, the elaboration of the role of the state in this regard. The idea is to involve ordinary citizens (including marginalised social groups) who are, after all, the beneficiaries of development to be involved in all stages—formation, implementation monitoring and evaluation of the development. The role of the state remains crucial but must encourage citizens to be partners in the development agenda. States must create enabling environment for such participation. Obviously this can only be possible if institutions of governance are democratic and subject to the rule of law.9

The third component is cooperation or what is commonly referred to as the principle of solidarity. The collective element in RtD is reminiscent of its antecedents and the politics of foreign aid of the past decades. However, the Declaration set the “solidarity” principle on a new plane—that which is participatory and is rights based. The Declaration calls for the

---

9 See K Gunther, Participation and accountability: Two aspects of internal and international dimension of the right to development (1992) *Third World Legal Studies* 55.
establishment of the new international order, which may be, in my view, structurally conducive to the development of poor countries and to marginalised social groups globally. Article 4 of DRD provides that “as complement to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development”. The new international order should ensure development and eliminate obstacles to development, and the participation of developing countries in the international economic policies. The question for those of us who are concerned about the people of African descent is whether this principle can be stretched so that the international community can reach out to marginalised social groups. Obviously the idea is that by expanding the states participatory role in the international realm increases its potential to benefit fully from collective responsibility of the international community. It provides the state with the opportunity to highlight its concerns and secure support that eventually trickles down to its citizens. Moreover, through such participation the plight of marginalised and minority groups may also become visible to the international community. The Declaration highlights the role of collective right to development and the correlative duty to cooperate as key to the states participation in the right to development. Sceptics may question whether solidarity should be enforceable in this way. Do developed states merely have a moral obligation to assist developing countries, and not an obligation? Admittedly this scepticisms exposes the inherent problem of the structure of rights in the Declaration as already mentioned.

Be that as it may, the right to development may be seen as serving a useful purpose of providing “a fitting platform for challenging the orthodoxies and hegemonies of the global political economy”. Most proponents of this right conceptualise the right as articulating the need for developed nations of the north to take responsibility for ensuring a just international economic order. Indeed the need to restructure the international economic and political order is long overdue. The need to allow more meaningful and effective participation of the developing nations of the south in international decision making is crucial. And right to development offers one avenue for doing so. The solidarity principle therefore envisages two major aspects. The first is that in enlarges rather than diminishes conditions for attainment of the right to development. Secondly, it ensures that inter-country inequalities do not inhibit the full benefit of access to national resources.

---

10 See B Ibhawoh, The right to development: politics and polemics of power and resistance (2011) 33(1) *Hum Rts Q* 76, at 89.

11 See J Ghosh, The right to development and international economic regimes, in *Reflections on the Right to Development* at 17.
Implementation

Apart from conceptual framing of the right the other biggest challenge for RtD is implementation.\textsuperscript{12} Yet the declaration does not specify its preferred framework for implementation of RtD. Its approach has been characterised as open-ended. The efforts to find modalities of implementing RtD have led the UN, through the Commission on Human Rights, to establish three Working Groups to facilitate discussions and prepare a policy framework that would help translate RtD into a reality.\textsuperscript{13} The first two WG that were established in 1993 and 1996 respectively did not achieved much except to identify the usual obstacles to development such as the debt burden, negative effects of globalization and lack of cooperation at the international level. In the domestic level, they identified lack of respect for human rights, poor governance and lack of accountability among others. In 1998, the Commission established an open ended WG and tasked it with monitoring and reviewing the progress made in the implementation of RtD. Much of the discussions and efforts of the Commission towards designing appropriate implementation are still on-going and have been carried within the WG.

Apart from the WGs, the Commission had also appointed an Independent Expert on Right to Development (IE), and set up the High Level Task Force (HLTF) in 2004. The major contribution that IE has made thus far is the recommendation for the establishment of the Development Pact, which encourages a step by step approach to the attainment of economic growth. The pact outlines a series of steps required which include a programme of debt sharing and the requirement that developing countries reform their legal systems and enact legislation that will allow for effective enforcement of human rights standards, including RtD. The HLTF mandate was to consider the challenges to Millennium Development Goals (MDGs), social impact on areas of trade and best practises on the implementation of RtD. Obviously, the ultimate goal was to find ways in which the human rights could be infused into all forums related to finance and trade, and as result expand the RtD agenda into all facets of international cooperation. The HLTF has provided a platform in which key organisations in international trade and finance have engaged with RtD. Thus it was instrumental in establishing linkages between MDGs and human rights. In addition to the foregoing structures, the UN has facilitated discussions at various other levels, for example the 1998 Global consultation where feasibilities

\textsuperscript{12} See B Ibhwawoh, \textit{supra note} 10 at 87.

\textsuperscript{13} The first WG was established in 1993 for three years (Res 1993/22). The second one was established in 1996 and lasted for 2 years.
for implementation of the RtD for both the international and domestic levels were explored by experts from all major international organisations such as the IMF and the World Bank.

1. Implementation at the national level

Lack of an effective implementation framework for RtD is its greatest weakness. Even states who support RtD have not been able to develop frameworks for enforcement of the right within their legal systems. While the developing countries in the south have been vigorous in asserting the need for development assistance from their rich counterparts in the north, they have been less succinct about their roles in meeting development needs of their own citizens. In certain instances, they have used the rhetoric of RtD to shield themselves from the scrutiny on their human rights record. According to one analyst, RtD has been used to “rationalise or justify political agenda” by these governments.\(^{14}\) He gives the example of South Africa propounding the right to development idea in respect of Zimbabwe instead of holding that government to account for its human rights violations.\(^{15}\) Some countries have sought to elevate social economic and cultural rights over political rights. All these are attempts to avoid domestic obligations that states have towards their own citizens. The right to development infers a complimentary relationship between the national and the international orders. Therefore, state centric approaches, where development is conceptualised in international terms only, and whether by developing nations of the south or by the developed countries of the north, diminishes the importance of the link between international and the national dimensions of the right to development which is important for the realization of the right. It also negates the interdependent and indivisible principle so well-articulated by the Declaration. In addition it privileges states above individuals and communities especially marginalized communities such as most people of African descent across the globe.

2. Justiciability

In the human rights discourse, there is a general acknowledgment that rights can be categorised into three generations: first generation being the civil and political rights, the second are the socio-economic and cultural rights, and the third generation are the “solidarity” rights such as the right to peace, and right to clean and healthy environment. The right to development falls into this last category. The first generation rights are the “negative” rights

---

\(^{14}\) See B Ibhawoh supra note 10 at 88.

\(^{15}\) Ibid.
which places obligation on states to ensure their non-violation. The second generation are positive rights that are social and economic in nature and merely require progressive fulfilment. There is no doubt that civil and political rights are important for the realisation of social and economic rights and vice versa. All human rights irrespective of the generations to which they fall, must be perceived as providing suitable platforms for achieving development. This places the whole rights question at the core of any development agenda. But rights are entitlements. They must be realizable and that is why the issue of justiciability often crops up whenever the question of whether the entitlement qualifies as a right or not arises. In addition there is the issue of capacity of the duty bearer to meet their obligations. Often, the issue of justiciability arises in regard to rights of socio-economic nature and recently with solidarity rights, because they do not often lend themselves to easy enforcement by existing judicial structures.

