

**RESEARCH PAPER****The Nature and Scope of Right to Development under International Law: A Legal Analysis**

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ABSTRACT

Senegalese jurist, KebaMbaye, the former president of the United Nations Commission on Human Rights (KebaMbaye, 1972), deemed as one of the first scholar to refer to right to development (RTD), that is defined by him as the recognition of every individual and people to enjoy in just measure the goods and services produced thanks to the effort of solidarity of the members of the community (Felice, 2009). The objective of this paper is to analyse the nature and scope of RTD under international law. An analytical method will be followed during this research. This paper analyses the concept of RTD and discusses various aspects of RTD and categorically its status under international law. It argues that RTD is not only recognised for certain group of people or states rather it is available to all human beings. It concludes that RTD is universally recognised right and even recognised in occupied territories.

Keywords: Development, Human Rights, International Law, Right to Development, Self-Determination

Introduction

In 1981, this right was given the first legal recognitions in the African Charter on Human and Peoples Rights. The RTD was reaffirmed later in Vienna Declaration and Program of Action, the 2000 Millennium Declaration, and the Durban Declaration and Program of Action. In 1960s and 1970s Non-Aligned Movement (NAM) companied and struggled for the creation of New Economic Order on just bases that was mentioned in 1986 Declaration. The focus of this campaign was to make distinction between civil and political rights and social and political rights. In 1960s and 1970s the concept of right to development emerged by newly emergent independent states those sought to coherent a new normative framework to accurate the years of colonial dominations. In 6th decades of 20th century, two conventions were passed namely International Convention on Civil and Political Rights (ICCPR, 1966) and International Convention on Economic, Social and Cultural Rights (ICESCR) 1966 (ICESCR, 1966). Both the conventions provide that all people have right of self-determination, by that right they freely determine their political status and freely pursue economic, social and cultural development (Art. 1, ICCPR, 1966).

In 1977, the RTD was first recognized as a Human Right by United Nations Commission on Human Rights in a resolution approved in February, that called on the United Nations Economic and Social Council to invite the secretary-general to undertake a study on the international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, taking into account the requirements of the New International Economic Order and the fundamental human needs (Felice, 2009).

The UNCHR adopted several mechanisms to formulate an agreement on Right to Development. An Open-Ended Working Group, with a power, to monitor and review progress worked on it. An independent Expert, prepared studies on the current state of implementation of right to development.

Literature Review

The Term Development and Right to Development

According to Black's Law Dictionary development means "changing's in economic and social trends in the culture and environment." Oxford dictionary defines it as, the act, process or result of developing or the process of developing or being developed.

According to the preamble of the UNDRTD:

Development is a comprehensive economic, social, cultural and political process which aims at the constant improvement of the wellbeing of the entire population and of all individuals on the basis of their active, free and meaningful participation and in fair distribution of benefits resulting there from (UNDRTD, 1986).

Arjun K. Sengupta, an independent expert on the RTD (1999-2004) defines right in terms of corresponding duty. He states that, Generally, in the human rights literature, to have a right means to have a claim to something of value on other people, institutions, a State of the international community, which in turn have the obligation to provide or help to provide that something of value. Therefore, development is the act or process of a person to develop or grow or enlarge himself. The continue process of developing is called development.

The right of a person to develop, process or grow is called right to development. The Right to Development is a group right of people as opposed to the individual right. By definition, RTD is an inalienable human right by which every human person and all people 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.

Classification of Rights Under International Law

Human rights are inherited by a person as a human being and are given to all persons as being belonged to the humanity. These are regardless of cast, creed, race, colour, their political or social context or nationality. These are freedom from fear, and want, and call for respect, protection, promotion and fulfilment, from duty bearers (Weerelt, 2001).

Arjun Sengupta defines the right to development as

The Right to a particular process of development in which all human rights and fundamental freedoms can be fully realized, which is recognized as a human right and which is consistent with the basic approach of the realization of all the rights and freedoms recognized as human rights.

The rights in true legal sense have a vast evolutionary history. The struggle for the rights was originated in equilibrium between the rights of individual and the rights of states. In the ancient time, the rights been defined and protected by the absolute monarch or "fortress" who enjoyed the absolute authority on the rights of individual without limits or restrictions even on right of life and liberty. The evolutionary process turned this centre from the monarch to the modern civilized states. This evolution may be surprised by the evolution of the generations of subjective human rights (Castignone, 2004).

