

**REALISING OF THE RIGHT TO DEVELOPMENT THROUGH DEVOLUTION IN
KENYA.**

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1. Introduction.

It is arguable that there is a strong and direct link between the right to development (RTD) and devolution. This paper seeks to bring demonstrate the linkage between devolution and the realization of the RTD in Kenya.

1.1 What is The Right to Development?

The right to development (RTD) is defined 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 realized.¹ The RTD is classified as a group right and includes both a right to substantive improvement in living conditions as well as the right by groups to participate in developmental processes.²

The RTD is a human right that integrates economic, social and cultural rights with civil and political rights³ in line with the established position that human rights are interrelated and interdependent; one cannot enjoy one group / class of right at the expense of others.⁴

¹ Article 1.1 Declaration on the Right to Development found at http://www.ohchr.org/Documents/Issues/Development/DeclarationRightDevelopment_en.pdf accessed on 22/03/16.

²Rebecca Browning, The right to Development in Africa: an emerging jurisprudence? 7 found at <http://kenyalaw.org/kl/index.php?id=1900> accessed on 22/03/16.

³ Arjun Sengupta Economic and Political Weekly Vol. 36, No. 27 (Jul. 7-13, 2001), 2527. Also Arjun K. Sengupta, 'Conceptualizing the right to development for the twenty first century ' in Office of the High Commissioner for human Rights, Realizing the Right to Development: Essays in Commemoration of 25 years of the U.N Declaration on the Right to Development (HR/PUB/12/4 United Nations 2013) 72.

⁴ This is the official position of the United Nations supported by both the General Assembly and office of the High Commissioner for Human Rights. See The 1968 Proclamation of the Teheran International Conference on Human Rights 13 U.N Doc.A/CONF 32/42 (1968) http://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf accessed on 22/03/16 also see Mureinik, 'Beyond a charter of luxuries Economic Rights in the Constitution' (1992) 8 SAJHR 464 also see Vienna Declaration and Programme of Action. U.N GAOR, World Conference on Human Rights 48th session, 22nd plenary meeting part 1,5 U.N Doc. A/CONF.157/24 (1993) .

The RTD was proclaimed in the U.N Declaration on the Right to Development (UNDR), adopted in 1986 by the United Nations General Assembly.⁵ The UNDR's preamble recognizes that: "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well being of the entire population and all individuals on the basis of their active, free and meaningful participation in development and the fair distribution of the benefits resulting therefrom."⁶

This right is also recognized in the African Charter on Human and Peoples' Rights⁷ and the Arab Charter on Human Rights⁸ and re-affirmed in several instruments including the 1992 Rio Declaration on Environment and Development,⁹ the 1993 Vienna Declaration and Programme of Action,¹⁰ the Millennium Declaration,¹¹ the 2002 Monterrey Consensus,¹² the 2005 World Summit Outcome Document¹³ and the 2007 Declaration on the Rights of Indigenous Peoples.¹⁴

1.2 A Historical Background of the Right to Development

In the 1970's and 1980, the right to development was introduced as one of the several rights belonging to a "third generation" of human rights.¹⁵ According to this view, the first generation of rights consisted of civil and political rights (CPRs) conceived as freedom from State abuse.

⁵ U.N.G.A Res. 41/128.

⁶ UNDR preamble.

⁷ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

⁸ League of Arab States, *Arab Charter on Human Rights*, 15 September 1994, available at: <http://www.refworld.org/docid/3ae6b38540.html> [accessed 12 August 2016].

⁹ UN Doc. A/CONF.151/26 (vol.I) / 31 ILM 874 (1992).

¹⁰ Supra note 4 above.

¹¹ U.N.G.A Res. 55/2.

¹² Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002 (A/CONF.198/11).

¹³ U.N.G.A Res. 60/1.

¹⁴ U.N.G.A Res. 61/295.

¹⁵ Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 *Harvard Human Rights Journal* (2004) 138.

The second generation consisted of economic, social and cultural rights (SERs); claims made against exploiters and oppressors. The third generation consisted of solidarity rights belonging peoples and covering global concerns like development, environment, humanitarian assistance, peace, communication and common heritage¹⁶ but has not entered the practical realm of development planning and implementation.¹⁷

Marks argues that the basic aspirations at the root of the claims of all the three ‘generations’ of rights are not historically determined. People suffering repression and oppression have aspired to fair and equitable treatment for millennia. Liberation from slavery and colonialism – based on premises similar to those of the so-called third generation rights – was expressed in terms later reflected in human rights language. Religious freedom was a human right concern as well before the mid-twentieth century separation of civil and political rights from economic, social and cultural rights.¹⁸

Marks therefore seems to suggest that categorization of human rights into three generations was merely a formal articulation of rights but the rights themselves were already in existence in their “raw state” and people all over the world going through different social, economic, political and cultural circumstances were agitating for these rights. This reasoning resonates with the argument that human rights are inherent in the nature of human beings¹⁹ thus even before rights were formally articulated, people were agitating for them by virtue of their humanness.

¹⁶ Philip Alston, *Making Space for New Human Rights: The Case for the Right to Development* *I HARV. HUM. RTS Y.B3*, -20 (1988).

¹⁷ Marks (note 15 above) 137.

