

Locating the Right to Development in Kenya

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ABSTRACT

Perhaps one of the most critical of all human rights is the right to development. Yet since its emergence in the 1970s and through its evolution it has been the subject of both academic and political controversy. Over the last four decades, the right to development has come to be a fundamental human right with the human person being identified its central subject and beneficiary. With the coming into force of the new Constitution on 27 August 2010, international law became part of the law of Kenya. The Constitution's expanded Bill of Rights lays down a progressive framework for the realisation of rights and realisation of the full potential of its subjects. Its net effect is to lay a foundation for the realisation of the right to development. This article locates the place of the right to development in Kenya's new constitutional dispensation.

1 INTRODUCTION

A scrutiny of the constitutions that Kenya has had since independence shows that the first post-independence constitutional order was designed to be little more than a regulatory framework for state affairs whereas the 2010 constitutional order is dominated by a social transformation ideology of rights, welfare and empowerment. In the case of *Gathungu v Attorney-General*¹ Justice Ojwang observed that the 2010 Constitution is a social transformation document that seeks to address historical social injustices that the previous constitutional order had visited on its subjects.

In adopting the 2010 Constitution, the people of Kenya committed themselves to nurturing and protecting the well-being of the individual, the family, communities and the nation.² Several of its provisions provide a framework for realisation of the right to development. These provisions of the Constitution, coupled with policy initiatives in the Kenya Vision

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¹ (2010) eKLR.

² Preamble [5].

2030, the Millennium Development Goals (MDGs), and the African Peer Review Mechanism (APRM) provide that framework within the state.

This article traces the emergence and evolution of the right to development in international human rights law and discusses its nature as a human right. The right to development is then located in the current governance structure with the Constitution of Kenya 2010 as its foundation. The opportunities that the new constitutional dispensation and current policy statements bring to the quest for realisation of the right to development are also examined.

2 THE RIGHT TO DEVELOPMENT

The definition of development has been in a state of flux for a long time now. It has also shifted over time.³ To some, it has been equated to economic growth and, therefore, with free markets.⁴ Development seen this way is not necessarily what people want but rather that which is imposed by economic powers. On the other hand, others argue that development means progress beyond mere economic growth.⁵ The concept of development adopted in this thesis, is the one endorsed by the United Nations (UN). The preamble to the UN Declaration on the Right to Development (DRD)⁶ defines development as:

... a comprehensive economic, social, cultural and political process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

The World Bank has taken the view that development encompasses the entire spectrum of change in any social system. It has affirmed the complex and multidimensional nature of development in the following terms:

The challenge of development is to improve the quality of life. A better quality of life generally calls for higher incomes but it involves much more. It encompasses as ends in themselves better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom and a richer cultural life.⁷

Amartya Sen approaches these complex and multidimensional objectives of development from the perspective of functionings and capabilities. He argues that people develop if they have capability to function.⁸ The concept of functionings reflects those things that

³ K Feyter, *World Development Law: Sharing Responsibility for Development* (Intersentia 2001) 2.

⁴ Ibid.

⁵ Ibid.

⁶ UN General Assembly Resolution 41/128 (4 December 1986).

⁷ World Bank, *World Development Report* (Oxford University Press 1991) 4.

⁸ A Sen, *Development as Freedom* (Alfred Knopf 1999) 75.

a person values doing and they vary from simple things like proper nutrition to complex ones such as self-respect and involvement in the community.⁹ Capabilities, on the other hand, refer to the freedom that a person has in terms of his choice of functionings, taking into account his personal characteristics and his command over available goods and services.¹⁰

Development is, therefore, both a physical reality and a state of mind. The two aspects of development have in them combinations of social and economic processes which have the objectives of increasing the availability and widening the distribution of life-sustaining goods, raising living standards and expanding the range of economic and social choices available.¹¹

There is no universally accepted legal definition of development. The UN Charter does not define development although in art 55 it spells out its objectives for international social and economic co-operation. Article 55 provides that the UN shall promote higher standards of living, full employment and conditions of economic and social progress and development; solutions of international economic, social, health and related problems; international cultural and educational co-operation; and universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

This approach is a decentralised one. It enables UN members to take separate and joint action on the above objectives. As a consequence, specialised agencies were created in the UN system to deal with various issues such as health, education, agriculture etc. A common approach to development in the UN system created the need for a co-ordination focal point. This led to the creation of the United Nations Development Programme (UNDP), which developed a conceptual definition of development through its *human development report series* first published in 1990.

The human development idea developed by the UNDP was a reaction to the equation of development to economic growth only.¹² The UNDP human development reports define development as a process of enlarging people's choices. The reports recognise income as one aspect of — and not only aspect of — well-being.¹³ As a process of enlarging people's choices, the human development paradigm has four main components.¹⁴ These are productivity, equity, sustainability and empowerment.

⁹ Ibid.

¹⁰ A Sen, *Commodities and Capabilities* (New Holland 1985) 10-11.