Primarily human rights were classified in three generations by Czech Jurist Karel Vasak at the international Institute of Human Rights in Strasbourg. He used the term as early as in 1977. The division of Karel Vasak follow three watchwords of the French Revolution: 'Liberty', 'Equality', and 'Fraternity'. Hence, he classifies the Rights in three generations. Now the international law scholars discuss the fourth generations also. The generations are as follow.

First Generation Rights

ICCPR is the foundation of the first-generation rights that was promoted and promulgated by the western countries but was not agreed by communist countries (Kirchmeir, 2006). First generation rights are the personal rights of the individual and are protected and guaranteed by the constitution and local law of most of the countries. These rights are originated on the natural law bases. These rights are enforceable on regional bases by Council of Europe and the European Court of Human Rights.

These rights are further divided in two categories as civil and political rights (Cornescu, 2009). Civil rights include "freedom of opinion, freedom of expression and press, personal ownership, the right to personal security in relations to justice and police, equality before law. Political rights include equal access to the public, participation in elaboration of laws, control of taxes and citizens control over administration. These rights are traced back in Magna Carta 1215, English Bill of Rights 1689, United States Bill of Rights, and Declaration of the Rights of Man and of the Citizen. At global level, these rights were included in the UDHR Arts. 3-21, ICCPR and European Convention on Human Rights 1953. These rights are called blue rights and positive rights. These rights are deemed as binding in all over the world on two main accounts. First most of the countries has incorporated these rights in their constitutions. So, these are the part of their domestic and constitutional laws. Second these are incorporated in the internationally binding legal instrument like ICCPR.

Second Generation Rights

ICESCR, 1966 is deemed as mother of second generation human rights those were promulgated by communist countries in assistance with the developing countries. Unlike the first-generation rights, the second-generation rights are the rights of individual on equality bases. These rights are economic, social and cultural in nature. These rights include right to be employed, rights to food, housing, health, social security and unemployment benefits. Like first generation rights, these are also included in UDHR.

The binding nature of these rights varies from state to state. Some states have declared these rights as binding on regional bases like in European Social Charter. Though these rights impose the duty on states to be respected and promoted but this depends on the economic conditions of the state. This is the reason that some developed states like New York State have enshrines some rights like right to free education, workers compensation, right to organize and to bargain collectively in its constitution. These rights are also called red rights and negative rights.

These rights as a common practice are not deemed binding yet some of the states have enshrined them in their constitution and have declared them as binding. The binding/non-binding nature of these rights depends on the constitutional Position of each state and its economy.

Third Generation Rights

Third generation rights are not civil or social rather these are the result of gradual evolution of international law. These are so called solidarity rights as being the collective rights of individual and cannot be enforced by an individual rather can be exerted

collectively (Cornescu, 2009). These are originated in Stockholm Declaration 1972, Rio Declaration on Environment and Development, and the United Nations Conference on Human Environment. Usually these are created under mere inspirationally soft laws and are not legally binding. These rights include right of self-determination, right to peace, right to development, right to humanitarian assistance, environmental rights and rights of minorities. As being inspirational these are also called green rights.

These rights are just aspirational and not deemed as binding. Though third generation rights are not deemed binding in true sense, but the contents of these rights can be deemed as binding as being the part of other binding instruments.

Fourth Generation Rights

This category includes the so called 'rights related to genetic engineering', rights which are on the doctrinal debate, in what regards their recognition on prohibition of certain activities. This category includes the rights of future generation, the rights that is not possessed by the individual, social group or even a nation, rather this right is deemed as the common heritage of mankind. These rights belong to humanity.

These include right to genetic identity of person, the duty of states to protect the individual and its self-esteem, irrespective of its genetic appearances, intervention in person's genetic characteristics that concerns human health and the respect of human self from beginning to death. Some other rights are also in debate. For example, Euthanasia, the assisted death, maintaining artificial death after brain death and infanticide (late abortion).

Analysis and Discussion

Right to development as a Human Right

UNDRTD 1986, explicitly affirms the existence of human right to development (Sengupta, 1999). Right to Development was introduced in DRTD and reaffirmed in Vienna World Conference. UNDRD defines the development as Human Right under article 1.