¹⁸ *Ibid.*

¹⁹ United Nations Department of Public Information, *Human Rights, Questions and answers* (1987) 4 United Nations New York. Nations, New York. The United Nations (UN) has described human rights as;

“those rights which are inherent in our nature and without which we cannot live as human beings... human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual needs. They are based on mankind’s increasing demand for a life the inherent dignity and worth in which of such human beings will receive respect and protection”

The formal articulation the RTD in the form of texts using the human rights terminology is a phenomenon of the late twentieth century, beginning in the early 1970's.²⁰ The United Nations General Assembly proclaimed development as a human right in its 1986 Declaration on the Right to Development (UNDR) and in 1993, the Vienna Declaration and Programme of Action called the RTD “a universal and inalienable right and an integral part of fundamental human rights.”²¹

This was followed by giving the RTD prominence in the mandate of the High Commissioner where the General Assembly required the High Commissioner to establish “a new branch whose primary responsibilities would include the promotion and protection of the right to development.”²²

It is worth noting that the right RDT was also recognized by the drafters of the Universal Declaration of Human Rights (UDHR) in 1948 and according to Sengupta, credit should go to Eleanor Roosevelt who was the head of the U.S delegation during the drafting of the UDHR for having first identified and advocated for the RTD when she stated;

“We are writing a bill of rights for the whole world and one of the most important rights is the opportunity for development.”²³

In April 1998, the U.N. Commission on Human Rights adopted by consensus a resolution on the

²⁰ Keba M'baye introduced the concept of 'the right to development' (Inaugural lecture, third teaching session, international institute of human rights, Strasbourg, July 1972 text in (1972) 13 *Revue des Droits del Homme* 505 Vasak later classified it together with other rights as “ a third generation of rights’ see Vsak K. pour une troisieme generation des draits del ‘homme’ in C Swinarski (ed) studies and essays in international humanitarian law and Red Cross Principles in honour of Jean Picet (1984) 837.

²¹ Vienna Declaration and Programme of Action: wrote by the Secretariat, world conference on Human Rights (note 4 above).

²² Marks (note 15 above) 139. See also G.A Res. 48/141, U.N . GAOR, 50th sess., Supp. No. 49 at 296 U.N Doc A/50/214(1995)

²³Sengupta (note 3 above) 2527.

RTD²⁴ recommending to the Economic and Social Council the establishment of a follow up mechanism consisting of an open-ended working group (OEWG) and an Independent Expert. The purpose of the working group was to monitor and review the progress of the Independent Expert and report back to the Commission. The Independent Expert was to “present to the working group at each of its sessions a study on the current state of progress in the implementation of the RTD as a basis for a focused discussion, taking into account, *inter alia*, the deliberations and suggestions of the working group.”²⁵ Dr. Arjun Sengupta, a prominent Indian economist, was appointed Independent Expert and by 2004 had produced eight reports, while the OEWG had held five sessions.²⁶

When the United Nations Office of the High Commissioner for Human Rights (OHCHR) marked its 25th anniversary of the UNDR in 2011, it acknowledged that the Declaration has had little significant practical impact;

Many children, women and men the very subject of development still have dire need of fulfillment of their entitlement to a life of dignity freedom and equal opportunity. This directly effects the realization of a wide range of civil, political, economic, social and cultural rights.²⁷

²⁴ Commission on Human Rights Res. 72, U.N. ESCOR, 44th Sess., Supp. No. 3, at 229, U.N. Doc. E/CN.4/1998/177 (1998).

²⁵ Sengupta ' Realizing the Right to Development: Essays in Commemoration of 25 years of the U.N Declaration on the Right to Development' (note 3 above) 233.

²⁶ Marks (note 16 above) 139.

²⁷ High Commissioner Navi Pillay available at <http://www.un.org/en/events/righttodevelopment/index.shtml> accessed on 1/04/16.

1.3 The International Covenant on Civil and Political Rights & International Covenant on Social, Economic and Cultural Rights.

It is important to briefly discuss these two international human rights treaties in light of the RTD. The International Covenant on Civil and Political Rights (ICCPR)²⁸ and the International Covenant of Economic Social and Cultural Rights (ICESCR)²⁹ do not explicitly mention the RTD but it is arguable both covenants put in place a foundation for the recognition of the RTD by their particular reference to certain rights that are in nature group or solidarity rights.³⁰ For instance Article 1 of the ICCPR provides that all peoples have a right of self-determination and by virtue of that right they can freely determine their political status and freely pursue their economic, social and cultural development. The article also provides that all peoples may for their own ends freely dispose of their natural wealth and resources.

This mirrors with the preamble of the UNDR which recognizes the importance of the active, free and meaningful participation of the people in the process of development and the fair distribution of the benefits resulting therefrom as a key component to realizing the RTD. It is therefore unlikely that the RTD can be realized if the people have been denied the right to self-determination and pursuit of their economic, social and cultural development.

Indeed Salomon has noted that the RTD derives its intellectual origins and legal claims³¹ jointly from Article 28, 55 and 56 of the United Nations Charter (U.N Charter).³² It is upon this legal

²⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

²⁹ International Covenant on Economic, Social and Cultural Rights G.A. res. 2200A (XXI), 2. U.N. GAOR Supp (No.16) at 49 U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan 3, 1976

³⁰ Tamara Kunanayakam, 'Conceptualizing the right to development for the twenty first century ' in Office of the High Commissioner for human Rights, The Declaration on the Right to Development in the Context of United Nations standard -setting: Essays in Commemoration of 25 years of the U.N Declaration on the Right to Development (HR/PUB/12/4 United Nations 2013) pp. 26-27.