RtD straddles between the civil and political rights and socio-economic rights. Those who contest its viability see the support of this right as putting in jeopardy the gains that have been made as far as human rights are concerned. They argue that the right to development is a vague and abstract idea that should rather be expressed as a principle not a right. They also question whether the right could be meaningfully applied in practice. The key issue raised here is that of justiciability. In this regards, rights are conceptualised as positive claims that courts should be able to enforce. Justiciability refers to the ability of courts to adjudicate and enforce rights.\textsuperscript{16} It is based on the idea that the court should be able to provide a remedy if it finds that there is a violation.\textsuperscript{17} This idea has roots in positivisms of philosophers such as Jeremy Bentham and Hans Kelsen. Bantham observed that obligations and rights must be juxtaposed and both must bear the force of law so that they rise above mere "fiction". According to Hans Kelsen, the essential element of a right is the legal power bestowed upon the individual by the legal order to bring about, by a law suit, the execution of a sanction as a reaction against the non-fulfilment of the obligation". Opponents of the right to development base their arguments of this conception of law and raise the same issues that have been raised before with regard to the socio-economic rights in general. They argue that since the right to development falls within the domain of third generation rights, and cannot be automatically enforced by the courts in the same manner as the civil and political rights, it is not a human right.\textsuperscript{18} They also doubt if it


\textsuperscript{17} See e.g. F Viljoen, National Legislation as a source of justiciable socio-economic rights, (2005) 6(3) ESR Rev. 6.

creates positive obligations on the state and on the international community that can be enforced by individuals or states. But even they do, especially with regard to individuals, their enforcement have huge implications on distribution, allocation and management of resources, a function that falls within the exclusive competence of the executive arm of governments. And therefore, if the courts were to pronounce on this right they may undemocratically, violate the doctrine of separation of powers.

The question in my view, is whether justiciability that positivists and opponents of RtD emphasize should be at the core of the normative value of the right to development. Should justiciability be the sine qua non of all rights? How about the question of implementability. It may be useful to envision justiciability as one of the ways of making rights effective, but not the only one. In the whole rights are complex and their realisation may not always depend on the existence of “coercive” enforcement regime. Justiciability and enforceability should not be the only basis for finding validity of rights. Sen has suggested that there can be room for “social and political action”, where pressure is brought to bear on violators of rights. Equally, there are situations, like in the case of RtD, where implementation and supervision have a preferred role.

RIGHT TO DEVELOPMENT IN THE CONTEXT OF PEOPLE OF AFRICAN DESCENT

The economic conditions of communities of people of African descent across the globe is not only alarming but also constitutes an indictment to the international community as a whole. According to the UN Secretary General, “People of African descent are among the poorest and the most marginalized around the world, with limited access to health care, education and even employment”. Not until the last decade has poverty and the marginalization of people of African descent become a matter of international concern and even then, the wheel seems to be moving much slower. What is even more alarming is that in the case of people of African descent, there is a stark connection between ethnicity and poverty to the levels that mirrors the early days when slavery and inhumanity characterised the relationship between races. The inequality, disadvantages and the general exclusion that people of African descent suffer are as a result of the history of slavery. Largely, it is the social attitudes and relationships

borne out of the many years of slavery that continue to influence how people of African descent are treated in Europe and the Americas. During the days of slavery, black people were not considered full citizens, could not own property or engage in certain trades, and had no capacity to hold government positions. While slavery may have ended and its horrors now well behind us, much of what it bequeathed to black people is evidently enduring. This is despite a plethora of international and regional instruments prohibiting discrimination, guaranteeing self-determination and proclaiming equality for all humanity. Today, people of African descent still suffer exclusion as a result of racism and racial discrimination. And their experiences show a marked similarity all across the globe. Racism and racial discrimination facilitates exclusion, which manifests in the unequal access to services such as education and health, to capital and property, to income (credits, employment and production markets) and to arrange of opportunities. The phenomenon is so pervasive that it has become anathema to human progress and development.

What is Development?

Development is one of those terms that is difficult to define precisely although it enjoys common usage in a variety of disciplines. Ordinarily, the term implies a sense of increased capacity, responsibility, and material well-being. It is often used in an economic sense, and its mention readily brings to mind issues of economic growth, industrialisation, technological advancement and GNP. According to Dennis Goulet, it is “seen as simultaneously the vision of a better life, a life materially richer, institutionally more modern and technologically more efficient and an array of vision to achieve that vision.” Development is an aspiration that every society must have no matter their economic, social or political status. At the international level, development has been used as one form of differentiation which account for terminologies such as the north south divide, the industrialized and non-industrialised, developing and developed world, third world and first world. Thus, it has become a means of justifying the mobilisation of international assistance to some societies and focusing on their needs, and by the same token, obscuring the needs of marginalised and minority groups in the north or developed world.

We have come to a point, at least in the international realm, where we view development as a multifaceted term whose goals encompass both the economic, social and political facets

---

of human endeavour. The idea that development cannot be limited to economic and material well-being and must indeed be a composite of many other things has completely eroded the significance of the "basic needs" theory of the 1970s. It has also created new perspectives that, in my view, augur well for normative intervention and human rights. This new conceptualisation has important ingredients that are perhaps most succinctly elucidated by Amartya Sen. According to him, development must denote more than just the attainment of economic growth, rise of personal incomes, technological advancement, industrialization or even growth of GNP.\textsuperscript{23} It should mean the total expansion of human capability. Thus, he links development to freedom and conceptualises it as consisting of the removal of "unfreedoms" which "leave people with little opportunity of exercising their reasoned agency". He identifies these "unfreedoms" as including, "poverty, as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance, or overactivity of repressive states".\textsuperscript{24} In his view, development is beyond the mere fulfilment of basic needs, but a process that enables people to overcome violations of freedoms.\textsuperscript{25} Sen's theory postulates the linkage that exist between individual capabilities and the whole array factors such as markets, the democratic system, the media, public distribution systems. Most significantly, it underscores the linkage between the political freedoms and the fulfilment of economic needs.

Let us distil some of the key elements that emerge from Sen's characterisation of development discussed above that have normative implications. The first is the idea of agency. In development, he argues, human life could be seen as a set of "doings and beings"—what he calls "functionings".\textsuperscript{26} Thus development can only be possible if people are enabled to function. The removal of all inhibitions that curtail their agency is therefore at the core of development agenda. Unlike in the basic needs theory, the poor and marginalised are given agency by being empowered to participate in defining their welfare needs rather than being passive recipients of aid and assistance. Here, the normative goals must be obvious. Rules must be in place that allow participation and guarantee freedoms. The second element is that of institutional order. Matters of good governance and democracy not only at the state level but the local level as well, are important to the attainment of development goals. Thus constitutional engineering and establishment of democratic institutions is a key imperatives in achieving development

\textsuperscript{24} Ibid.
\textsuperscript{26} See A Sen, \textit{supra note 23} at 75.
goals. Thirdly, is its embodiment of the twin concepts of solidarity and international cooperation—the idea that if development is to be associated with economic empowerment and human well-being, then there must collaboration towards the attainment of its goals. The notion of “solidarity” is key to the understanding of the so-called third generation human rights to which the right to development falls. All these normative elements find expression in the right to development. Therefore as we endeavour to define the contours of the rights based approaches development that have a bearing on the condition of marginalised groups, we must assess their development needs based on this understanding of what development should mean. Indeed, these elements elicit richer appreciation of how to deal with the economic conditions and the level of deprivation and poverty that people of African descent find themselves in and therefore give meaning to the notion of “freedom” that is embodied in our current understanding of development.