¹¹ M Todaro, *Economic Development* (Pearson Addison Wesley 2003) 22-23.

¹² Feyter (n 3) 4.

¹³ Ibid.

¹⁴ United Nations Development Programme, *Human Development Report 1995* (Oxford University Press 1995) 12; Feyter (n 3) 4.

The UNDP human development reports became a major reference point for the UN as it developed its Agendas for Development in 1994 and 1997. In 1992, the UN General Assembly requested the Secretary-General to prepare an agenda for development.¹⁵ This was to be a working counterpart to the UN agenda for peace released in the same year. The Secretary-General presented his agenda in 1994 and this was adopted by the General Assembly.¹⁶

Thereafter, the General Assembly tasked an open-ended ad hoc Working Group that it set up, to discuss the text further. The Working Group's report was adopted by consensus in 1997.¹⁷ This report did not fundamentally change the Secretary-General's. It only added a wish list for all interested parties: a traditional diplomatic method of achieving consensus.¹⁸

The 1994 Agenda confirms that each state bears the primary responsibility for its own development. The Secretary-General's report is adamant that while the individual state is no longer the sole actor in development, each state continues to bear primary responsibility for its own development. Whether expressed as a responsibility of states or as a right of peoples, development requires competent governmental leadership, coherent national policies and strong popular commitment.¹⁹ The state must make strategic decisions for development through appropriate national policies. It must have the political will to act.²⁰ Capacities for designing, implementing and enforcing policy must be strengthened as well as adequate weight given to government's responsibility for social development through political processes. As de Feyter observes, governance is the single most important development variable within the control of individual states.²¹

The UN Agendas for development emphasise that states bear the primary responsibility for realising the development of the people in their territory. In the 1970s, when developing countries initiated the debate at the UN on the right to development, their hope was that a human rights approach would strengthen their claims for a more equitable distribution of goods globally under a new international economic order.²² The use of human rights language in turn led to questions as to whether a human right to development existed, and if it did, what it meant.

¹⁵ UN General Assembly Resolution 47/181 (22 December 1992).

¹⁶ UN Doc A/48/935 (6 May 1994).

¹⁷ UN Doc A/51/45 (16 June 1997).

¹⁸ Feyter (n 3) 6.

¹⁹ UN Doc A/48/935 (n 31) [139].

²⁰ Feyter (n 3) 7.

²¹ Ibid.

²² F Ouguerouz, *The African Charter on Human and Peoples Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development in Africa* (Martinus Nijhoff Publishers 2003) 310-311.

The DRD, while recognising development as a multi-dimensional concept, differs from the UN agendas on development by introducing a legal perspective: human rights. It obliges all states to take steps to eliminate all obstacles to development resulting from the failure to observe civil and political rights, as well as economic, social and cultural ones.²³ This provision debunked the common argument in many post-colonial states in the 1960s and 1970s that violations of human rights were excusable for the sake of economic development and that the realisation of human rights in those states was dependent on the transfer of resources from developed to developing countries.²⁴

The DRD effectively ended the 'economistic' approach to development by incorporating the concept of human rights. The 'economistic' approach to development assumes that for a people to develop, their *per capita* income must increasingly grow over time. Therefore, if human rights are part of the definition of development, their violation constitutes lack of development.²⁵ But given the 'soft law' nature of the DRD, perhaps its main contribution has been the mainstreaming of development co-operation in the various UN development agencies.

The idea of a human right to development was articulated for the first time by Keba Mbaye in 1972.²⁶ Until 1993 when the World Conference on Human Rights (Vienna Conference) was held, the right remained the subject of politically charged debate, especially at the UN level.²⁷ The UN Declaration on the Right to Development of 1986 did little to explain what such a right actually meant or necessitated. Instead, it had the effect of fuelling the controversy surrounding an already highly contentious issue.²⁸

The controversial debate on the right to development can be traced to the politics that surrounded the development of international human rights law in the mid-twentieth century. The international community at that time intended that after the adoption of the Universal Declaration on Human Rights (UDHR)²⁹ by the UN, that a single covenant incorporating all the rights it set out be negotiated to give them the force of an international treaty.

Although the immediate post-Second World War political environment had created unanimity in the international community that human rights were indivisible and interdependent as evidenced by the

²³ Article 6(3).

²⁴ K Feyter, *World Development Law: Sharing Responsibility for Development* (Intersentia 2001) 21.

²⁵ Ibid.

²⁶ K Mbaye, 'The Right to Development as a Human Right' (1972) *Human Rights Law Journal* 503.

²⁷ S Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 *Harvard Human Rights Journal* 137.

²⁸ J Paul, 'The Human Right to Development: Its Meaning and Importance' (1992) 25 *John Marshall Law Review* 235.

²⁹ UN Doc A/RES/41/128 (1948).