³¹ Salomon M, Global Responsibility for Human Rights (Oxford University Press 2007) 4; Margot Salomon, 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development' in Stephen Marks (ed), Implementing The Right To Development: The Role of International Law (The Friedrich-Ebert-Stiftung /Harvard School of Public Health 2008) 17.

foundation that the building blocks of the UNDR on the RTD are laid down under international law.³³

In light of the foregoing, it is arguable that the RTD is moving towards being accepted as a positive principle of international law³⁴ part and parcel of the international bill of rights in spite of reservations expressed by certain academics and in political circles regarding the enforceability and actualization of the right to development.³⁵

2. A Critique of the RTD.

While a critique to the RTD is not the main objective of this paper, a short analysis of the various dissenting voices will help us understand the underlying legal issues surrounding the RTD. Arne Vandebogaerde notes that since the proclamation of the existence of the RTD by the UNDR, it has been controversial among States and scholars due to its lack of conceptual clarity.³⁶ The enduring failure by States to agree on a common conceptual framework to develop the RTD has been greatly affected by the normative validity of the right.³⁷

³² United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> (Accessed 18th June, 2016).

³³ Oduwole O.O, International Law And The Right To Development: A Pragmatic Approach For Africa, Inaugural Lecture as Professor to the Prince Claus Chair in Development and Equity 2013/2015 delivered on 20 May 2014 at the International Institute of Social Studies, The Hague, The Netherlands, 5. Available at http://www.iss.nl/fileadmin/ASSETS/iss/Documents/Academic_publications/PCC_Inaugural_Lecture_20May2014.pdf (Accessed on 1st August 2016).

³⁴ Bunn I.D The Right to Development: Implications for International Economic Law, *15 American University International Law Review* (2000) 1436.

³⁵ See, e.g., Jack Donnelly, In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development, *15 Cal. W. Int'l L.J.* 473 (1985).

³⁶ Vandebogaerde A. Right to Development in International Human Rights Law; A Call for its Dissolution (2013) *31/2 Netherlands Quarterly of Human Rights* 188.

³⁷ *Ibid.*

For instance, the United States has been opposed to or reluctant to recognize development as an international human right and has expressed its reservations towards the rights.³⁸ Professor Philip Alston described that the Reagan Administration in the United States considered the RTD:

as the antithesis of a large part of its foreign policy. In this view, the right to development is little more than a rhetorical exercise designed to enable the Eastern European countries to score points on disarmament and collective rights and to permit the third World to “distort” the issue of human rights by affirming the equal importance of economic, social and cultural rights with civil and political rights and by linking human rights in general to its “utopian” aspirations for a new international economic order.³⁹

According to Bunn, while the fluidity of the definition of development within UNDR has not been particularly problematic, extracting the exact substance of the right has been a source of extensive legal critique. The declaration’s often vague language reflect both complexity of the subject matter and the demands of political compromise.⁴⁰

There are also difficulties in identifying the beneficiaries and duty holders under the right as the UNDR holds both individual and collective dimensions. Justiciability or enforcement is also an issue of concern as there are doubts as to how the right maybe upheld at national or international spheres.⁴¹

Brownlie argues that the content of the UNRD reveals a problem of identity and the result is perhaps to blur the conceptual profile and make the task of promulgation of the right more

³⁸ Stephen Marks, (note 15 above) 138. When U.N. General Assembly proclaimed development as a human right in its 1986 Declaration on the Right to Development the United States cast the only negative vote; eight other countries abstained.

³⁹ Alston, (note 17 above) 22.

⁴⁰ Bunn (note 34 above) 1434.

⁴¹ Ibid 1435.

difficult.⁴² Ghai on the other hand unequivocally shows his skepticism towards the RTD by stating that;

The value of the concept of a right is that it creates entitlements, and the entitlements are easier to enforce if the contents and beneficiaries of the right are clearly specified. In the case of the right to development, it is not clear who are the right and duty bearers. Equally vague is the content of the right.⁴³

Carty describes the debate about the RTD as a 'crisis in legal history' because it encompasses a determined attempt to place material content before form and yet retain whatever advantages are supposed to attach to the use of legal language.⁴⁴

Despite criticism from various legal scholars, it is now widely accepted that the RTD is recognized as a human right thanks to the efforts of the U.N to implement the right.⁴⁵ In fact Alston notes that in terms of international human rights law, the existence of the RTD is a *fait accompli*. Whatever reservations different groups may have as to its legitimacy, viability or usefulness, such doubts are now better left behind and replaced by efforts to ensure that the formal process of elaborating the content of the right is a productive and constructive exercise.⁴⁶

⁴² Brownlie I, "The Human Right to Development " Human Rights Unit Occasional Paper, Commonwealth Secretariat, (1989) 11.

⁴³ Yash Ghai, "Whose Human Right to Development?" Human Rights Unit Occasional Paper, Commonwealth Secretariat, (1989) 5-6

⁴⁴ Carty A, From the Right to Economic Self-Determination to the Right to Development: A Crisis in Legal Theory *Third World Legal Studies* (1984) 73, 75.

⁴⁵ For a detailed discussion see Bunn (note 34 above) 1436-39.

⁴⁶ Philip Alston, Development and the Rule of Law: Prevention Versus Cure as a Human Rights Strategy, in *Development, Human Rights And The Rule Of Law*, 31 International Commission of Jurists eds. (1981) 106.

3. The African Approach to the Right to Development.

The African Charter on Human and Peoples Rights also known as the Banjul Charter (ACHPR)⁴⁷ provides for the RTD under Article 22. The charter demonstrates Africa's commitment to actualizing the RTD. The right includes political, economic, social and cultural processes aimed at the constant improvement of the well-being of all individuals⁴⁸ and guarantees the peoples' free participation in the economic, social and cultural processes of their States and the fair distribution of the proceeds.⁴⁹ Note worthy is that the signatories of the charter went one step further than the United Nations General Assembly by ensuring that State parties are treaty bound to protect, promote and fulfill the RTD.⁵⁰

The ACHPR has been criticized as being a toothless dog when it comes to of protection and enforcement of human rights mainly because of its claw-back clauses.⁵¹ It has also been criticized on the grounds that the charter fails to precisely state the scope of the duty to ensure the exercise of the RTD and how this right can be exercised.⁵²

The above short comings notwithstanding, the charter is seen as a progressive human rights instrument which recognizes several controversial 'third generation' rights such as the RTD and a clean environment, certain group rights like the right to self-determination as well as duties such as the duty to promote the achievement of African unity.⁵³ Following the finding of the

⁴⁷ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

⁴⁸ J. Swanson 'The emergence of new rights in the African Charter' (1991) 12 New York Law School Journal of International & Comparative Law 317.

