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An evaluation of the practicability of the Right to Development

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Abstract Human rights broadly speaking refer to norms, and codes that seek to protect humans from political, legal, and social abuses (Stanford, 2003). In more recent times, concerns for issues involving global and social justice in the discourse of rights ultimately transpired into a formulation of what we now know as the right to development. Consequently, the motive behind the right to development was to harmonize human rights and core economic development concerns. The right to development can be seen from two perspectives; as it pertains to a citizen's right to enjoy social and economic benefits where a government is burdened with the responsibility of protecting that right, and collectively as a group or society's right to development in relation to other societies. This article attempts to address the critics of the right to development, and its achievability. Our analysis highlights the need to create a nexus between rights and development as well as measures through which the contentious issues in relation to the right to development can be addressed.

Key Words: Development, Rights, Inequality, Justifiability, Enforcement

Introduction

Rights as derivatives of either natural law or the concept of legal positivism are often discussed within the context of conceivable norms as entitlements of persons that ought to be protected and may otherwise be infringed by another's will, a body or policy. Consequently, they are often backed by constitutions. There are certain conceivable norms, however, whose existence and practicability some argue for, but appear to lack the same capacity of enforcement by distinct bodies of legislation as the more familiar rights; such is aptly expressed in the controversial 'Right to Development'. This right broadly emphasizes an individual's or group's right to enjoy economic and political development. Its practicability has been criticized, its ability to produce legal sanctions questioned, and its potential destructiveness exposed (Nwauche and Nwobike, 2005). The paper seeks to explore the possibility of attaining a practicable and legal status of the right to development amidst several criticisms regarding its unfeasibility, extreme politicization, and allegedly utopian character. The conclusions, therefore, assert that the concept of rights to development is a viable socio-political discourse, but that the concept presents salient limitations - such as the practicability of enforcement and uptake - that have drawn indispensable criticisms.

An overview of the Right to Development

Human rights, broadly speaking, refer to norms and codes that seek to protect humans from political, legal, and social abuses (Stanford, 2003). In more recent times, however, concerns for issues involving global and social justice in the discourse of rights ultimately transpired into a formulation of what we now know as the right to development. Consequently, the motive behind the right to development was to harmonize human rights and core economic development concerns.

Furthermore, concerns about the existing economic imbalance between developed and developing societies begot political thinking toward rights in the context of development (Bunn, 2000). Additionally, the colossal disparities between standards of living, the contentions about the economic exploitations of underdeveloped societies by developed ones, and the events and aftermath of colonialism are subjects that may contribute to an attempt to justify a right to development.

With this background in mind, the right to development can be seen from two perspectives: the individual and the collective.

Right to development as it pertains to the individual's rights

In some instances, rights to development are addressed from the perspective of the citizen's right to enjoy social and economic benefits where a government is burdened with the responsibility of protecting that right.

The United Nations Special Rapporteur on the Right to Development describes the right as a means of promoting and protecting the individual's ability to participate in, contribute to, and enjoy development (Alfarargi, 2017). As a right allegedly *sine qua non* to the realization of

An Evaluation of the Practicability of the Right to Development

other human rights, the Rapporteur considers the human person to be the central subject, participant, and beneficiary in the process of development (Alfarargi, 2017).

Right to development as it pertains to a people's collective rights and its import on their individual rights to the same

The right to development is often discussed in the context of the collective, as an international agitation designed to promote a new order based on sovereign equality, interdependence, mutual interest, and interstate co-operation with human rights as the focal point (Bunn, 2000). In 1986, the United Nations (UN) embraced the Declaration on the Right to development (UNDRD) which described the latter as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized” (Bunn, 2000, p. 1434). In 1993, the United Nations recognised the right as universal, inalienable and a vital component of fundamental human rights.

The UN Special Rapporteur, Saad Alfarargi also recognises individual and collective perspectives on the right of development, showing its interconnectedness with the right of a people to exercise sovereignty over their natural wealth and resources. Basically, their right to self-determination. The United Nations deem the right important because it can help reduce poverty levels, tackle inequality and conflicts across nations. It claims not to be restricted only to economic progress but cultural, social, and political developments as well. The right according to the UN Rapporteur aims to create a “social and international order in which all human rights and fundamental freedoms can be fully recognised for all individuals and peoples in all nations” (Alfarargi, 2017).

Preceding the emergence of the right to development were deliberate actions by certain members of the UN particularly in the interest of less developed countries that sought to alter the prevailing international economic regime and bring new norms into a legal document. Furthermore, there was an adoption of the Charter of Economic Rights and Duties of State that insists on every state's responsibility to promulgate economic and social growth not only for its citizens but developing countries as well (Bunn, 2000). Experts have pointed out the obscurity of the collective relative to individual tendencies of the right to development. The Second World War characterised by Nazi crimes acted as reinforcement and creation of a cynosure on individualist rights at the expense of collective rights, thus instruments of classical human rights say little concerning the right of groups (Mason Meier & Fox, 2008). However, subtle references to collective rights are noticeable in the right of self-determination and that of ethnic, religious or minority groups to enjoy their culture and freely practice their religion. These were adopted by the General Assembly: one of the six principal organs of the UN, under the International Covenant on Civil and Political Rights (Mason Meier & Fox, 2008).