UDHR, that solidarity eventually gave way to the Cold War and states became divided in their support for the various rights.³⁰ As a result, in 1966 the UN adopted two international human rights instruments. These were the International Covenant on Civil and Political Rights (ICCPR)³¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³² In the preambles of both the ICCPR and the ICESCR, the dominant theme of the UDHR that 'the ideal of all human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created where everyone may enjoy his civil and political rights as well as his economic, social and cultural rights' was restated. Reference to the dominant theme of the UDHR by both the ICCPR and the ICESCR is an indication that the community of nations recognised the indivisibility and interdependence of rights despite having adopted two separate instruments.

The UN confirmed the recognition of the indivisibility and interdependence of human rights by the ICCPR and the ICESCR with the adoption of the Proclamation of Tehran in 1968. The Proclamation of Tehran was emphatic that 'since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of social, economic and cultural rights is impossible'.³³ One year later, the Declaration on Social Progress and Development³⁴ reiterated that position.

The existence of the right to development was affirmed by the UN at the Vienna Conference through consensus. The Vienna Declaration and Programme of Action (Vienna Declaration)³⁵ stressed that the right to development as established by the DRD was a universal and inalienable right and an integral part of the body of human rights.³⁶ It also declared that the human person was the central subject of development. The recognition of the right to development as a human right at that time was of a right that integrated economic, social and cultural rights with civil and political rights in the manner conceived by the human rights movement before the Second World War. The United States of America, which had previously opposed the idea of the right to development, voted in favour of the Vienna Declaration.³⁷

In terms of consensus, many intergovernmental conferences that followed the Vienna one seem to have put to rest the debate as to

³⁰ A Sengupta, 'On the Theory and Practice of the Right to Development' (2002) 24 *Human Rights Quarterly* 837, 839; D Chirwa, 'Towards Revitalising Economic, Social and Cultural Rights in Africa' (2002) 10 *Human Rights Brief* 14.

³¹ UN Doc A/6316 (1966).

³² *Ibid.*

³³ UN Doc A/Conf.32/41 (1968).

³⁴ UN Doc A/7630 (1969).

³⁵ UN Doc A/Conf. 157/23 (1993).

³⁶ *Ibid.*, art 10.

³⁷ Sengupta (n 30) 841.

whether the right to development exists as a human right. These conferences include the International Conference on Population and Development (1994), the World Summit for Social Development (1995), the Fourth World Conference on Women (1995), the World Food Summit (1996) and the Second UN Conference on Human Settlements (1996). However, at the UN level the right remains soft law, since it has not been embodied in a treaty.

At the regional level, the African Charter on Human and Peoples Rights (ACHPR)³⁸ explicitly spells out the right to development as being the right of all peoples to their economic, social and cultural development.³⁹ The ACHPR is the only legally binding international instrument that contains an explicit affirmation of the right to development. In its preamble the ACHPR recognises that the African situation demands that particular attention be paid to the right to development. The preamble further urges that with regard to the right to development, civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as their universality. Importantly, it recognises that the satisfaction of economic, social and cultural rights is a guarantee for enjoyment of civil and political rights.

The early 1960s saw the birth of newly independent African states. Political emancipation was the prime consideration for those states at that time. Accordingly, the focus of the Organisation of African Unity (OAU) at its inception in 1963 was the concerns of newly independent states and liberation of the colonised ones.⁴⁰ Human rights were not the direct concerns of African states at the time of formation of the OAU. But at the same time there were some indications towards respect for human rights. The preamble to the OAU Charter reaffirmed its members' adherence to the UN Charter and the UDHR as the solid foundation for peaceful co-operation amongst states.⁴¹ Other parts of the Charter impliedly encompassed human rights but the main focus was political liberation.

Post-independence Africa was turbulent. Political instability brought about corruption, economic deprivation, authoritarian governments and civil war.⁴² Leaders lost touch with their people and the means of retaining control of power was through authoritarianism and abuse of human rights. Irrespective of the lack of emphasis on human rights at its inception, the OAU undertook in art 2(1) of its Charter 'to promote international co-operation having regard to the Charter of the United Nations and the Universal Declaration on Human Rights'. Prior to

³⁸ 21 ILM 58 (1982).

³⁹ Art 22(1).

⁴⁰ K Quashigah, *The African Charter on Human and Peoples Rights* (Centre for Human Rights, University of Pretoria 2002) 1.

⁴¹ *Ibid.*

⁴² *Ibid.*

its formation, also, some thought had been given to a human rights system for Africa. In 1961 at its Congress of Lagos, the International Commission of Jurists (ICJ) called for the formulation of an African Convention on Human Rights.⁴³ At another seminar in Dakar in 1978, the ICJ requested the OAU to do everything possible to establish a system of guarantees and verification of human rights in Africa.

By 1979, the ground had been sufficiently prepared for the Assembly of Heads of State and Government of the OAU to direct the Secretary-General to 'organise as soon as possible in an African capital, a meeting of highly qualified experts to prepare a preliminary draft of an African Charter of Human Rights providing among other things for the establishment of bodies to promote and protect human rights'.⁴⁴ The ACHPR thereafter came into force on 21 October 1986.