⁴⁹ Mbondenyi M.K International Human Rights and their Enforcement in Africa, (2011) 212.

⁵⁰ The U.N Declaration on the Right to Development is not a legally binding document while the Banjul Charter is binding upon a member State that has ratified the treaty. See M. A. Tadeq, Reflections on the right to development: Challenges and prospects, (2010) 2 AHRLJ. 327.

⁵¹ See generally Michelo Hansungule, Towards a more effective African system of human rights: "Entebbe Proposals" available at http://www.biicl.org/files/2309_hansungule_towards_more_effective.pdf (accessed on 3/03/16).

⁵² Mbondenyi (note 49 above).

⁵³ Browning (note 2 above) 5.

African Commission on Human and People's Rights in the *Endorois case*⁵⁴ the African charter was the first and is the only international human rights instrument that recognizes the RTD as a discrete justiciable right.⁵⁵

Some have argued that the RTD is promoted through other rights in the charter such as the right to self-determination, property, nature, resources, life and some socio-economic rights. Many of these rights were indicated in the *Social and Economic Rights Action Centre (SERAC) & Another vs Nigeria*⁵⁶ (*the Ogoni case*) which dealt with environmental and socio-economic rights of the Ogoni people in Nigeria.⁵⁷ The universality, interdependence, indivisibility and interrelatedness of rights principle states that one right cannot be enjoyed at the expense of others;⁵⁸ all human rights are related and therefore the protection of civil and political rights guarantees the enjoyment of social-economic rights and by extension the RTD.⁵⁹ No right can be enjoyed in isolation or at the exclusion of others.

4. The Right to Development in Kenya.

The RTD is not expressly provided for in the Constitution of Kenya though certain group rights in the Constitution contain elements of the RTD.

⁵⁴ Communication 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council versus Kenya*.

⁵⁵ Browning (note 2 above).

⁵⁶ Communication 155/96, Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

⁵⁷ African Commission held that the Nigerian government had violated Article 21 of the charter because the government had given a green light to oil companies to devastatingly affect the well-being of the Ogonis; a practice that falls short of the minimum conduct expected of the government.

⁵⁸ Vienna Declaration (note 4 above).

⁵⁹ *Ibid.*

4.1 Constitutional Provisions.

Article 56 of the Constitution of Kenya provides for the rights of minorities and marginalized groups wherein the State is obliged to put in place affirmative action programmes designed to ensure that minorities and marginalized groups:-

- a) participate and are well represented in governance and all spheres of life;
- b) are provided special opportunities in educational and economic fields;
- c) are provided special opportunities for access to employment;
- d) develop their cultural languages and practices; and
- e) have reasonable access to water, health services and infrastructure.

All the above mentioned rights are aimed at offering minorities and marginalized groups an opportunity to participate in political, socio-economic and cultural activities which play a crucial role in the development process thus ensuring that they are beneficiaries of the development process.

Article 57 of the Constitution provides for older members of society and requires the State to ensure the rights of older persons to;

- a) fully participate in the affairs of society;
- b) pursue their personal development;
- c) live in dignity and respect and be free from abuse; and
- d) receive reasonable care and assistance from their families and the State.

It is arguable that it would have been impossible for the older members of society to participate in the development agenda of their community if their ability to fully participate in the affairs of society and pursue their personal development was hampered by reason of their age. It is also arguable that the rights provided for in article 57 were included in the Kenyan Constitution to ensure that the older members of society are not disadvantaged in any way when it comes to exercising their right to participate in development processes which in effect guarantees their inclusion in the benefits accruing from development.

The other provision of the Constitution that touches on the RTD is Article 42, which provides for the right to a clean and healthy environment which includes the right;

- a) to have the environment protected for the benefit of present and future generations through legislative and their measures particularly those contemplated in Article 69; and
- b) to have obligations relating to the environment fulfilled under Article 70.

Article 69 places a duty on the State to take a wide range of measures to ensure that the environment and natural resources are protected, conserved, managed and utilized in a proper and equitable manner for the benefit of the people of Kenya. Article 69(1)(a) provides that the State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of accruing benefits.

As History as shown that whenever major development programmes are implemented by the state or state sanctioned investors, the local communities find themselves disadvantaged⁶⁰ in the sense that they may not benefit from the accruing benefits of the development process especially in cases where natural resources that are being exploited either by the government or foreign entities. The Kenyan people are however afforded Constitutional protection under the provisions of articles 42 and 69 of the Constitution, which provides for a right to benefit from a process of development that is friendly to the environment and natural resources. In fact, article 70 takes it a notch higher by providing for the protection and enforcement of environmental rights under the Constitution of Kenya.

It is my submission that the rights discussed above in articles 42, 56 & 57 are substantively third generation rights giving rise to the RTD because their very nature predisposes them to solidarity or group of rights. Therefore in spite of lack of an express provision on the RTD in the Constitution of Kenya, articles 42, 56 & 57 can be interpreted to give rise the right to development.

⁶⁰See The *Ogoni case* (note 56 above) and the *Endorois case* (note 54 above).