**Extent of marginalisation and economic exclusion**

As already mentioned, the poor economic and social conditions of people of African descent reveal the connection between racism and poverty. Indicators of poor development among them may become apparent by looking at the social and economic conditions in which they live. Unfortunately, clear and reliable data as to the extent of poverty and marginalization is not available. Unfortunately there is no accurate data on the extent of the economic exclusion of this group and a lot still needs to be done in this regard. There is equally no accurate data on the cost of the exclusion. And this is true in Europe as well as in the Americas. Other than Brazil, Colombia and Nicaragua, many Latin American countries do not collect data relating to ethnicity during their census. Another related problem is that of identification. Identity and definition of people of African descent is major problem especially in ethnically-mixed communities. Thus, even if ethnicity is used, the results may still vary depending on the ethnic category used (whether preto, pardo, Moreno, Mulato, or Afrocolombiano). In some countries, for example Ecuador, this has resulted in undercounting of people of African descent. Indeed many people of African descent are reluctant to self-identify themselves as such because of racial stigma. As far as development is concerned, the people of African descent have largely

---

27 See M Htun, Political inclusion and representation of Afrodescendant women in Latin America, in M Escobar et al, ed., Representation: The Case of Women (2014), 120 (In the early 2000s, 9 out of 10 countries collect such data. This has somewhat improved by 2013, but with differing terms and criteria).


29 See E Telles, A retrospective: looking back a decade later at Brazil’s racial inclusion policies, (2010) Desigualdade e Diversidade 6, at 8.
been invisible as much attention has been paid to indigenous communities. It was only recently that we began to see studies meant to increase visibility of people of African descent and engineer interventions so that their economic conditions can be improved. In 2001, Inter-American Development Bank (IDB) conducted a study in Bolivia, Brazil, Guatemala and Peru to identify the linkages between ethnicity and economic progress.\textsuperscript{30} In a nutshell, this study and several others that have been done subsequently have revealed similar patterns of exclusion experienced by people of African descent all over the world. These studies have also found that as a result of the exclusion, specific development programs that address the needs of people of African descent are non-existent. Secondly, that people of African descent do not participate in levels of governance where decision affecting their well-being are made. Thirdly that exclusion, discrimination and poverty go hand in hand.

1. Latin America

There are over 150 million people of African descent in Latin America and the Caribbean. This constitutes about 30% of the total population. And about 40% of the poor in Latin America are PADs.\textsuperscript{31} Unfortunately, most of them, live in abject poverty and have little or no access to access to justice, property, education, and health. Since they live in the poorest part of the country, they lack transport and are exposed to crime. In Columbia, which has the second highest number of PADs (about 10-17 million), 98% of their PADs lack basic public utilities as compared to 6% of the whites. The infant mortality rate among this group is almost twice the national average; life expectancy for men average about 64.6 years for African descent as compared to the national figure of 70.3 years. The UNDP reports that 38% of PADs have no houses of their own, and 61% of their households have no running water. Illiteracy rates are higher among people of African descent than in any other ethnic group in the region. In Brazil for example 14.4 million 15 year olds or over were found to be illiterate by a 2006 survey. Out this 67% were dark skinned or “pardos”. Most people of African descent have the lowest jobs, are poorly paid, lack social security benefits and the rate of unemployment is very high. They are often they are discriminated against in job places on account of race. In Ecuador, PADs constitute the majority of the poorest of the poor. 81% of their population are living


\textsuperscript{31} In 1997, the total number of the poor in the region was estimated at 181.1 million. See IDB, Strategy to Reduce Poverty (1997). According to a 2006 survey, 43% of all blacks in Brazil were living below the poverty line. See M Htun supra note 27 at 120.
below the poverty line. According to Bolivian community organisation, ORBOAFRO, people of African descent in Bolivia “need everything from the most basic services to the most important economic and educational support”.

Poverty among people of African descent in many South American countries such as Colombia, Peru and Brazil have resulted in low levels of education. For example the barrios in Livingstone, Guatemala, where more than half of the population had not completed primary school, 13% attended secondary school, and only about 1% have graduated from University.\textsuperscript{32} Similarly, a survey of 44 communities in Honduras revealed that 17.7% had secondary school education and 3.7% university education.\textsuperscript{33} Educational infrastructure in areas where PADS live are very poor or non-existent at all. Thus, educational programs and institutional are completely lacking. Poverty also affects affordability of educational costs. As a result, very few people of African descent are able to enter or complete higher education. This makes it difficult for these communities to overcome poverty. Apart from education, access to health care is also limited. Migration and poverty have magnified the impact of HIV/AIDS. There are many common diseases that could be controlled if health facilities were available. For example in Honduras, the infant mortality is caused by diseases such as pneumonia, diarrhoea, perinatal, malnutrition which are all preventable.\textsuperscript{34} In addition to the foregoing, there has been fragmentation of the social stratum due to displacement. All these problems are exacerbated by social practises of racial discrimination. Yet in the face of all these problems, there is no proper policies, plans or programs to alleviate poverty in these areas or deal with endemic racial discrimination. All throughout the Americas, PADS face discrimination in work places. PADS are excluded from participation in politics and policy making. Very few hold positions in government. Indeed in a majority of the countries in this region one can only compete for political office if they have huge sums of money. Politics is costly undertaking that require substantial investment that most PADS cannot afford. But there are other structural factors that inhibit their participation. For example during campaigns, voters are often incited against people of African descent. This is fuelled by deep rooted racial discrimination and racism throughout the region.

Special mention must be made of the condition of women. They disproportionately suffer the effects of exclusion, racism and racial discrimination than men in their communities. They

\textsuperscript{34} See ODECO ed., \textit{Exclusion Económica de Afrodescendientes en Honduras}, (2002)
African descent are discriminated against in respect of housing. They have limited access to social housing and therefore suffer poor living conditions. According to a 2002 survey in France, only about 38% of the black households lived in social accommodation. In Denmark as well as Spain, people of African descent have been denied access to homeless shelters or denied opportunity to rent properties in certain areas because of their skin colour. There are gaps in access to education. In the UK for example, the number of black students entering the top universities is just about 8% as compared to 24% for white population. Racial discrimination in the social sphere is pervasive. In some countries, people of African descent are openly denied entry to social places and even told explicitly that they are black. The assumption that all black people are immigrants is widespread and contributes to the discrimination. This is because of the growing anti-immigrant attitudes across Europe.\(^{41}\) People of African descent are often the victims of racist violence—being threatened in public or crimes being directed at them because of their skin colour. Racism in football is also well documented.

It should be mentioned here that there has been considerable effort on the part of European nations both collectively and individually to deal with racism, especially the more overt forms that manifest in the form of hate crimes and physical expressions of racial hate and prejudices such we have recently seen in football fields. The approach has mainly been through criminal sanctions based on legislations that take their cue from international and regional frameworks such as the United Nations’ International Convention on the Elimination of All Forms of Racial Discrimination, and the European Convention on Human Rights. There also regional policy frameworks such as the EU Racial Equality Directives.\(^{42}\) Clearly the criminal approaches are not working. Moreover, the subliminal forms of discrimination, or what has been called “access racism”,\(^{43}\) are still rampant thus constricting opportunities for people of African descent. Gringolo, Hermanin and Möschel argue that Europe must adopt a race sensitive approach to deal with racism.\(^{44}\) This requires that considerable effort be put on addressing “patterns of historical, structural, systemic, institutional and indirect racial


2. Europe

According to a report by the US Congress, there were over 7 million people of African descent in Europe in 2011. This number comprise the population of the so called “black Europeans” whose identity is historically associated with the European colonial exploits and others who have recently immigrated into Europe for a variety of reasons.\(^{38}\) The so called “black Europeans” now represent not just those who became citizens as result of the colonial adventures, but also refugees, mainly from Africa who have settled mostly in Switzerland, Sweden, Denmark, and Norway,\(^{39}\) labour migrants and students. These peoples identity is bound with a shared experiences of discrimination and racism. Precise and consistent data on people of African descent in Europe is absent because most countries do not collect information based on ethnicity or ethnic region. This makes it difficult to measure the magnitude of the inequalities and disadvantages of black people living in Europe today. What complicates it even more is that there is no common terminology among states describing people of African descent in Europe. Some countries describe them as foreign population and others as immigrant population. This disparity affects the nature of data collected. Although the composition of people of African descent may be diverse, their differences tend to diffuse as they acquire the label of ethnic minority. Even the so called “black Europeans” born in Europe do not escape such labelling and they continue to suffer racism and exclusion. Some scholars have argued that “blackness in Europe is not a representation of African ancestry, but a sociologically constructed identity which has been imposed on a people.”\(^{40}\) The difficulty of ascertaining the identity of people of African descent somewhat contributes to their marginalization.