The ACHPR is flexible and with a changing political environment can be interpreted in a liberal fashion. One avenue for such interpretation of the ACHPR can be found in art 60. The art sets out guidelines of interpretation for the African Commission as follows:

The Commission shall draw inspiration from international law on human and people's rights, particularly from the provisions of various African instruments on human and people's rights, the Charter of the United Nations, the Constitutive Act of the African Union, and the Universal Declaration on Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and people's rights as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the parties to the present Charter are members.

2.1 *The Right to Development as a Human Right*

Whether a particular claim is a human right in international law can be determined by ascertaining if it has been accepted as such by the community of nations through a norm-creating process.⁴⁵ As Sengupta observes, a pronouncement of the General Assembly of the UN can contribute to this process either by adopting and opening for signature an international convention or treaty that creates binding obligations on states that ratify it, or by expressing the consensus of the international community on the meaning of a particular human right through a declaration, which if reaffirmed in subsequent international pronouncements as well as by state practice, may gradually gain the status of customary international law.⁴⁶

The right to development has been defined as a right to a particular process of development in which all human rights can be realised. This

⁴³ Ibid 2.

⁴⁴ Ibid.

⁴⁵ Sengupta (n 30) 843.

⁴⁶ Ibid.

process must aim at the constant improvement of the well-being of the person and the entire population.⁴⁷

2.2 *The Content of the Right to Development*

Article 1 of the DRD provides:

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

The DRD defines development in terms of a human right.⁴⁸ It is the right to a process of development which ensures that equal opportunities are provided. Where, for example, a country records a sharp increase in its Gross Domestic Product (GDP) but the gap between the standards of living of the rich and the poor widens, the right to development is violated. There may be growth in the economy but the increased income does not spread over all its sectors. Economic growth that is accompanied by increased inequalities and rising concentrations of wealth and economic power without any improvement in the indicators of social development, education, health, gender equality and environmental protection cannot fulfil the human equality to development.⁴⁹

The nature of the process of development contemplated by the DRD is centred on equity and justice. The majority of the population, who are usually poor or deprived, must have their standards of living raised and their capacity to improve their lot strengthened. This conception of well-being extends beyond conventional notions of economic growth to include the expansion of opportunities and capabilities to enjoy those opportunities in the development process.⁵⁰ The DRD is rooted in the notion that the right to development is a claim to a social order based on equity. A number of its provisions relate to the equality of opportunity, equality of access to resources, equality in sharing of benefits and fairness of distribution, and equality in the right to participate in the process.⁵¹

⁴⁷ Ibid 847.

⁴⁸ A Sitta, 'The Role of the Right to Development in the Human Rights Framework for Development' <http://www.capabilityapproach.com/pubs/5_1_Sitta.pdf> accessed on 11 July 2011.

⁴⁹ Sengupta (n 30) 848.

⁵⁰ Ibid; Sitta (n 48) 7.

⁵¹ Sengupta (n 30) 848.

Casting the right to development as a human right has certain implications. When it is asserted that a subject (right-holder) has a specific right, it means that that subject is entitled to claim against another subject (duty-bearer) that his right be respected. The other subject has a duty to respect, fulfil and protect that right.⁵² The assignment of duties is particularly important for purposes of establishing accountability for realisation of rights.

Article 2 of the DRD places the human person at the centre of the right to development. It states that the human person is the central subject of the right to development who should be an active participant and beneficiary of the right to development. The article provides that:

1. The human being is the central subject of the right to development and should be the active participant and beneficiary of the right to development.
2. All human beings have a responsibility for development, individually and collectively, taking into account the need for the full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect and appropriate political, social and economic order for development.
3. States have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits arising therefrom.

The DRD captures its duty-holders in a broad manner. The responsibility to realise the right to development falls upon individuals and states. Article 2(2) requires individuals both individually and collectively to take responsibility for realisation of the right to development by respecting the rights and freedoms of others. In the same way the community of individuals must commit to creating an environment of equity and social justice to make the right to development a reality for all.⁵³

Article 3, however, draws attention to the fact that the primary responsibility for realisation of the right to development lies with the state. States bear the duty of creating national and international conditions favourable to realisation of the right.⁵⁴ The actions that states are required to take at both national and international level are elaborated in various articles of the DRD. Article 2(3) creates both a right and duty for states to develop appropriate national development policies. Under art 8, states should undertake at the national level, all measures necessary for the right to development to be realised and encourage popular participation in all spheres of the development

⁵² Sitta (n 48) 7.

⁵³ Ibid 8.

⁵⁴ Sengupta (n 30) 853.

process. Article 6 obligates states to eliminate obstacles to development arising from failure to observe economic, social and cultural rights because the implementation, promotion and protection of those rights are essential to the realisation of the right to development.