4.2 Domestic Application of The ACHPR in Kenya.

Article 2(6) (the supremacy clause) of the Constitution provides that any treaty or convention ratified by Kenya should form part of the law of Kenya while article 2(5) provides that the rules of international law shall form part of the law of Kenya.⁶¹ The said Constitutional provisions particularly article 2(6) in effect transformed Kenya from a dualist country to a monist country meaning that Kenya does not have to enact local legislation to operationalize an international treaty locally.⁶²

Kenya therefore does not need to enact local or municipal legislation to operationalize the ACHPR in Kenya. The charter is binding and enforceable locally on account of its ratification by the republic of Kenya.⁶³ As noted earlier in this paper, article 22 of the ACHPR expressly

⁶¹ It is important to note that the Court of Appeal sitting in Nairobi in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR interpreted article 2(5) as referring to peremptory norms of international law or *jus cogens*. The court stated as follows;

“Further, it must be noted that Article 2 (5) of the Constitution makes general rules of international law to be part of the laws of Kenya. It is the general rules that form part of the laws of Kenya and not all rules of international law. In this context, rules of international law are not part of the laws of Kenya unless they are part of the general rules of international law. The general rules of international law are those rules that are peremptory principles and are norms of international law; they are the customary rules of international law or *jus cogens* in international law, are those rules from which no derogation is permitted; they are globally accepted standards of behavior; they are rules and principles that are applicable to a large number of states on the basis of either customary international law or multilateral treaties;...”

⁶² F Viljoen International human rights law in Africa (2012) 522; M Killander & H Adjolohoun ‘Introduction’ in M Killander (ed) International law and domestic human rights litigation in Africa (2010) 3 11. Dualism envisages the complete separation of national and international legal systems, and that for rules of international law to apply in the national legal system, they must be transformed, through domestication, and thus apply as part of domestic national law and not as international law. Monism, on the other hand, envisages international law and national law as part of one legal system, and that international law is directly incorporated into the national legal system without any difficulty in its application as international law within the domestic legal system. Cited in Orago W.N The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective (2013) *13 African Human Rights Law Journal* 416.

⁶³Kenya ratified the ACHPR on the 23rd of January 1992 see <http://www.achpr.org/instruments/achpr/ratification/> accessed on 18/03/2016.

provides for the RTD meaning that Kenyans can move to the local courts for assistance where their RTD is being violated or threatened and the courts will be expected to uphold the provisions of article 22 of the ACHPR.⁶⁴

The much celebrated decision of the African Commission for Human and People's Rights in the *Endorois Case* affirmed the justiciability of the RTD in Kenya. The commission found that the Kenyan government had violated the Endorois peoples' RTD when it took over their land without compensating them and converted it into a gazetted park.⁶⁵

Note worthy is that the *Endorois case* was filed before the High court in Kenya in the year 2000. This was at the time when Kenya was still shackled by the 1963 independence Constitution which has been criticized as having a retrogressive bill of rights replete with limitations whose enormity rendered enjoyment of human rights peripheral thus making it a bill of exceptions rather than rights.⁶⁶ The High Court in Kenya rejected their claim by stating that it could not address the issue of a community's collective right to property, referring throughout to individuals affected and stating that there is no proper identity of the people who were affected by the setting aside of the land that has been shown to the court. The court also stated that it did not believe Kenyan law should address any special protection to peoples' land based on historical occupation and cultural rights.⁶⁷

It is therefore my submission that the High Court arrived at this decision because of lack of a Constitutional legal framework to support a claim for the RTD.⁶⁸ The Endorois then moved to the African Commission in 2003 after which the Commission, in the year 2009, recommended that Kenya returns their land vindicating the Endorois culture, development, religious, property

⁶⁴ My research has indicated that there has not been any significant litigation in this area under the provisions of the Constitution of Kenya 2010. My source is the Kenya Law reports database.

⁶⁵ Note 54 above.

⁶⁶J. Mutakha Kangu 'The Theory and Design of limitation of fundamental rights and freedoms' (2008) 4/1 *The Law Society of Kenya Journal* 1.

⁶⁷*William Yatich Sitetalia, William Arap Ngasia & Others vs Baringo County Council* High Court of Kenya at Nakuru Civil Case No. 183 of 2000 parag 12 of the African Commissions finding in *Edorois case* (note 54 above).

⁶⁸ See note 66 above.

rights and rights to natural resources. The African Union made the recommendation legally binding on Kenya in 2010 by endorsing it at a meeting of heads of states and governments showing its support for the finding of the commission.⁶⁹

The *Endorois case* would have taken a different tangent if it would have been filed after 25th August 2010 when Kenya promulgated a new Constitution with a robust bill of rights and provisions domesticating international treaties ratified by Kenya into municipal law.⁷⁰

4.3 Conclusion

The finding of the African Commission in the *Endorois case* and the aforementioned provisions of the Constitution of Kenya, make it crystal clear that the RTD is justifiable and enforceable in Kenya.

5. Devolution in Kenya.

5.1 Introduction.

Devolution is a form of decentralization. It refers to the process of transferring decision-making and implementation powers, functions, responsibilities and resources to legally constituted, and popularly elected local governments.⁷¹ According to Ghai, the significance of the objectives of devolution was at least threefold. It involved the reorganization of the entire state moving it towards hybrid – federalism. It sought to introduce standards and practices of equitable distribution and delivery of services throughout the country. Finally, it established rules and principles including democracy and participation, by which devolved powers (as also national powers) must be exercised.⁷²

⁶⁹ Browning (note 2 above) 10-12

⁷⁰ Orago (note 62 above). The provisions of the ACHPR on the right to development would have been directly enforceable in the Kenyan courts.