Like in the Americas, most people of African descent communities live in abject poverty, lack access to justice, property, education, and health. Although there is no data on the extent of discrimination, studies have shown that people of African descent living in Europe suffer racial discrimination in almost all aspects of their lives because of their visibility. They don’t find work easily, are poorly remunerated and are often employed in positions that they overqualified for. Thus, unemployment rates is higher among people of African descent than any other group. The UK is a good example here. According to a 2009 estimate, 48% of black people between 16 and 24 were unemployed. The figure rose to 55.9% in 2011. People of

\(^{38}\) See A Blakely, Historical dimensions of blackness in Europe in DC Hine et al, Black Europe and the African Diaspora (2009).

\(^{39}\) In Denmark, for example, Somalis are now the 6th largest ethnic group with a population of 16,943.

are discriminated on the basis of race and also gender as well. They have even lesser possibilities of accessing healthcare, housing and education than men in their communities. The girls are unlikely to attend school than the boys. They are unrepresented in decision making bodies. Take for example representation in the legislature. Throughout the region, the number of elected black women is very minimal. According to the Inter American Commission on Human Rights, the number Afro-descendant women in legislatures barely reaches 1% and that they “claim only 0.03% participation in the legislature”.\textsuperscript{35} In Brazil where relatively better data is available, out of 46 elected black deputies in 2006, only 3 were women.\textsuperscript{36} And despite the number of women in Senate increasing to 13 in 2010, no black woman was elected. In Colombia, there was no black woman elected to the chamber of representatives or Senate in 2013. Costa Rica equally had none. Ecuador on the other hand had done better in this regard in the same period. Out of the 9 elected black legislators 5 were women. Peru had 3 and Venezuela had one.\textsuperscript{37}

Apart from poor participation in politics, women suffer discrimination more than men in employment because, “their multiple roles both inside and outside home are not adequately reflected in social status, employment and even wages”. They are mostly confined to domestic duties earn low wages, and have no social security benefits. In certain instances they are portrayed as sexual objects and are more subject to prostitution and human trafficking. The Commission has noted that there is an alarming rate of sexual violence, sexual slavery and femicide against women which is compounded by sexual stigma of black women. The women are often the greatest sufferer when displacement occurs. They are often subjected to racism, ridicule by receiving communities. Poverty and low level of education which together with lack of job opportunities make their displacement even worse. It is also worthwhile to mention that many women are disadvantaged because they have no access to justice, largely because they are marginalised. Majority live in rural areas and they mostly maintain their traditions and language and cannot therefore access institutions that are in urban centres. The situation is made even worse because of the poor judicial culture in the region. Judicial organs are less sensitive and are openly intolerant to diversity and difference. In certain instances, access is hampered by poverty since they cannot afford the costs associated with adjudication. Thus the possibility of enforcing rights is diminished even further.

\textsuperscript{36} See M Htin supra note 27 at 123-124.
\textsuperscript{37} \textit{Ibid.}
discrimination generated by the peculiar European experiences of colonialism and (im)migration...."\(^{45}\)

3. The African context

Africa presents a rather different picture. Whereas according to the 2014 UNDP Human Development Report, Africa seems to have performed better than it did 40 or so years ago, the economic situation of its inhabitants is not any better, and may in fact be worse than that of marginalized black communities in Europe and Latin America. It is not in dispute that while poverty in other parts of the world is decreasing, that reverse is true in Africa. This is not a new phenomenon. Over the years, Africa’s performance in terms of poverty reduction and improvement human well-being has been very poor. About 46.8% of the population in Sub-Saharan Africa currently live on less than 1 dollar a day and its GDP still remains the lowest as compared to the rest of the world. Its peoples are ravaged by diseases and feminine and the segments of the population that is mainly affected are women and children. According to a recent survey, about 15 million women and 2.6 million children in Sub-Saharan Africa are living with HIV/AIDS.\(^{46}\) Statics in education are even more alarming. The illiteracy rates are staggering with only about 62% of adults are literate. Only about 55% of the population have access to clean water and sanitation. Life expectancy is low (average of about 49 years), and access to education, water, and health care are all very poor.\(^{47}\)

The statics above, which indicate the pathetic conditions in which Africans live, show the extent to which development for Africa is much more urgent. Similarly, approaches to poverty reduction in the continent and the international relationships that individual countries have forged towards this end, have produced some of the most remarkable and interesting dynamics that have made the implementation of the right to development most suited, urgent and less contestable from a human rights point of view. The rights discourse which connect human rights to development resonates with many Africans because they have lost hope in internal structures and institutions that are supposed to uplift their livelihoods. Unlike in the Americas or Europe, Africans suffer poverty not because of racial segregation, but because of a mixture of internal and external factors that diminish their potential to improve their economic situation. Most of these factors indicate the need to deepen the understanding of the

\(^{45}\) Ibid at 1636.


\(^{47}\) UNDP Human Development Report 2014.
human rights dimensions in dealing with problems of development. Although it is not within the remit of this paper to discuss these factors in detail, a mention of a few will be attempted to illuminate the point. The first of these factors is the failure of institutions of governance, which has in turn led to armed struggles in some countries and the weakening or total collapse of the state, in others. Poor governance exacerbates poverty. Manifestations of poor governance include the lack of transparency and accountability, and the increase in public corruption. Poor accountability affects the state’s ability to deliver on economic development. According to Ayittey, about $200 billion (about 90% of sub-Saharan GDP) was in foreign banks as in 1991.\textsuperscript{48} The figure must be much higher today. As already stated, poor governance results in great mistrust between government and citizens. As An Na’im notes, “African societies appear to regard the post-colonial state with profound mistrust and have no sense of ownership of it nor expectation of protection or service from it”.\textsuperscript{49} The atmosphere of repression, censorship, intimidation and intolerance is rife in these kinds of situations. The second factor is armed conflicts. Violence and civil unrest is widespread in the continent. Some of the most impoverished countries in Africa are those that have suffered lengthy civil wars.\textsuperscript{50} For example immediately after the war in 1991, Mozambique was described as the ‘world’s poorest, hungriest and most indebted, most aid-dependent country’\textsuperscript{.51} Countries such as Sierra Leone, Liberia, Sudan, Rwanda and even Angola are yet to fully recover from the effects of the war. Apart from the foregoing Africa also suffers feminine and disease in an unprecedented levels. The current resurgence of Ebola in West Africa has devastating effects on the economy of Liberia, Guinea and Sierra Leone.