Article 22 of the ACHPR proclaims the right to development in the following terms:

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 and collectively, to ensure the exercise of the right to development.

The jurisprudence of the African Commission on Human and Peoples Rights does not offer much insight into the character of the conception of the right to development in art 22.⁵⁵ In *Centre for Minority Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*⁵⁶ (the *Endorois* case), the African Commission was for the first time called upon to decide a matter in which violation of art 22 was alleged. In that communication, the complainants alleged that the Government of Kenya, in violation of the ACHPR, the Constitution of Kenya and international law, had forcibly removed them from their ancestral lands around Lake Bogoria in the Baringo and Koibatek District of the Rift Valley Province of Kenya without proper consultation and without adequate and effective compensation.

In finding that the Government of Kenya had violated art 22 of the ACHPR, the African Commission declared that ‘development is not simply the state providing for particular individuals or peoples but is about providing people with the ability to choose. Freedom of choice must be part of the right to development’.⁵⁷ The Commission further observed that it is incumbent upon the state to allow affected persons to participate in making decisions crucial to the life of their community.⁵⁸ Finally, by invoking art 2(3) of the DRD that the right to development includes ‘active, free and meaningful participation in development’, the Commission concluded that the result of development must be the empowerment of the people it benefits and that the capabilities and choices of its subjects must improve for it to be realised.⁵⁹

Any conception of the right to development under art 22 must see the peoples’ participation in their own development as an irreducible minimum and the right to development as inclusive of the rights to

⁵⁵ Charles Okafor, “‘Righting’ the Right to Development: A Socio-Legal Analysis of art 22 of the African Charter on Human and Peoples Rights’ in Stephen Marks (ed), *Implementing the Right to Development: The Role of International Law* (Friedrich Ebert Stiftung 2008) 52, 55.

⁵⁶ Communication No 276 of 2003.

⁵⁷ *Ibid* [278].

⁵⁸ *Ibid* [282].

⁵⁹ *Ibid* [283].

the means, process and outcomes of development.⁶⁰ According to art 22, the right to development is to be claimed by 'all peoples'. Although the term 'peoples' appears several times in the ACHPR, it is not defined. Kiwanuka argues that this was a deliberate omission on the part of the drafters of the ACHPR.⁶¹ The drafters of the ACHPR foresaw the difficult discussion on the precise meaning of the term and chose not to ascribe any meaning to it because of its political connotations that varied from country to country.⁶² This dilemma is captured in the *Endorois* decision in the following terms:

Despite its mandate to interpret all provisions of the African Charter as per art 45(3), the African Commission initially shied away from interpreting the concept of peoples. The African Charter itself does not define the concept. Initially the African Commission did not feel at ease developing rights where there was little concrete international jurisprudence. The ICCPR and the ICESCR do not define 'peoples'. It is evident that the drafters of the African Charter intended to distinguish between traditional individual rights where the section preceding art 17 make reference to 'every individual'. Article 18 serves as a break by referring to the family. arts 19 to 24 make specific reference to 'all peoples'.⁶³

The African Commission noted that the ACHPR is an innovative and unique human rights document compared to other regional instruments by placing emphasis on the rights of peoples. It departs from the narrow formulations of the other instruments by weaving a tapestry through the three generations of rights: civil and political; social and economic; and group or peoples' rights.⁶⁴ In the context of the ACHPR, the term 'peoples' is therefore associated with collective rights.

Article 22 places the primary duty to ensure exercise of the right to development on the state. Unlike the DRD, it places no duty on the individual or peoples to ensure realisation of the right. Article 1 of the ACHPR buttresses this position by providing that States Parties to the Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

The nature of the legal obligation to realise the right to development is one of taking legislative or other measures to do so. These measures should create an environment in which people can develop their full

⁶⁰ Okafor (n 55) 56.

⁶¹ R Kiwanuka 'The Meaning of "People" in the African Charter on Human and Peoples Rights' (1999) 82 *American Journal of International Law* 82.

⁶² Report of the Rapporteur of the OAU Inter-Ministerial Meeting on the Draft African Charter on Human and Peoples Rights CAB/LEG/67/3/ Draft Rapt. Rpt II, p 4.

⁶³ The *Endorois* Case (n 56) [147].

⁶⁴ *Ibid* [148].

potential and lead productive and creative lives in accordance with their needs and interests.⁶⁵

3 THE RIGHT TO DEVELOPMENT IN KENYA

International human rights law on the right to development enjoins states to take legislative and other measures to ensure realisation of the right by their subjects. In Kenya, the possibilities for realisation of the right to development are to be found in the Constitution, Kenya Vision 2030, the MDGs and the APRM.