⁷¹ Hand Book on Devolution, ICJ Kenya (2013) pp. 5 available at

<http://www.icj-kenya.org/dmdocuments/books/devolution%20handbook.pdf> accessed on 6th July 2016.

⁷² Ghai Y.P ‘Devolution in Kenya: Background and Objectives’ in Steytler, N and Ghai, Y eds, Kenyan – South African Dialogue on Devolution, (2015) 78-79.

5.2 Historical Background

Ghai traces the demands and rationale for devolution to the origins of the Kenyan State. Before the arrival of the British Colonialists in Kenya, Africans were living in largely self-regulating communities or tribes each with its own territory meaning there was no one state. The fortunes of communities therefore depended on natural resources, rains, disease, the ebb and flow of trade, internal conflict among other factors.⁷³

Some communities engaged in cultivation meaning that there was abundant resources and little conflict over the same while for pastoralist communities, this was not the state of affairs; these communities were more prone to conflict arising out of resources. As much as there were no organizations on rules that extended beyond a tribe, contacts and exchanges between different communities existed. Differences between tribes were settled through negotiations, perhaps leading to reparations and sometimes force.⁷⁴

The arrival of the British marked the advent of a territory with defined boundaries that included many tribes which had lived on their own lands since time in memorial. The British introduced the concept and organization of the State and Constitution translating into common rule over both the inhabitants of the colony and those who visited the colony for trade or other purposes. This system of administration formed the foundation of governance in modern Kenya.⁷⁵

In the process of stamping their authority over the colony the British used force to alienate the resources from certain tribes,⁷⁶ for instance the Maasai people were removed from their ancestral lands to pave way for British interests.⁷⁷ Gradually, the British set up a civilian administration built upon District Officers and Provincial administration, another foundation of the

⁷³ Ibid 56.

⁷⁴ Ibid.

⁷⁵ Ibid 57.

⁷⁶ The British used violence on a locally unprecedented scale. See Elis D 'The Nandi protest of 1923 in the context of African Resistance to Colonial Rule in Kenya (1976) 17 (4) The Journal of African History 558.

⁷⁷ Kanyinga K 'The legacy of the White Highlands: Land Rights, ethnicity and the post 2007 elections violence in Kenya (2009) 3 Journal of Contemporary African Studies 327.

contemporary Kenyan State. Doing so required consideration of the colony's legal foundations⁷⁸ thus the establishment of a Constitution that had less to do with Kenyans than with how the British ruled over them.⁷⁹

The take over of power and its exercise by the British also affected the social and economic structures of the African communities seriously disrupting the rhythm of their lives. Subsequently political, social and economic forces drove society in new directions and this led to uneven development of groups and regions.⁸⁰ The basis of traditional egalitarianism was destroyed by the market as well as administrative practices leading to differentiation among and within communities. These tendencies accelerated with the approach of independence destroying trust within communities as well as between communities.⁸¹

The colonial structure of government and administration from the onset marginalized the Africans politically, socially and economically. For instance, the creation of the white highlands and African reserves placed Africans at a disadvantage.⁸² The colonial policy of exclusion of Africans from political, economic and development matters led to a wide spread resentment of the colonial system by Africans. The Local Native Councils⁸³ whose primary objective was to provide a forum for community consultation in decision making and developmental functions in matters including public health, education, land use among others, proved inadequate in terms of cooling down the rising political pressure from disgruntled Africans.⁸⁴

Economic restrictions placed on Africans such as the ban on growing cash crops and the socio-economic problems created by displacements, segregation and poor services in African areas contributed to the intense anti-colonial feeling among Africans. Loss of land to European

⁷⁸ Ibid.

⁷⁹ See generally Ghai Y.P & McAuslan, Public Law and Political Change in Kenya (1970) chapt. 1 & 2.

⁸⁰ Ghai (note 72 above) 58.

⁸¹ Ibid. 59.

⁸² C.M Bosire Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010 (2013) PHD Thesis University of Western Cape 112 available at http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/3008/Bosire_PHD_2013.pdf?sequence=1 (last accessed on 8/07/16) 90-96.

⁸³ 1912 Native Local Council Ordinance.

⁸⁴ Bosire (note 82 above) 97.

settlement had created a major sense of loss among Africans whose population was steadily rising.⁸⁵

As Kenya moved towards independence, the larger and economically and politically dominant ethnic groups came together under the Kenya African National Union (KANU) while the smaller communities coalesced under the Kenya African Democratic Union (KADU) whose main agenda was to agitate for an independence Constitution that protected their land rights and ensured them a share of state power.⁸⁶ KANU agitated for a strong centralized government while KADU was for a decentralized government with power given to regional governments.

Asians on the other hand felt too vulnerable to make any major demands and asked for citizenship for those who wanted it, equal rights with other citizens and preservation of their British citizenship. As for the Arabs living in the coastal areas, the British had treated them as a distinct community from other indigenous groups thus they were seen as supporters of the British creating resentment among Africans.⁸⁷

5.3 Majimbo / Regionalism.

It is against this background that regionalism or majimbo (a form of devolution) which was closely related to ethnicity was introduced in Kenya under the independence Constitution of 1963.⁸⁸ Since majimbo is closely related to ethnicity, a brief account of ethnic diversity is necessary to understand the appeal and politics of devolution in Kenya.⁸⁹ Statistics show that no ethnic community is close to being the majority in Kenya.⁹⁰ The largest single group is Kikuyu whose population is about 17.2%, followed by the Luhya 13.8%, the Kalenjin 12.9%, and the

⁸⁵ Overton J. 'The Origins of the Kikuyu Land Problem: Land alienation and land use in Kiambu, Kenya 1895-1920 (1988) 31(2) African Studies Review 109.