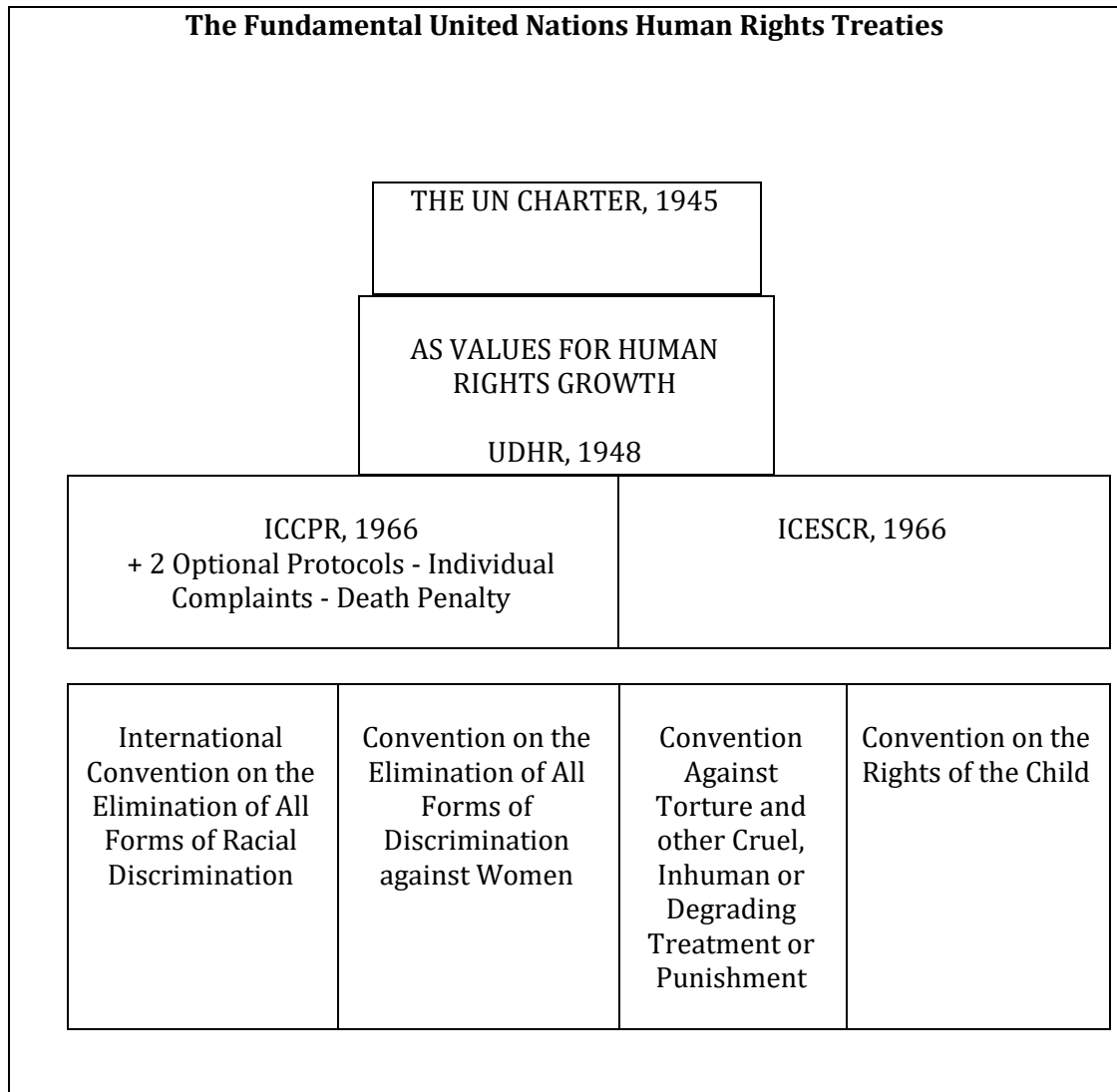
Thus, although the adoption of the RTD in 1986 and its reaffirmation in the Vienna Declaration and Programme of Action in 1993 have placed the right firmly within the international human rights corpus, the right to development remains one of the most contested and contentious facets of the international human rights regime (Ibhawoh, 2011). Article 10 of the Vienna Declaration further states that the Development as contained in UNDRD is a universal and inalienable right and an integral part of fundamental human rights.

In the language of international human rights, like the right of self-determination, the right to development while at time contentious and somewhat unconventional in its approach to human rights might in our present climate be recognized as a right without which a range of other rights cannot be enjoyed (Salmon, 2008).