3.1 *The Constitution*

Article 2 of the Constitution pronounces the supremacy of the Constitution and declares that it binds all persons and all state organs at both the national and county levels of government.⁶⁶ It also imports the general rules of international law and any treaty or convention ratified by Kenya to form part of the law of the country.⁶⁷ The text of the Constitution makes Kenya a monist state in international law. A domestication process is no longer necessary to translate treaty obligations into law. Article 2(5) provides that the general rules of international law shall form part of the law of Kenya. Article 2(6) further provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya.

In *Re Zipporah Wambui Mathara*⁶⁸ the High Court considered the provisions of the ICCPR and held that by virtue of the provisions of art 2(6) of the Constitution, international treaties and conventions that Kenya has ratified are part of its law. This was the first decision made by the courts with regard to the position of international law in the new constitutional order. The judgment was issued in September 2010, a month after the promulgation of the Constitution. Two months later the High Court sitting as a constitutional court in *Gathungu v Attorney-General*⁶⁹ affirmed that the general rules of international law and treaties ratified by Kenya were now part of its law.⁷⁰

In the case of *Satrose Ayuma v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme*⁷¹ the High Court found that both binding and non-binding public international law is part of the law of Kenya under art 2(5). The Court held that:

⁶⁵ Okafor (n 55) 60.

⁶⁶ Article 2(1); *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney-General* (2011) eKLR 2.

⁶⁷ Article 2(5) and (6).

⁶⁸ (2010) eKLR.

⁶⁹ *Gathungu* (n 1).

⁷⁰ *Ibid* [17].

⁷¹ (2010) eKLR.

... international law will include non-binding as well as binding law. International agreements and customary international law accordingly provide a framework within which the Bill of Rights can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments such as the United Nations Committee on Human Rights, the European Court of Human Rights, the Inter-American Court of Human Rights and in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.⁷²

Therefore, in terms of art 2(5) and (6) of the Constitution, the DRD and the ACHPR are part of the law of Kenya. Article 10 of the Constitution proclaims the national values and principles of governance that are to guide the management of the public affairs of the nation. These national values and principles are patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.⁷³ The national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.⁷⁴

In the Bill of Rights, there is an elaborate framework for realisation of the right to development. Article 19(1) provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural practices. Article 19(2) sets out the purpose of the Bill of Rights as being to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. Article 19(3) makes it clear that the Bill of Rights in the Constitution is not a complete and closed catalogue of rights. It states that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights not proclaimed in it but recognised or conferred by law. The right to development set out in art 22 of the ACHPR and imported into Kenyan law by art 2(6) of the Constitution is one such right.

Article 21 addresses the issue of implementation of human rights and fundamental freedoms. It makes it a fundamental duty of the state and every state organ to observe, respect, promote and fulfil the rights and fundamental freedoms enshrined in the Bill of Rights. It enjoins state organs and all public officers to address the needs of marginalised and vulnerable groups in society. It also places a duty on the state to enact and implement legislation that enables fulfilment of its international

⁷² Ibid [5].

⁷³ Article 10(2).

⁷⁴ Article 10(1).

obligations in respect of human rights and fundamental freedoms. Article 28 is important to the realisation of the right to development. It ordains that every person has inherent dignity and the right to have that dignity respected and protected. Human dignity lies at the heart of human rights discourses including their enforcement and realisation. In the case of *Susan Kariuki v Nairobi City Council*⁷⁵ the High Court observed that in interpreting the Bill of Rights the Court was under a duty to interpret it in a manner that promotes the values of an open and democratic society that is based on human dignity.

3.2 Kenya Vision 2030

Kenya Vision 2030 is a long-term development plan for the country. It is driven by a collective aspiration for a better society by the year 2030. The aim of Vision 2030 is to create a globally competitive and prosperous country with high quality of life by that year.⁷⁶ It aims to transform the country into a newly industrialised, middle income country providing a high quality of life to all its citizens in a clean and secure environment. The development plan was formulated after the successful implementation of the Economic Recovery Strategy (ERS) for Wealth and Employment Creation, which saw rapid growth from 2002 when the GDP grew from 0.6% to 6.1% by 2006.⁷⁷

The plan is based on three pillars, namely the economic pillar, the social pillar and the political pillar.⁷⁸ The economic pillar aims at providing prosperity to all Kenyans through economic development through the achievement of a GDP growth rate of 10%. The social pillar seeks to build a just and cohesive society with social equity in a clean and secure environment. The political pillar aims at realising a democratic political system founded on issue-based politics that respects the rule of law and protects the rights and freedoms of every individual in Kenya.

Vision 2030 was developed through an all-inclusive stakeholder consultative process.⁷⁹ The process of developing it was launched by President Kibaki on 30 October 2006 when he advocated for a consultative approach that would involve ordinary Kenyans. This was done through workshops with stakeholders from the public service, the private sector, civil society and the media. Nine provincial forums were held. The objectives of the forums were to provide in-depth understanding of the country's development problems and the

⁷⁵ (2011) eKLR.

⁷⁶ Republic of Kenya, *Kenya Vision 2030* (Ministry of Planning and National Development 2007) 1.