⁸⁶ O. Oginga Not Yet Uhuru; an Autobiography (1967) 146-71.

⁸⁷ Ghai (note 72 above) 63.

⁸⁸ For a detailed discussion see Ghai (note 72 above) 68-74.

⁸⁹ Ibid 59.

⁹⁰ Ibid 61.

Luo 10.4%.⁹¹ The regions were drawn along ethnic lines albeit with minor alterations⁹² meaning that ethnicity became the foundation of the entire system of Majimbo.⁹³ Regionalism was based on two levels of government; national and regional governments; The Country was divided into seven regions including Nairobi.⁹⁴

Regionalism or majimbo did not survive long after independence. Shortly after independence, the Kenyatta government resisted further implementation of regionalism and proceeded to dismantle it formally by amending the Constitution. Members of the Senate were bribed to acquiesce in the necessary Constitutional amendments including the demise of the Senate itself.⁹⁵

5.4 Resurrection of Devolution: 2010 Constitution.

The repeal of regionalism resulted in systematic dismantling of democratic principles of government.⁹⁶ Kenya became a one party State and all State institutions became effectively subjected to the will of the president.⁹⁷ This in effect meant that all power was concentrated at the center (the presidency) and all the inequities, regional marginalization, socio-economic and political imbalances created by the British colonialists continued to thrive in Kenya.

The demand for Constitutional change became unstoppable after the 2007 bungled elections. There was a widespread feeling among Kenyans of alienation by the government because of concentration of power in the national government and to a remarkable extent in the president. They felt marginalized, neglected, deprived of their resources and victimized for their political or

⁹¹ Republic of Kenya 2009 'Population and housing census results' Ministry of State for Planning, National Development and Vision 2030 (31 August 2010).

⁹² Smoke P, Local Government Finance in Developing Countries: The case of Kenya (1994) 69.

⁹³ Ghai (note 72 above) 71.

⁹⁴ Part II Schedule II to the Independence Constitution the regions were Western, Nyanza, Coast, Rift Valley, Central, Eastern, North Eastern and Nairobi area.

⁹⁵ Ghai (note 72 above) 74.

⁹⁶ Ibid.

⁹⁷ Ibid.

ethnic affiliations. Regions that did not support the president were penalized in terms of resources and development.⁹⁸

On the 4th of August 2010, Kenyans overwhelmingly voted in favour of a new Constitution in a national referendum. The Constitution under Articles 174 and 175 provided for a new structure of government where power was devolved from the central government to regions known as counties.

5.4.1 Structure of Government under the 2010 Constitution.

The Constitution provides for 47 developed units known as counties.⁹⁹ County political powers are divided into legislative¹⁰⁰ and executive powers¹⁰¹ with the former vested in the county assembly and the latter in the county executive. The general country government structure is a presidential system led by an elected county governor who appoints a cabinet that is approved by the county assembly.¹⁰²

The county assembly consists of elected and nominated members representing various wards and the speaker as an ex-officio member.¹⁰³ There are however a number of checks and balances put in place to limit the powers of the governor and enhance accountability in the county government generally.¹⁰⁴

⁹⁸ Constitution of Kenya Review Commission (CKRC). The main Report of the Constitution of Kenya Review Commission (2002) 181.

⁹⁹ First Schedule of the Constitution of Kenya read with article 6(1).

¹⁰⁰ Article 185 of the Constitution of Kenya.

¹⁰¹ Article 183 of the Constitution of Kenya.

¹⁰² C.M Bosire 'Political Structures and Politics of Counties in Kenya' in Steytler, N and Ghai, Y eds, Kenyan – South African Dialogue on Devolution, (2015) 138.

¹⁰³ Article 177 of the Constitution of Kenya.

¹⁰⁴ Articles 181, 182, 183, 185, 192 and 195 of the Constitution of Kenya.

5.4.2 Objects of Devolution.

The objects of devolution comprise the following:-¹⁰⁵

- a) To promote democratic and accountable exercise of power;
- b) To foster national unity by recognizing diversity;
- c) To give powers of self-governance to the people in exercise of the powers of the state and in making decisions affecting them;
- d) To recognize the right of communities to manage their own affairs and to further their development;
- e) To protect and promote the interests and rights of minorities and marginalized communities to manage their own affairs and to further their development;
- f) To protect and promote the interests and rights of minorities and marginalized communities;
- g) To promote social economic development and provision of proximate, easily accessible services throughout Kenya;
- h) To ensure equitable sharing of national and local resources throughout Kenya;
- i) To facilitate the decentralization of state organs, their functions and services from the capital of Kenya and;
- j) To enhance checks and balances and separation of powers;

Article 175 provides that county governments ought to reflect the following principles:-

- a) Democratic principles and separation of powers;
- b) Reliable sources of revenue to enable them govern and deliver services effectively and;
- c) No more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

¹⁰⁵ Article 174 of the Constitution of Kenya.

5.5 The impact of Devolution on the Right to Development in Kenya.

The objectives of devolution under Article 174 have a direct bearing or impact on the RTD. Promotion of democratic and accountable exercise of power results in proper governance thus creating space for the realization of CPRs. The protection of CPRs guarantees the enjoyment of SERS and by extension the RTD. The Vienna Declaration provides that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.¹⁰⁶

Devolution is meant to foster national unity by recognizing diversity, which, ensures access to resources by all thus eliminating the vice of marginalization of certain communities and people groups that had bedeviled this country since the colonial era. Equal access to resources opens up an avenue for all the people to participate in, contribute to and enjoy economic, social, cultural and political development including a fair distribution of the benefits resulting therefrom.