The undertone therefore of the right to development is not a new discourse, and recent attempts have been made to synchronize the seeming polarization of collective and individual rights to development. The first article in the ‘Declaration on the Right to Development’, as adopted by the UN, states that development is central to the human person, so the human person should be the active participant and beneficiary of the right to development. The preceding article points

An Evaluation of the Practicability of the Right to Development

to an individual and collective responsibility towards development and particularly individual duties toward the community (Perean, 2015). Subsequently, an individual orientation will see the right to development as a synthesis of all human rights (Hamm, 2001) while a collective perspective views the right to development as a means of creating a favourable atmosphere for general human development (Perean, 2015). Barsh (1999) considers the right to development as a comprehensive collective right that sees people as subjects having right to survival, material improvement, at the same time wielding some degree of power as opposed to objects or resources to be made productive or skilled.

Critiques of the Right to Development

Perhaps the most difficult task of the right to development is establishing a connection between rights and development which may have to consist in definitions of development as a human right. Such definitions will be burdened with making historical cases for the impact of human right promulgation on the issues of development. Furthermore, the attempt to make both individuals and collective groups holders of the right to development does little to escape the controversy on the “who” of the right bearers in relation to the duty bearers tasked with upholding the right. Such synchronization tends to obscure the subject matter, the content of the right, and renders it vague. Also, creating a superimposing entity as duty bearers and determinants of either violation or upholding of collective rights can have a significant effect on the sovereignty of nations even without much discourse on justifiability. The following are some experts’ criticisms of the right to development that can be viewed as seeking to emphasize its unattainability, contentiousness, and overly political tendency.

Bunn (2000) identifies one of the issues with the right to development in its enforcement and justifiability. How do you enforce a right that has not attained legal status? In 1974, The General Assembly adopted a Declaration and Program of Action on the Establishment of a New International Economic Order (‘NIEO’). While its documents make no specific mentions of a right to development, Bunn cites Georges Abi-Saab who maintains that they nevertheless contain the “blue-print” of the right to development; if the right is to attain the level of legal sanction and become law, the NIEO, Abi-Saab says, is the most realist process (Bunn, 2000). But the NIEO itself is not a legally binding treaty, nor does it clearly stipulate the conditions for a right to development. Arising questions as to its capacity to harden a ‘treaty’ to law are inevitable irrespective of its claim to be an inalienable right. The Special Rapporteur Alfarargi himself admits some challenges to the realization of the right; among these is politicization. He blames this politicization however on the debate between emphases on state national obligations versus that of the international committee. This politicization Alfarargi thinks results from the divisions in states’ interpretations about the right in terms of the criteria and indicators for measuring progress and implementation (Alfarargi, 2017).

The right to development is charged with obscurity. What, according to Yash Ghai (1989), gives value to a right consists in its ability to create entitlements which are enforceable when its contents, beneficiaries, duty bearers are clearly specified. The right to development makes no such specifications; it has a vague content. Bunn (2000) cites several experts’ critiques on the right to development. Ian Brownlie concurs that the identity crisis it creates ultimately

An Evaluation of the Practicability of the Right to Development

results in a further obscurity of the subject matter of the right and makes its promulgation even more difficult (Bunn 2000). Carty says the right to development tries to place material content before form, whilst retaining alleged benefits of the use of legal language (Bunn 2000). The right to development is an offshoot of the United Nations; an intergovernmental institution created to maintain international peace, security, protect human rights and promote sustainable development amongst other things. Subsequently, understanding the legal standing of the right to development would require, according to Bunn (2000), legal “analysis of the normative resolutions of the UN General Assembly, of state practice and customary international law...”

Another major criticism of the right to development is justifiability. Perean (2015) says that one problem with collective rights resulting in its poor promulgation is the fact they are not justifiable. Part of the reasons for this is that states cannot be held accountable for the implementation of the rights. Experts contend that under International Law, the right to development is not legally binding (United Nations, 2016). Reduced to a tool in regular human rights language, a major advantage of the right, according to some critics, is to stimulate discussions; and that the focus for strengthening justifiability ought to be channelled, instead, to social and economic rights (Perean 2015). Some proposed means of implementation for the right to development eludes the collective perspective to the right to development. As identified by Perean (2015), three ways for its implementation that focus on the obligations of the national state include enablement of legislation at the country level and successful court prosecutions to establish legal precedents; backed by international support and oversight, albeit, without an infraction on state sovereignty in this wise. The conclusion of this framework however, is that international law does not embed any mechanisms for the enforcement of the right to development (Perean 2015). Malone and Belshaw (2003), however, argue that the various human rights committees have never been beneficiaries of reports concerning development policies by concerned states, nor has development been discussed or monitored by human rights committees with member states.