Hence this right is deemed as a part of international human rights. But this right is deemed as third generation right. Current interpretations see RTD as the sum of economic, social and cultural rights, economic right connected with right to self-determination, a new right creating new obligations, for example against developed countries for the provision of Overseas Development Assistance (ODA), an umbrella to describe all rights, the right to particular process of development and a tool to use human rights principles into development (Piron, 2002).

Thus, though this right is not the "positive right" nor is it "negative right" but this may be deemed as positive and simultaneously negative as per its elements common in

those Declarations protecting positive rights like ICCPR and the Declaration protecting negative rights like ICESCR.



Who is entitled to Right to Development?

Individual as Right Holder

The study of traditional approach shows that this is the sole human being as an individual who is entitled to these rights and can make claims to enforce these rights. Under some interpretations it seems that the RTD promotes people-centred development” that says, “The human person is the central subject of development and should be active participant and beneficiary of the right to development.

Like individual, people are also deemed as the right bearer. The declaration itself states that, The Right to Development is an inalienable human Right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

State as a Right Holder

DRTD declares that states have not only the duty but have the right to formulate appropriate national development policies, and other actors of international community

have duty to facilitates the process. Clearly, states on their own, may not be able to formulate and carry out that process in an increasingly globalized and interdependent world without the cooperation of other states and international agencies.

Though the right to development is enforced against state and also state can enforce same against international community in certain cases, like if international community compels the capacity of state to advance national growth polices but in true and strict sense states cannot be deemed as the true right holder. This is the collective right of the individuals.

Duty Bearer

This is the fundamental principle of law that where there is right, there is corresponding duty. Though in traditional sense it seems that people are only the right holder but at the same time they are also the duty bearers. DRD states that, People should function both individually and as member of collectives and communities and have duties to their communities that have to be carried out in promoting the Right to Development.

State as Duty Bearer

It the duty of state to create conditions for realizing the RTD. The preamble of DRD itself declares that, the creations of conditions favourable to the development of peoples and individuals is the primary responsibility of their states. States are required to take different actions to create favourable conditions for realization of RTD in different articles of DRTD.

Article 2(3), Article 8(1) (2), Article 6(3), deals with the actions of state to be required at national level. Article 3(3), Article 6(1), Article 7, deals with the states to act as international level. Article 4 states that: States have the duty, individually and collectively, to formulate international development policies to facilitate the realization of 'Right to development' and recognize that sustained action is required to promote rapid development in developing countries. It further states as a complement to efforts of developing countries, international cooperation is essential.

International Community as Duty Bearer

Traditional human rights setting involves only state and nationals, but this was before we all become willingly or involuntarily plugged into new global networks that diminish the management capacities of nation state (Salama, 2005).

Under Articles 56 and 57 of the UN Charter, international community is duty bound toward RTD. The reasoned basis for human rights lies in the importance of human freedom and the need for solidarity that for-reaching recognition demands engagement- Both at the local and at the global level (Sen, 2006). Arjun Sengupta, proposed that, "when development is seen as a human right, it obligated the authorities, both nationally and internationally, to fulfil their duties in promoting the right in a country where the adoption of appropriate policies follow from that obligation (Senagupta, 2000). International community showed her highly commitment to the realization of the Right to Development from the grass root level (UNGA Resolution 55/2).

International Financial Institutions (IFIs) as duty bearers

With development of international human rights, international law creates new duty bearers because of globalization creates, especially with reference to socio-economic rights in developing countries. In post RTD era, the development and poverty reduction do not deem as the exclusive duty of the states in developing countries (Darrow, 2003).

The concept of international economy as is evident by formation of international financial institutions has imposed a joint responsibility on IFIs and other notable actors. The human rights obligations of IFIs are formed from two classes. First class of human rights contains, rights created by Articles of Associations or memorandum of association of the IFIs itself and second class of rights includes rights created by the international human rights law and general principles of public international law (Isa and Feyter, 2006).

So, the primary duty bearer is the state to whom individuals are the subject and then the international community.