Thirdly, African states generally ignore the needs of the poor, especially those in the rural areas. In many countries, government action is concentrated in urban areas, completely ignoring the rural population. This has been blamed on the legacy of colonialism. Mahmood Mamdani’s \textit{Citizen and Subject}, a book that was published almost twenty years ago, captures the essence of the exercise of power in African states. He argues that across Africa, rural people have remained subjects of undemocratic modes of authority while citizenship and democratic modes of authority have only been attainable in urban settings. Rural populations do not often

\begin{footnotesize}
\end{footnotesize}
participate in programmes and policies that affect them. The other factor worth mentioning is that in the Americas and Europe overt racism and discrimination is a major concern for most people of African descent. In Africa, increasing xenophobia in several countries is marginalising sections of the population. This adds to the complexity in understanding the factors that contribute to poverty in the continent.

Accelerating development in Africa may have the obvious benefit of improving lives of majority of black people who live in the continent. It has another benefit which is much more subtle and is rarely mentioned—that of improving the perception about black people generally. The perception of an African as an impoverished individual, lacking in many things imprints a label of poverty on him/her wherever he/she lives. Currently people of African descent who live in Americas and Europe are perceived as not belonging, but as immigrants in search of better lives. This perception perpetuates marginalization and discrimination. The view is that if you are black and in diaspora you far better off than if you were back home in the continent. Therefore you should not complain however poorly you are treated. This influences social welfare as well as immigration policies. The perception affects how people of African descent are treated in Europe and the North America.

Rights based approach to development

The international Bill of Rights provide the constitutive base for articulation of all human rights. The standards that it establishes have informed the evolution of all human rights norms. Both the civil and political rights, the socio-economic as well as solidarity rights covers a wide spectrum of human endeavours which include the right to self-determination, education, work, health, food, housing, liberty, equality and even security of persons. The right to development must necessarily be founded on the exercise and compliance with the international Bill of Rights. What the Declaration on the rights to development has done is to provide “an environment conducive to the realization” of all other rights. The rights based approach to development envisages there main elements: that the development agenda will aim at fulfilling human rights; that the approach will identify rights holders and their benefits and duty bearers and their obligations and provide the environment for exercising the rights or fulfilling the obligations; and lastly that international human rights standards shall guide the process. Therefore when we say that the Declaration on the rights to development articulates


21
what could be regarded as the rights based approach to development, we mean that it brings
the host of human rights standards to bear on the quest for improving human well-being. In this
regard we could envision poverty and exclusion constituting the basic violation of rights. The
Vienna Declaration and Program of Action of the World Conference on Human Rights
affirmed:

That extreme poverty and social exclusion constitute a violation of human dignity and
that urgent steps are necessary to achieve better knowledge of extreme poverty and its
causes, including those related to the problem of development, in order to promote the
human rights of the poorest, and to put an end to extreme poverty and social exclusion
and to promote the enjoyment of the fruits of social progress.\textsuperscript{53}

1. Framing the debate

Rights based approaches will succeed if development strategies both at the national and
international level effectively integrate human rights standards. The connection between
human rights and development have been alluded to previously when discussing the nature of
RtD. In this section, we draw on the broader conception of human rights to illustrate how the
human rights corpus sits well with RtD contrary to some viewpoints. As we all know, human
rights are a product of human experiences and are shaped by competing political struggles in
certain specific social contexts and historical circumstances. The idea of a right is well
articulated. Rights are entitlements which human beings enjoy by virtue of being humans. They
embody the notions of equal worth of all humanity, dignity and whole range of freedoms. These
notions have been with us since the enlightenment period and are have been expressed in
various significant documents such as the American Declaration of Independence as
"inalienable rights", the French Declaration of the "Rights of Man", and more recently in the
Universal Declaration of Human Rights (UDHR) and a plethora of subsequent documents.
Foundation of human rights is key to understanding the enlargement of the corpus of human
rights. In the early stages, the corpus of human rights law was mainly political in nature, its
thrust directed towards denial of political freedom and physical impairment of an individual’s
capacity to enjoy movement and participation in governance. In its current stage, human rights
has expanded to accommodate socio-economic and cultural rights as well as solidarity rights.
Thus its agenda has become much more relevant to the developing world and to the needs of
peoples of African descent globally.

There are two compounding dimensions to the human rights approach to development
which explicate the nexus between human rights and development. There is the human

\textsuperscript{53} Article 25.
development dimension and the human rights dimension. The latter focuses on governance while the former on poverty alleviation and general improvement of human social and economic conditions. The human development dimension is increasingly finding support in many fora. In the 2014 UNDP Human Development Report, for example, emphasis is put on minimization of human vulnerability as an important development goal.\textsuperscript{54} It is backed by the range of human rights of the socio-economic nature, especially those contained in the ESCR. Certainly within the African context such realisation has been consistent and reflects in the initiatives proposed by the Continental body, the African Union.\textsuperscript{55} The human development dimension also envisages the establishment of viable international and regional relationships. This is particularly important because mobilisation of resources is critical. That the human rights dimension on the other hand creates a suitable environment for individuals to realise their full potential by ensuring that institutions of governance do their work and individual’s freedoms and rights are secure. This paradigm calls for acknowledgment of the benefits of the rights holders and also the identification the obligations of the duty bearers in the civil and political rights framework. This dimension has been embraced by donor organisations such as UK Department for International Development (DFID), Norwegian Agency for Development Cooperation (NORAD), Danish International Agency for Development (DANIDA), Swedish International Development Agency (SIDA) and the Canadian International Development Agency (CIDA). These organisations have infused the human rights paradigm into the development mandates. The same with international financial organisations such as the World Bank and the IMF. The idea of good governance is now promoted as key to the Attainment of development goals.

The right to development unifies these two dimensions and therefore establishes the framework for understanding the nexus between human rights and development. The right codifies a long established practice in the United Nations where the unification of the civil and political rights with socio-economic rights has long been a tradition.\textsuperscript{56} Evidently, human rights and development share a commonality in their goals to secure freedom, well-being and dignity of all human beings. And although they may have developed separately, their convergence have become a reality in RtD. Its reach in matters of global governance, incorporation of socio-


\textsuperscript{56} See for example, the environment and development Rio; Population and development (Canberra); social development (Copenhagen), platform for Action (Beijing), the decade for peoples of African Descent.
economic rights, reformulation of the relationship between the individual and the global political order make it a suitable platform for improving the human condition. In addition, it may be worthwhile to mention that the nexus between human rights and development is growing to encompass more areas of international cooperation. Already, most experts are talking encouraging the expansion of the Millennium Development Goals (MDGs) agenda to incorporate the right to development. So, while there may appear to be disagreement on conceptualization of the right to development or how to implement it, there is much congruence in the goals of the right.

2. Normative structures

Several rights are implicated in the rights based approaches, especially in view of the nature of economic conditions and the development goals envisaged for people of African descent in regions discussed above. Most of these rights fall under the category of socio-economic and cultural rights and include rights such as the right to property, work, education health and even social security, which are provided for in ICESCR. This instrument embody essential elements required for human dignity and freedoms. The bundle of rights establishes and ensures a platform for social justice and well-being of all. Celina Romany underscores the importance of enforcing socio-economic rights to ensure development. She states that a "crucial area for the development and strengthening of democracies that recognize the States’ plurinational and multi-ethnic character must be underpinned by the effective implementation of the economic and social rights recognized in the Covenant on Economic and Social Rights."