⁷⁷ *Ibid* 2.

⁷⁸ *Ibid*.

⁷⁹ *Ibid* 3.

necessary strategies to achieve results by people affected by those problems and people to be involved in implementation of the plan.

To synthesise the findings of these forums, a core team of technical officers from government, research institutions and the private sector under the guidance of the National Vision Steering Committee visited various firms, investors, farmers and business people in the country.⁸⁰ Information from the nine provincial forums during which *wananchi*⁸¹ made direct contributions to the development of the Vision was included. The experts used all of this information to identify sectors with the potential of driving Kenya's economic growth until 2030. This approach involved the assessment of two critical components: the potential of different sectors for economic growth; and the feasibility of unlocking that potential for the benefit of economic growth, employment and poverty reduction.

The technical team also looked at the social and political reforms necessary to ensure that these economic goals could be achieved. The overall assessment of the potential for economic impact was informed by the identified sectors' current size and their future prospects for growth.⁸² The analysis was based on an understanding of the impact each sector would make on the economy and the factors necessary to increase the level of resources available nationally. A similar process was followed in identifying projects and priorities in the social and political pillars.⁸³ Detailed analysis was carried out in a consultative process to develop strategies capable of resolving the social and political problems that Kenyans face.

The economic pillar of Vision 2030 identifies six priority sectors to be targeted as the engines for driving economic growth and creating more opportunities for everyone.⁸⁴ These sectors are tourism; agriculture and livestock; wholesale and retail trade; manufacturing; business process outsourcing; and financial services. It was envisaged that these sectors could raise the national GDP growth rate to 10% by 2012. The sectors make up 57% of Kenya's GDP and account for about half of the country's formal employment.⁸⁵

The social pillar recognises that widespread prosperity for the country involves the building of a just and cohesive society.⁸⁶ For a society to be just and cohesive, it must enjoy equitable social development in a clean and secure environment. For that purpose, the Vision identifies six social sectors that must form the basis of social transformation.

⁸⁰ Ibid 4.

⁸¹ Kiswahili term for 'ordinary citizens'. It literally means 'owners of the nation'.

⁸² Republic of Kenya (n 64) 5.

⁸³ Ibid.

⁸⁴ Republic of Kenya, *Kenya Vision 2030: First Medium Term Plan 2008-2012* (Ministry of Planning and National Development 2008) 58.

⁸⁵ Ibid.

⁸⁶ Ibid 86.

These sectors are education and training; health; water and sanitation; the environment; housing and urbanisation; and gender, vulnerable groups and youth. The Vision also makes provisions for Kenyans with disabilities and communities that have been previously marginalised.⁸⁷

The political pillar of the Vision commits government to a wide-ranging governance reform programme. This reform programme must take into consideration the lessons learnt from the 2007 post-election crisis. The ERS period witnessed some progress in the area of governance. The Vision seeks to give greater focus to the reforms initiated during that period. The political pillar envisages a democratic system of political governance that is issue-based, people-centred, result-oriented and accountable to the public.⁸⁸

3.3 *The Millennium Development Goals*

The MDGs are an effort of the UN to define the specific content of the right to development. They were adopted by the UN General Assembly through the Millennium Declaration in 2000.⁸⁹ The Declaration was adopted without any dissenting or abstaining vote. This means that it has the endorsement of the entire international community. The MDGs represent an effort to translate the vague concepts embodied in the right to development into concrete indicators that governments can strive to achieve and be held accountable for.

The vision behind the Millennium Declaration is respect for human rights and fundamental freedoms; the rule of law and good governance; making the right to development a reality for everyone; generous development assistance; sustainable development; and special regard to the neediest of countries and people.⁹⁰ The theme of human rights and justice that runs through the Millennium Declaration led to the identification of eight specific goals that were to be achieved under it. The goals were assigned targets and indicators for measuring them.⁹¹ The eight goals that were identified in the Millennium Declaration were: first, eradication of extreme poverty and hunger; second, achievement of universal primary education; third, promotion of gender equality and empowerment of women; fourth, reduction of child mortality; fifth, improvement of maternal health; sixth, combating HIV/AIDS, malaria and other diseases; seventh, ensuring environmental sustainability; and eighth, developing a global partnership for development.

⁸⁷ Ibid.

⁸⁸ Ibid 124.

⁸⁹ UN General Assembly Res 55/2 (8 September 2000).

⁹⁰ UNDP, 'The MDGs through Socio-Economic Rights' <<http://www.endpoverty2015.org>> accessed on 9 July 2011.

⁹¹ Ibid.

The specific goals with their indicators make it possible to know whether they have been achieved within the specified timelines or by how much they have not been achieved. For many of the MDGs, the year 2015 was set as the achievement date. The goals are set out in terms of improvement of the conditions of the world's population.⁹² Each country was left to modify its targets for good reasons so as to fit them into the country's particular circumstances.