Justifying the Right to Development: The Plausibility of Enforcement

Some attempts have been made to justify the right to development; many others assume its justification and channel their focus on its implementation. We will briefly see one or two of these attempts before an attempt at justification. The UN has over the years made a series of attempts to implement the right to development from the purview of human rights. The right to development under the UN High Commissioner for Human Rights has been a subject of global consultation and of four distinct expert working groups created for the right to development (Bunn 2000). Some intergovernmental organizations have also made consultations with the UN high commissioner for human rights and the various working groups, organizations like the European Commission, the Organization for Economic Cooperation and Development. There exists a 1979 report to transform the right to development into a notion that is capable of providing practical guidance based on internationally recognized human right standards in the context of development activities (Marks & Malhortra, 2017). The working groups set up in the 1980s and 1990s are said to have

An Evaluation of the Practicability of the Right to Development

accomplished little as regards the challenge of implementation of the 1979 report (Marks & Malhorta, 2017).

Marks and Malhorta (2017) look upon the UN organized Global Consultation on the Realization of the Right to Development in Geneva 1990. Among the participants of this conference were Development and Human Rights NGOs, representatives of specialized agencies, international financial institutions, and leading experts. With about 48 papers presented, its lack of success due to differences in development agenda at national levels, and the structural setback that mitigates aid effectiveness, was highlighted and tabled once more in the recommendations for implementation in 2015 (Marks & Malhorta, 2017). These recommendations were characterised by the urge for states to promulgate the right to development in national policy and development strategies, to create plans that should ensure compliance to the right by corporations, and more importantly, for state cooperation in the creation of an international economic and political environment that is conducive for the realization of the right to development. This was attempted through a democratic process of decision making within institutions and international bodies, those dealing with trade, monetary policy, and development assistance (Marks & Malhorta, 2017).

The UN has subsequently created bodies designed to monitor, coordinate, and implement the right to development including the aforementioned appointment of a Special Rapporteur on the right to development in 2018. However, these efforts continue to be charged with a right to development characterised by political rhetoric rather than development practices. The UN high-level task force has proposed however, some criteria to translate the right from political commitment to development practice: evaluate human rights implications of development and trade policies; assess states' commitment to promoting an enabling environment for realizing the right to development; contribution to mainstreaming the right in policies and operational activities of relevant actors at national and international levels (United Nations 2014).

Conceptual Discussion on the Right to Development

A conceptual defence of the right to development could be taken from justifications of the existence and practicability of the Natural Law theory. The right to development has been charged with being obscure, vague in content or basically ideological. Ironically, such accusations can also be levied against Natural Law theory; a theory emphasising fixed principles and external laws for regulating human conduct, principles that we ought to discover and manage, hidden in nature and knowable by reason. The natural law to its theorists is considered as the foundation of all existing positive laws. Moreover, there is a sense in which the entire discussion of 'right' can be considered vague. The philosophy of law considers certain concepts as incomplete symbols namely: rights, obligation, duty, and justice. These concepts have no significance in isolation, but they contribute significantly to the whole. They are in themselves abstract concepts; they could mean nothing in a sense. Philosophers Alfred North Whitehead and Bertrand Russell call these concepts incomplete symbols (Pickel, 2013).

Glanville Williams and Thomas Hughes (in Curan, 1958) realized that incomplete symbols found in sciences are also in law. Since they are not understood in themselves, external principles, methodologies are required to investigate them. The implication is that they cannot

An Evaluation of the Practicability of the Right to Development

be understood using legal methodologies, but different methods outside cases and legal systems namely, meta-analysis and philosophical investigations. If it is accepted that rights cannot be understood outside ontological principles, if we generally accept that the natural law derived from nature, inherent in the human mind is justifiable and valid, we may have no justifications for denying the validity of the right to development. In other words, the right to development was formulated as an intrinsic right of man not derived from any positive law, if it satisfies the condition of being ‘just by nature’; a condition that broadly allows actions insofar they do not pose harm to another, it is valid law. But the right to development however, likened to the natural law, still does not escape the problem of implementation and the philosophical/legal tensions of the relationship between natural and positive law.