57 Many of the rights established by this instrument and others have been violated.

The protection of the right to development as provided for in the Declaration must necessarily begin by addressing these violations. Let us examine two of these rights, the right to property and the right to work, in the context of DRD just to illustrate the point being made here. The right to property is guaranteed by almost all major international and regional human rights instruments as well as national constitutions. In Latin America, the questions of access, use (tenure) and ownership of land is very crucial. Land is a basic resource for the poor communities. As Frantz Fanon observed, "For a colonized people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread

and, above all, dignity”. They can at least produce some food from it, find shelter and mitigate conditions of poverty. Substantial number of people of African descent in Latin America live in lands in the rural areas where they were able to settle after slavery ended. Today, there is much uncertainty about ownership of these lands. In other places, economic encroachment have forced people into displacement. Thus there are now numerous local movements towards recognition of ownership in Honduras, Bolivia, Ecuador and Peru, and people of African descent together with indigenous groups are agitating for reform of the process for recognition of ownership. These efforts have been complemented by the keen interest that international donor organisations now have on the economic improvement of lives of the marginalised social groups. The pressure has thus been put on governments to undertake legislative reforms. In 1988, Brazil adopted article 68 into its constitution that recognized the land claims of historical communities and “quilombos” (descendants of freed slaves). In Colombia, Law 70 passed in 1993 recognised land rights of Afro-descendants in the Pacific coast. In 1998, Ecuador adopted article 83 which guaranteed collective rights to ancestral lands. These legal reforms have been prompted by the need to conform to donor demands rather being a result of the shift in government policy.

The right to work is important for improving income and rescuing these marginalised groups from poverty. It has a direct relevance to development. The high levels of unemployment among people of African descent in the regions discussed above, poor work conditions, lack of opportunities for employment in certain sectors, discrimination at work places and in securing employment and poor remuneration are well documented. And even when they find work, it is mostly the lowest positions with poor remuneration. Discrimination at work place and in employment is pervasive and the matter has reached the Commission. For example, the Commission found admissible a petition by a group of women alleging that they had been denied employment opportunity by reason that they were Afro-descendants. The Commission found that this constituted racial discrimination which was prohibited under article 24 of the IACHR. In addition to lack of work and discrimination in work places, lack of infrastructure facilities in the rural areas where most people of African descent live constrains their ability to improve their economic status. Other rights within the socio-economic rubric

59 See IACHR Report No 84/06 (Admissibility) Petition 1068-03, Neusa dos Santos Nasamento and Gisele Ana Ferreira (Brazil) 21 October 2006. See also, IACHR Report 66/06, Simone André Diniz (Brazil) Merits Case 12.001, 21 October 2006.
that could be mentioned are the rights to health and education. Both of which are provided for in the UDHR, ICESCR and ICCPR.

It is always important to remember that international human rights law do not provide all the answers and that international law in general has its weaknesses. It is state centred, and only states have capacity to participate in it. Yet the effectiveness of legal regimes lie in the ability of states to enforce them. Thus law must be embedded within the national judicial framework. In most countries, the human rights framework is contained in the Bill of rights sections of the constitutions. Any other rights that are outside these provisions have limited justiciable limits. In addition, states can suspend the constitution in many situations—through the use of one might refer to as claw back clauses, intimidation of the courts, and recognition of customary laws that run counter to rights. In addition, some regional bodies lack authority to enforce the law. For example, the Southern Africa Development Community (SADC) tribunal was disbanded when it upheld property rights.\textsuperscript{60}

\textbf{PROSPECTS FOR IMPLEMENTATION OF THE RIGHT TO DEVELOPMENT}

There are many formidable development challenges that marginalised communities of people of African descent face and confronting all of them is certainly not an easy task. Yet improving the conditions of marginalised group of people is a mandatory task which has obvious benefits. To begin with, it is in the best interest of any state to develop all its regions and all its communities. Societies with high inequality are generally at risk.\textsuperscript{61} Secondly, people of African descent produce essential goods and services to all levels of the society. They are mostly in the informal sector which services the poorest sections of the population. Economies that tolerate market discrimination and is segmented along racial lines “diminish productivity, growth and economic development”. Thirdly, some communities of people of African descent have a rich cultural heritage and may in some instances have access to natural resources. Harnessing development in these regions have tremendous positive economic impact on the state as a whole. The culture is a rich source of knowledge that could be harnessed to further educational and other goals. In many instances, culturally sensitive development agenda may be appropriate, and does in fact conform to international standards of human rights protection.

\textsuperscript{60} See M Hansungule, Suspension of the SADC tribunal (35 (1) \textit{Strategic Review for Southern Africa} 135; D Matyszak, The dissolution of the SADC tribunal, \textit{available at} http://archive.kubatana.net/docs/demgg/rau_dissolution_sadc_tribunal_110905.pdf

It is in light of all these factors that development of people of African descent should become a national priority. But in the wider context of rights based approaches to development, certain key aspects should necessarily be affirmed to make RtD useful in this endeavour. In my view, the aspects discussed below provide greater opportunity for implementing RtD and accelerating its actualisation for the benefit of marginalised communities.

Legal and policy interventions

There is urgent need for legal and policy interventions to deal with the challenges of development that people of African descent face in the various countries in which they live. In the previous sections of this paper we have summarised some of this challenges and they range from racial discrimination, to lack of access to health care and education. There is no question that development can be achieved through deliberate government intervention and by the enactment of target legislation and implementation policy that are favourable. Legal intervention can occur at two levels. The first by states signing and ratifying international treaties that set standards for ensuring optimum conditions for fostering development. The standards could then be domesticated by enacting suitable local laws that are capable of attracting enforcement by local courts. Latin American and even African states are parties to most of the international human rights instruments that guarantee rights. The idea of rights is therefore not entirely alien to them. Indeed, many of the countries now have legislations that domesticate international standards and make them enforceable domestically. The problem though is that these legislations have very little practical effect on racial and social discrimination and therefore abuse of rights still remains rampant. The authorities that implement the law are themselves discriminatory. In Latin America, cases involving people of African descent are delayed or speeded up depending on whether a white person is involved. It should be noted though that there are very few specific legislations that recognise the rights of the people of African descent. With the exception of Brazil, which introduced in the late 1990s a number of reforms to safeguards the interests of Quilombos in land, to outlaw discrimination in the media (Federal Law 8, 01/90, Lai Cao) and eradicate racism in work place (Law 9455/97), very few other Latin America countries have adopted reform aimed at prohibiting the endemic racism and social discrimination. Different dynamics play out in the African context where the rule of law is largely ignored by the minority elite and manipulated to suit the interests of the ruling class.

Apart from legislation, transparent policies aimed at promoting equity, public accountability, tolerance, the rule of law and human dignity. Strategic use of law and policy
may strengthening social capital by empowering previously divided and marginalized social
groups. And if the normative structures and policies are not put in place, development levels
of people of African descent will remain as they are, and not even programs such as MDGs
will benefit them.

1. Use of special measures

The use of special measures should also be mentioned. States may adopt special measures
to redress historical wrongs committed against particular groups. Such measures have been
variously referred to as “positive measures”, affirmative action”, “positive discrimination” or
“reverse discrimination”. According to the International Covenant on Elimination of All Forms
of Racial Discrimination (CERD):

Special measures taken for the sole purpose of securing adequate advancement of
certain racial or ethnic groups or individuals requiring such protection as may be
necessary in order to ensure such groups or individuals equal enjoyment or exercise
of human rights and fundamental freedoms shall not be deemed racial
discrimination, provided, however, that such measures do not, as a consequence,
lead to maintenance of separate rights for different racial groups and that they shall
not be continued after the objectives for which they were taken have been
achieved.62

The Inter-American Commission on Human Rights has supported the use of such measures to
promote equality “for victims of structural equality or long standing exclusions”.63 It has
recognised that “special measures are useful tools to remedy the persistent condition of de facto
discrimination as long as those conditions persist, and until equality of opportunities is
achieved. Given that affirmative action measures aim at resolving the situation of historical
discrimination affecting a particularly at risk group, these measures do not constitute
discrimination.”64 This approach to rights enforcement has been used in many countries. In
Canada, special measures have been used to ensure equity in employment. In South Africa,
where many years of the apartheid rule denied black population opportunity in education and
therefore curtailed their advancement, employment equity laws have been implemented to
provide formerly disadvantaged groups greater access to jobs and other benefits. Such
measures have been implemented in the South American region in varying formats. For

62 International Covenant on Elimination of All Forms of Racial Discrimination, art 1.4.
63 See IACHR, The Situation of People of African Descent in the Americas (2011), 64.
64 See IACHR, Considerations Regarding the Compatibility of Affirmative Action Measures Designed to
Promote the Political participation of Women and the Principles of Equality and Non Discrimination, Annual
Chapter VI.