Kenya has made some progress on several fronts since the 2002 elections although significant challenges remain.⁹³ In 2004, the government adopted MDG-based planning in order to strategically implement achievement of the MDGs across its various ministries. To monitor progress, MDGs status reports are produced every other year. The reports show that despite the various challenges encountered in implementation, Kenya has made significant progress on most of the MDGs.⁹⁴

Most of the gains made towards realisation of the MDGs can be attributed to the ERS and a trend towards embracing good governance. However, this progress has been slowed by several challenges particularly widespread poverty; food insecurity due to unfavourable weather; and corruption.⁹⁵

3.4 *The African Peer Review Mechanism*

When the OAU was replaced by the African Union (AU) in 2002, there was a marked increase in the number of African states that were making commitments to respect and promote good governance in their territories. Through the Constitutive Act of the AU, African states bound themselves to promote human rights, democratic principles and institutions, popular participation and good governance. Specific commitments were made in relation to good governance within the New Partnership for African Development (NEPAD) and the APRM. The APRM aims at fostering the adoption of policies and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental integration.⁹⁶ The sharing of experiences by participating countries and the reinforcement of successful and best practices is central to the process.

Kenya was among the first four countries to open up themselves to the critical examination of the APRM. The other three were Ghana, Mauritius and Rwanda. Kenya signed the memorandum of

⁹² Ibid.

⁹³ House of Commons, *Kenya: DFID's Country Assistance Plan 2004-07 and Progress towards the Millennium Development Goals* (The Stationery Office Limited 2008) 5.

⁹⁴ Republic of Kenya, *Progress in Attainment of MDGs and the Way Forward towards Achieving MDGs* (Ministry of Planning and National Development 2010) 3.

⁹⁵ Ibid.

⁹⁶ African Peer Review Mechanism, *Country Review Report for the Republic of Kenya* (APRM Secretariat 2006) 8.

understanding committing itself to a review by the APRM in March 2003 soon after the elections that ended the Kenya African National Union's (KANU's) forty year stay in power.⁹⁷

The first self-assessment was conducted for the APRM from February 2004 and covered the four identified APRM areas, namely political governance and democracy; economic governance and management; corporate governance; and socio-economic development. The report of that self-assessment was submitted to the APRM secretariat in September 2005. In October that year, Graca Machel, the member of the APRM panel assigned to Kenya, conducted a review mission to consider the self-assessment findings and complete the APRM Eminent Persons' Country Report. On 30 June 2006, the report together with the Programme of Action (PoA) to implement it agreed with the Kenyan Government was presented to the African Peer Review Forum (APRF) at the AU summit in Banjul where the documents were debated and adopted.⁹⁸

Of the self-assessments undertaken by the first four countries to participate in the APRM process, Kenya's has been rated as the most consultative.⁹⁹ Workshops were held throughout the country and a wide range of opinions on the state of governance in the country were documented. A comprehensive record of the political, social, cultural and economic situation in Kenya was developed. The process gave ordinary Kenyans an opportunity to voice their concerns on matters that affect their lives. Together with the new constitutional order, the APRM process has shown that Kenyans want more say in how they are governed.¹⁰⁰

While significant gains were identified in the first report, there are challenges in issues which are cross-cutting in nature. These issues require a holistic approach to their resolution because of the wide impact they potentially have on the quality of governance.¹⁰¹ The cross-cutting issues identified in the report are managing diversity in nation building; corruption; constitutional reform; poverty; gender inequality; and youth unemployment.¹⁰²

The APRM process provides new possibilities for realisation of the right to development. It supports the development of a culture of accountability, which is the nerve centre of human rights-based governance. This also represents a shift in the traditional thinking of African states that there should be 'non-interference' in the internal matters of other African states.¹⁰³ The APRM provides a forum for

⁹⁷ S Akoth *The APRM Process in Kenya* (AfriMAP 2003) 1.

⁹⁸ *Ibid* 2.

⁹⁹ *Ibid*.

¹⁰⁰ African Peer Review Mechanism (n 96) 14-21.

¹⁰¹ *Ibid* 23.

¹⁰² *Ibid*.

¹⁰³ Akoth (n 97) 3.

addressing social and transitional justice through the reforming of state structures.

4 CONCLUSION

Kenya's new constitutional dispensation provides the best starting point since independence for a sustained campaign aimed at improving the lives of Kenyans. The Constitution marks the dawn of a new era of improved governance with true separation of powers; the articulation of a robust Bill of Rights; the establishment of decentralised government; and the equitable sharing of national resources. The people legitimately expect that government shall provide leadership in the evolution of a Constitution-based development process.

Three common themes run through the Constitution and national policy and they will play a critical role in the construction of a new state in which the full potential of citizens can be realised. These are poverty reduction; fighting corruption; and ensuring public participation in decision making. The strategies that will be employed to counter these challenges will determine if realisation of the right to development in Kenya will become a reality.