Right to Development and International Law

It is almost difficult to locate the very beginning of RTD under international law. It starts from the very beginning of the emergence of the United Nations and still it continues under some more comprehensive declarations and conventions. In true sense, it was first recognized in 1981 in African Charter on Human Rights and Peoples Rights. The Charter elaborates in art. 22(1) that All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity, the equal enjoyment of common heritage of mankind. In 1986, it was further proclaimed by United Nations in Declaration on The Right to Development. In 1993, it was reaffirmed by Vienna Declaration and Program of Action". Moreover many other conventions and declaration like ICCPR, 1966, ICESCR, 1966, UNDRD, 1986, Declaration of Philadelphia 1944, First UN Conference on Trade and Development 1964, Tehran International Conference on Human Rights 1968, Declaration of Social Progress and Development 1969, Charter of Economic Rights and Duties of States 1974, African Charter on Human and People's Rights 1981, also include the provisions relating to the Right to Development under international law. These instruments will be discussed in detail in chapter two under the heading Instruments Governing Right to Development.

Nature of United Nations Declaration on Right to Development

Though the RTD is seemed as clear in its language but the nature of RTD is seemed as problematic regarding the kind of right, the right holder and the duty holder under the United Nations Declarations on Right to Development. Moreover, it is ambiguous to understand how this right can be implemented, monitored or enforced under international law as well as local law? On one side, this right is deemed non-binding as being the part of a declaration having no binding nature. On another side, the contents of this declaration are reaffirmed in other binding instruments. This confusion may be resolved by understanding its nature under international law.

Findings of the Research

The contents of Right to Development and other binding instruments

The contents of RTD those are common in other legally binding instrument are as follows:

Self Determination

The first article of RTD deals with the right of self-determination. The article states that: The human right to development also implies the full realization of the right of people to self-determination, which includes, subject to the relevant provisions of both International Convention on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Same right is protected in Article 1 of both ICCPR and ICESCR.

Improvement of Human wellbeing

The improvement of Human wellbeing is protected in DRD under Article 1-4 and 8. The Same is protected in UDHR (art.25), ICESCR (art. 13-15), CRC (arts. 3, 24 and 27) and CRPD (art.2) and United Nations Charter (art. 55).

Participation of individual

Participation of individual in process of development is guaranteed in RTD in article 1,2 and 8 and same is protected in ICCPR (art.15), CEDAW (arts. 7 and 14), CRC (arts. 12 and 15), International Convention on the Protection of All Migrant Workers and Members of Their Families (arts. 26, 42-43), and Convention on Rights of Persons with Disabilities (arts. 9, 21, 29-30).

Non-discrimination

UNDRD (art. 6) protects the right of individual to not discriminated on any account. Same right is protected in UDHR (ART 1), ICESCR (ART. 2) ICCPR (ART. 26-27), CRC (ART. 2) Convention on Rights of persons with Disabilities (art. 3 5), International Convention on the Elimination on All Forms of Racial Discrimination and CEDAW.

Cooperation among states

The UNDRD emphases on the cooperation of states to achieve the goal of development (arts. 3, 4 and 6). Same right is protected in ICESCR (art. 2), Convention on the Rights of Persons with Disabilities (art. 32) Convention on Rights of Child, (art. 4 and 23).

Access to public services

The United Nations Declaration on Right to Development gives right to individual for public services. Same right is protected by UDHR (Art. 22 and 25), ICESCR (Art. 6, 11-13), ICCPR (Art. 2 and 25), convention on Rights of Person with Disabilities, (art. 24-25 and 28) and International Convention on the Protection of Rights of All Migrants Workers and Members of Their Families (art. 43, 6).

From the above study, it is evident that though UNDRD is not binding (in itself) but the provisions of same may deemed binding as being the part of others binding instrument. The instrument those are signed and ratified by the member states as binding document. Moreover, the moral and political power is also there to make this document binding on civilized states.

Conclusions

Right to Development has legally required procedures and requirements but still this Right is not deemed as the legally binding right as the Declaration under which this Right is established is not a legally enforceable treaty hence states cannot be legally held for its implementation. Yet the moral or political force is accepted and cannot be denied having effects. Though RTD is not enforceable by law, but some other human rights instrument has foundations for it, like ICCPR, 1966 and ICESCR, 1966.

These covenants have been constituted by large number of countries as international law (Kirchmeir, 2006). Hence it can rightly presume that the legal foundations for RTD can be sought in other legally binding documents. The contents of RTD show that the Bill of Human rights can be taken as foundation for the legally binding nature against all those countries who are parties to the Bill of Rights.

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