28
example, in Ecuador Decree No 60 of 2009 provide for preferential access to positions in
government for Afro-Ecuadorians, and in Colombia, Law No 70 of 1993 establishes special
National Districts for Black Communities.  

It is suggested that many states that have communities of people of African descent
should consider adopting such measures in redressing inequity in employment and in areas
where representivity is critical. They may also be useful in protecting property, especially land,
from unwarranted expropriation or acquisitions by unscrupulous private operatives, such as we
have seen in some states, and in allocating social benefits. Special measures require legislative
force. States should be encouraged to back any policy frameworks with appropriate legislative
regimes. Such regimes will ensure that all sectors of the marginalised population, including
women are able to participate fully in the policy formulation as well as in institutions of
governance that implement such measures. Appropriate data must be kept to ensure that the
progress can be monitored and that measures taken are curtailed when the objectives have been
achieved. States must also ensure that adequate resources are allocated to institutions
established to effect these measures as well as to the overall development goals in marginalised
communities.

2. Role of human rights lawyers

There is a greater role for lawyers and human rights activists in the promotion of right
based approaches to development. The truth is that governments will only fully embrace the
right to development when its philosophical, economic, political and legal ramifications are
understood. Human rights lawyers must therefore assist in the interpretation of RtD and
developing legal frameworks that meet international standards and also answer to the needs of
marginalised communities. There is great need for human rights lawyers to engage with
scholars across the many disciplines to fashion appropriate understanding of how the right can
be implemented in the varying political environments that our world has become. What human
rights lawyers need to know is that human rights is not a preserve of lawyers. A lot of other
disciplines have something to contribute and the capacity to engage across disciplines is
desirable. Lawyers might claim that they do not have the necessary competence to engage in
cross-cutting debates, yet the reality is that they are particularly more suited than any other
professionals to “undertake the evaluation or analysis which is necessary to provide

---

65 See M Martinez and P Elias, Affirmative Action Measures or Special measures: Correct Historical
Injustices and Discrimination in OEA, Workshop on Experts on Afro-descendants in the Americas, Chapter 1 p. 16.

29
foundations upon which future legislative initiatives.” Human rights scholarship need not be confined to chronicling of violations and must go beyond the superficial to unravel the situations of potential difficulty. And focusing on structures which generate or are conducive to human rights violations should be the goal of legal enquiry not mere instances of violations. In legal circles, too much effort has been expended in condemning and resisting interpretations of the right to development which reflect its philosophical alignment to the overall human rights agenda, than on specific proposals on duties and obligations which flow from the right.

**Participation**

As already mentioned, participation is a key element in the attainment of the RtD. Indeed, for rights based approaches to succeed, there must a high degree of participation from the broad range of stakeholders. Participation must generally free, active and meaningful. The Declaration on the Right to Development has elaborate provisions in this regard that I have already discussed. Unfortunately, people of African descent do not participate in the design of development policies and programmes that affect them. So they cannot influence important policies such as those that relate to decentralisation of resources. This is not conducive to attainment of any level of development. Participation enhances accountability in the use and distribution of resources that influence development. The role of participation in making rights meaningful is not new in international normative circles. For example, the International Labour Organisation (ILO) had developed the need for participation and engagement with social groups in 1987 where it urged agencies to encourage governments to “promote participation and dialogue with and between social groups”. But meaningful participation is only possible when people are properly informed and suitably empowered. This cannot happen unless they are sufficiently educated. Thus education is key to any development agenda. The relationship between education and poverty reduction is well articulated by most donor programs. For example, the UK’s Dfid has stated that “The elimination of poverty and progress towards sustainable development will only take place if there are increased and improved levels of education.” It goes on to explain the rationale as follows:

In enabling poor people to develop skills, education enhances productivity and provides an essential underpinning for economic growth. Without improved levels of education, sustained and equitable economic growth will not take place. There is

---

a close parallel between the rates of economic growth of a country and the overall level of education of its economically active population.\textsuperscript{67}

Education is also useful in the attainment of other societal growth indicators such as democracy, increased protection of human rights and attainment of human development.\textsuperscript{68} All these enhance the capacity of people to make informed choices about their economic situation.

\textbf{Research and documentation}

Often policy makers, experts such as yourselves and development agencies are on one side while the people at the grass roots are on the other. This does not allow for ideas to ventilate. Do researchers, experts and policy-makers communicate with each other? Research and policy interface is a problem that most development projects face. The other problem is the rural/urban dichotomy and the dynamics that it produces which make it almost impossible to engage rural communities is some of these deliberations. The result is that developments projects are concentrated in urban areas where there is greater free flow of information and stakeholders are readily accessible. To understand the conditions of marginalised communities one has to talk to them. Their stories must be told. There is often scarcity of funds to support meaningful research and documentation. The international organisations should aim to be incubators of intellectual ideas not mere platforms for regurgitation of documents and policy instruments developed by ivory tower institutions or think tanks. Meaningful research must engage with communities concerns. Thus local researchers must be given a chance and appropriately supported.

As already mentioned, there is often a problem of determining the accurate numbers of people of African descent so as to focus attention on their development needs. There is great need to improve data collection in this regard because little is known about communities that live in remote areas that have for years been neglected by governments. It suggested therefore that methods used to collect data in the Americas and Europe must have ethno-racial indicators, so as to reflect the real situation of indigenous populations and peoples of African descent. There should also be free flow of information so that engagements can be meaningful. Also development must be research driven. But this is only possible if it is well-informed, credible

\textsuperscript{67} See DfID, Education for All (2000).
and produces meaningful data and information about the socio-cultural, and economic conditions of communities and gauge the effectiveness of policy and law.

Monitoring mechanisms

Rights based approaches to development necessarily require that systems of enforcement of any rights be established. Secondly, the attainment of development goals are contingent on the existence of a well-functioning monitoring system. These systems may take many forms and states may be at liberty to establish mechanisms that allow them to assess whether the development needs of marginalised communities are being met. Since we are talking here of rights, a better approach may be that which protect entitlements and ensure that obligations are met. In the rights discourse, the achievement of this goal is possible when national institutions do their job. Human rights advocates believe that national institutions offer better chance for rights protection than international ones. This is because they are accessible, enforcement is immediate and are results oriented. In this regard, states may be called upon, as already mentioned to establish legal systems that work, and which provide mechanisms of rights protection that are accessible to marginalised groups. Such mechanisms must remove or minimise the vulnerabilities that such groups have and position themselves as collaborators in the quest for development.