Positive laws, although argued to be derivatives of natural law by natural law theorists, are relatively easier to be implemented. The positive content of law depends on social facts, laws derived from human society; they are social creations. Legal systems here depend on the structure created by society, where every society has leading structures, authorities that create law for the people. The right to development, in order to become legally binding, must be inculcated into law. But laws as we have them now tend towards positive laws that are state oriented rather than natural laws. Positive laws see the law as what is decided, practised, and tolerated by the structures of an independent society. The wisdom, justness, rationality of policies does not make things sufficient to become law according to the more practised positive laws. Legal positivism sees laws as determined by structures put in place that can be empirically studied. However, when positive laws meet contradictions and points of impasse, legal systems arguably often revert to the natural law.

The debate is enduring, it appears endless. It would seem as though the right to development must overcome the herculean task of overcoming this debate to become a legally-binding right. ‘Sovereign’ societies cannot collectively claim a right to development in the context in which rights are claimed in the court of law. The discourse will be more an infringement of autonomy and sovereignty as opposed to a right to development, because in reality, no autonomous society can be made responsible for the development of another autonomous one and be liable to punitive measures of inaction. What they may owe other societies according to the prominent political thinker John Rawls, is the duty of assistance (e.g. Rawls, 1999).

The Duty of Assistance

The United Nations was created basically to see that a world war no longer occurs. It does so by fostering healthy relations between sovereign nations. The point of introducing a right to development that would be legally binding may be far-fetched. John Rawls, a political philosopher, talks about the law of peoples for a liberal foreign policy. His notion of justice however applies, as he says, to liberal societies. It basically entails a system that seeks to harmonize reasonable pluralism; distinct political conceptions of justice where the agreed harmony would not be so much against the fundamental belief of anyone. As it regards foreign policy, Rawls believes that the ‘law of peoples’ will be an international foreign policy that guides liberal societies in their interactions with other societies, both liberal and non-liberal

An Evaluation of the Practicability of the Right to Development

(Stanford, 2008). His vision is of a cooperative international order that secures human rights and helps struggling countries become more effective.

Rawls believes that once the duty to assist is satisfied, there is no further obligation or requirement on international economic distributions (Stanford, 2008). In other words, what more developed countries owe underdeveloped ones is simply the duty of assistance. Arguably, many developed countries over the years attained their levels of development by exploitation of underdeveloped ones. Regardless, if retributions are to be made to the underdeveloped countries, such cannot be contained in the more recent formulations of a right to development except if such formulations are channelled centrally to prohibit future dominations-- the central purpose of the United Nations. The right to development in itself is reasonable, may be a valid right, and as some have said is great to stimulate discussions. But the criticisms as regarding it not being achievable, being overly political, and being contentious, particularly on the attempts at implementation and attainment of a legally binding status, seem justified.

Summary and Conclusion

When we attempt an analysis of its attainability, the right to development seems caught between the lingering debate about the origin of constitutional laws as social creations or as derivatives of the natural law of reason.

Furthermore, it would appear that an alignment with either school of thought affects one's view of its possibility of enforcement. It becomes much more difficult, however, to enforce the right to development as it is more tilted towards natural law than it is to positive law. The latter would appear to have systems and authorities tasked with enforcement and implementation; natural law arguably does not. Therefore, however universal natural law or rights claims to be, it may not be capable of determining associated norms such as the right to development as legally binding except by means of superimposition on nations with the aid of an international organization like the UN and at the risk of tampering with the sacred sovereignty of nations which may incur severe consequences.

Crucially, it is pertinent to note that the discourse of right to development wields a compelling import on its viability to the collective, albeit within the scope and coloration of the national development agenda, and extant legal frameworks that expedite its promulgation. However, as global discourse, purveyors, and custodians of this concept must -- through relevant international bodies -- provide oversight and support for the effective promulgation of the right to development in concerned states.

Additionally, despite the fact that the right to development, for the most part, assumes a macro posture at the policy or national level, its impact is accurately measured in how well the individual citizen enjoys the dividends of infrastructural advancement, education, access to healthcare, and other socioeconomic indices. This delicate balance of differing perspectives, therefore, is what has drawn criticisms for the discourse, as much as it has provided opportunities for a more incisive view of how the collective import of the right to development is conjoined with its impact on the individual.

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An Evaluation of the Practicability of the Right to Development

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Owodunni Mustapha was born and raised in Lagos, Nigeria, relocating to Ireland in 2014. Her writing is inspired by her experience of prolonged living in the Direct Provision system in Ireland, highlighting the struggles of asylum seekers navigating their way through the rigorous constraints imposed on them. Owodunni started documenting the experiences of the Black community as a freelance writer in 2018, then began writing short stories and poems. Some of her published poems include: 'Up the hill in Mayo' in *Correspondences: An anthology to call for the end to direct provision* (ed. Jessica Traynor and Stephen Rae); 'The Unknown' in *MASI Journal* (2019); and '6 Autumns' in *I am a man of peace: writings inspired by the Maynooth University Ken Saro-Wiwa collection* (2020). She holds a BSc. in Political Science and MA degree in Gender, Globalisation and Rights from the prestigious NUI Galway.