1. International mechanisms

Apart from national institutions, there are a number of mechanism for rights protection at the international and regional levels. Currently there are several monitoring mechanisms established by either the UN Charter or by multilateral treaties. Treaty bodies have been established to monitor rights provided for in treaties such as ICCPR, CEDAW and CERD. These bodies have systems for dealing with individual complaints of human rights violations and also consider state reports on performance. Human rights violations and conditions of deprivation must be regularly monitored to ensure that the society is on the right path. Since the right to development present unique sets of challenges, scholars have suggested that a special monitoring body be established at the UN level to monitor the performance of states as regards RtD. Whether or not the establishment of such a body may require a treaty is a matter that can be debated. Such a body will be responsible for fostering implementation by elaborating on the right and facilitating the exchange of information and the sharing of best practices. It may also provide the focal point for conversations around RtD and coordination.
of state action. This might be particularly useful considering the need to continuously build consensus around the many issues that affect people of African descent, and which have a bearing on the violations of their rights. In addition to the establishment of such a body, the various levels of governance and rights enforcement must begin to work together bearing in mind the role of grassroots civil society groups and the other collaborators.

2. Regional mechanisms

Mention must also be made of regional efforts in the enforcement of rights that the body suggested above could borrow from. Key in this regard are the different regional human rights systems which provide levels of enforcement for human rights violations almost along the same lines as the UN treaty bodies do. Primarily, they provide avenues for seeking redress for human rights violations by individuals and consider state reports. I am suggesting that advocacy strategy that focuses on expanding the use of these systems by marginalised groups may be desirable. This is because these bodies provide platform for articulation and elaboration of rights and may be particularly useful for groups whose natural resources are targeted for national expropriation or acquisition by private sector operatives as we have seen in the South American situation. Let us take the example of the African human rights system that is based on the African Charter on Human and Peoples Right. The African Charter was perhaps the first instrument of a multilateral character to provide for the right to development. According to Evans and Murray, the Charter “is unique in codifying a legally binding right to development upon states”.69 The right, which is provided for in article 22 places obligations on states with regard to development that is unprecedented. That provision is worded as follows:

(1) 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.
(2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

What is interesting is that already the African Commission on Human and Peoples Rights has heard a complaint based on this provision. This was the Endorois case70 against Kenya. The Endorois community are a sub-group of the larger Kalenjin ethnic community leaving in Northern Kenya. Sometime in 1974, the Kenyan government began a process of removing the

---

members of this community from their land to create room for a wildlife reserve. The Community challenged the displacement that had separated them from vital natural resources in their land and denied them the rights to freely dispose of their wealth and natural resources, contrary to article 21 of the Charter. In addition, they claimed that the creation of the game reserve and the refusal of the state to involve them in the development process violated their rights to development as guaranteed in article 22. According to the Commission the right to development provided for in article 22 was both “constitutive and instrumental”. Its view was that development required the fulfilment of five criteria, namely, that it is equitable, non-discriminatory, participatory, accountable, and transparent. Notably, the Commission observed that right to development did not simply refer to the physical such as schools and roads, “the result of the development should be the empowerment of the Endorois community. It is not sufficient for Kenyan authorities to merely give food aid to Endorois. The capabilities and choices of the Endorois must improve in order for the right to development to be realised.”

Given the position adopted by the Commission, it becomes apparent why participation is critical to the realisation of the right to development. And even where there has been consultation, the Commission observed that there must free and informed consent before community resources and traditional lands of indigenous communities can be exploited.

It should also be recognised that there have been vigorous engagements and studies within the Inter American human rights system as well. Indeed, there is recognition of the plight of people of African descent and the Commission has been more than succinct about the need to acknowledge the extent of human rights violations that these communities suffer and have called for greater accountability for governments in the region.

**International cooperation**

The key word here is collaboration. This idea is embodied in the Declaration of the Right to Development. States are enjoined to seek collaboration and cooperation to foster their development agenda. But greater collaboration between international agencies is key to the

---


73 Endorois supra note 70 at para 277. The criteria set out above are also embodied in art 2(3) of the UN Declaration on the Right to Development, U.N. GAOR, 41st Sess., Doc. A/RES/41/128 (1986), which states that right to development includes, “active, free and meaningful participation in development”.

74 See Singoe & Shepheard supra note 71 at 75.
infusion of the rights agenda into the overall spectrum of development oriented programs across the globe. Many will recall that in 1999 the UN adopted the Declaration on Human Rights Defenders, which primarily acknowledged the role of individuals groups and associations in the promotion of human rights and the need for them to work together in this regard.\textsuperscript{75} This underscored the importance of seeking collaboration towards human rights protection. Collaboration with development agencies and international financial institutions such as the World Bank and the IMF should be harnessed in the context that they provide greater human rights protection which support development goals. Thus far, The UN has been instrumental in linking socio-economic development and human rights and freedoms. The so-called UN path that have provided forum for dealing with some of the concerns raised in this paper and made visible the plight of people of African descent indicate the importance of the multilateral effort. The 2001 Durban Conference, as well as its Declaration and Plan for Action, are part of this path, and have laid the foundation for UN action in this regard. A lot of what has happened thus far have built on this foundation.

1. Role of NGOs and other None-State actors

The role of NGOs and transnational and civil society organisations must also be acknowledged. It should be noted that NGOs are an integral part of the development process especially in rural communities. They exist at the grassroots and provide useful information on conditions of marginalised communities. They invariably collect information on human rights abuses and serve as advocates of members of these communities. At the international level, NGOs and civil society groups are major players. They have claimed presence in international events such as the Conference on Environment and Development (Rio de Janeiro, 1992); the World Conference on Human Rights (Vienna, 1993); the International Conference on Population and Development (Cairo, 1994); the World Summit for Social Development (Copenhagen, 1995); the four World Conferences on Women in Mexico (1975), Copenhagen (1980), Nairobi (1985) and Beijing (1995); and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001). And in all these instances, NGOs and civil society groups have greatly influenced the demands, recognition and enforcement of rights. It must be acknowledged however that greater spaces for civil society participation in international conversations is still desirable.

2. Millennium Development Goals (MDGs)

International cooperation can also be forged around the MDGs. It is one of the areas in which development and human rights have forged cooperation at least in the international sphere. The MDGs came out of the Millennium Declaration and are quantifiable targets set by the UN to be attained by the year 2015. The 8 specified goals which talk to the objectives of eradicating poverty, achieving universal primary education, promotion of gender equality, reduction of child mortality, improvement of maternal health, combating HIV/AIDS and other diseases, environmental sustainability, and lastly promotion of global partnership for development. The MDGs have now become a key focal point in the work of both the UN towards the elaboration of the right to development and its realisation. The High Level Task Force (HLTF) established by the Commission in 2004 to operationalise the right, was mandated "to examine MDG Goal No 8 ...and suggest criteria for its periodic evaluation with the aim of improving effectiveness of global partnership with regard to the realisation of the right to development". The recommendation made by HLTF in November 2005 which included seeking better ways in which the partnership could reflect human rights standards and a rights based approach to development were wholly endorsed by the Working Group on the Right to Development. Thus, the 8th goal is of interest because its aim of strengthening "global partnerships for development" is an integral aspect in the elaboration of the right to development. This means that development goals that target marginalised communities can set priorities for states in their engagement with international partners. Indeed it can be argued the right to development now provide legal grounding for such favourable cooperation, and especially towards achieving development targets that have implications for the attainment of MDGs as well.

CONCLUSION

Respecting the dignity and worth of all people is a matter that should be at the centre of today's global development agenda. The right to development or the rights-based approach to development is thus not only a legal question but a moral one as well, and should touch on all humanity. In this paper I have attempted to summarise some of the main imperatives of this approach based on the elaboration of the UN Declaration on the Right to Development. The key elements of RtD, which include the affirmation of the right as inalienable, participation and international cooperation, provide a suitable tool for dealing with lack of access to
education and health, poverty and other challenges that people of African descent face. Thus, upholdong and implementing RtD is one way of significantly responding to the development needs of this marginalised group.