Enhancing the participation of the people in the exercise of the powers of the State and recognizing the right of communities to manage their own development gives the people a chance to participate in crafting their own unique and appropriate development agenda based on their socio-economic, cultural and political needs. The ultimate effect of opening up participation by the people in charting the course of their own development agenda is that they get to reap the benefits arising therefrom.

Devolution promotes social and economic development and the provision of proximate easily accessible services throughout Kenya. This ensures the realization and development of SERS. Better access to SERS results to enjoyment of CPRs and the RTD by extension since human rights are universal, interrelated and indivisible.

¹⁰⁶ Article 8 of the Vienna Declaration (note 4 above).

Devolution ensures equitable sharing of national and local resources throughout Kenya meaning that each and every region has a fair chance and opportunity to break free from the yoke of political marginalization perpetuated by the British colonial government and the successive governments of Jomo Kenyatta, Daniel Arap Moi and Mwai Kibaki.

Noteworthy is that Article 185 (4) of the Constitution of Kenya makes development a people driven affair by vesting the County Assembly with powers to receive and approve plans and policies for the management and exploitation of the county's resources and the development and management of the infrastructure and institutions. The requirement for public participation in decision making also enhances the involvement of the people in development.

Article 201 of the Constitution of Kenya provides that the public finance system of Kenya shall promote an equitable society and in particular revenue raised nationally shall be shared equitably among national and county governments and expenditure shall promote the equitable development of the country including making special provision for marginalized groups and areas.

The equalization fund created under Article 204 seeks to create equity in development. The national government is mandated to use the fund to provide basic services including water roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation so far as possible.

5.6 Conclusion.

The Constitution of Kenya lays a lot of emphasis on equitable distribution and/ or sharing of resources between the national government and the county government. It seeks to correct the historical injustices related to development by creating the equalization fund under article 204 of the Constitution. Devolution makes people the center of development creating an avenue for realization of RTD.

6. Conclusion and Recommendations.

For the realization of any right, duties must be assigned so as to establish accountability. The UNDR assigns responsibilities for implementing the RTD.¹⁰⁷ Under Article 2(3) of the UNDR States have a duty to formulate national development policies, which must have the following characteristics:

- a) They must be participatory, that is, active and meaningful participation;
- b) Equitable, that is, fair distribution of resources.

Further, States have the right to adopt these policies, implying that if States acting on their own are unable to formulate and execute those policies in a globalized and interdependent world, they have the right to claim cooperation and help from other States and international agencies.¹⁰⁸ I wish to submit that the UNDR can be used as an authoritative document for interpretation of the scope of the duty to ensure the exercise of the RTD and how this right can be exercised under article 22 of the ACHPR.

According to Malhotra, the RTD puts people at the center of the development process, which aims to improve “the well-being of the entire population and all individuals on the basis of the active, free and meaningful participation in development and in the fair distribution of the resulting benefits.”¹⁰⁹ Devolution in fact puts people at the center of the development process because it opens up an avenue for the people to control their own resources and therefore be in a position to craft and drive the development agenda in their communities.

The RTD, as mentioned above, involves the realization of all civil, political, economic, social and cultural rights, and therefore all the characteristics of State obligations also apply to its

¹⁰⁷ Sengupta (note 3 above) 72.

¹⁰⁸ Ibid.

¹⁰⁹ Rajeev Malhotra ‘Towards Operational Criteria and Monitoring Framework’ in Office of the High Commissioner for human Rights, The Declaration on the Right to Development in the Context of United Nations standard -setting: Essays in Commemoration of 25 years of the U.N Declaration on the Right to Development (HR/PUB/12/4 United Nations 2013) 390.

implementation. But in the nature of things, the RTD largely entails obligations to fulfill or to promote and provide, which are in general “imperfect” obligations to elaborate policies or programmes of action wherein all parties, particularly States and the international community, have clear roles to play in helping to realize the right to development.¹¹⁰ Devolution therefore creates the much needed and required framework for the State to fulfill its obligations for the realization of the RTD in the Kenyan context.

It is therefore arguable that devolution creates a platform for active and meaningful participation of the people in the development process at the grassroots level through the county governments. Devolution also aims at ensuring that there is equitable and fair distribution resources among the people based on the needs of each county. This augurs well with the provisions of Article 2(3) of the UNDR that States have an obligation to formulate national development policies that are participatory in nature and equitable in terms of fair distribution of resources. Article 22(2) of the ACHPR also provides that States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Devolution of power enhances participatory governance by opening up multiple centers of decision making¹¹¹ which can greatly enhance the pursuit of development, ethnic accommodation and limiting central powers.¹¹² Devolution also facilitates a people centered development through local democratic institutions¹¹³ thus reducing the inefficiency and red tape associated with central bureaucracy thereby advancing effective development.¹¹⁴ The inclusion of minorities and marginalized groups in governance is also made possible by devolution.¹¹⁵ All these factors are conditions precedent to realizing the RTD.

¹¹⁰ Sengupta (note 3 above) 73.

¹¹¹ World Bank World Development Report 1999/2000: Entering the 21st Century (1999) 107.

¹¹² Bosire 209.

¹¹³ World bank 107.

¹¹⁴ World bank 114.

¹¹⁵ Ghai YP Devolution: Restructuring the Kenyan State (2008) 2 *Journal of Eastern African Studies* 211-226.

The purpose of this paper was to make a case for the realization of the RTD in Kenya through devolution. As a country, we need to strive to eliminate all factors that water down and dilute the objectives and spirit of devolution as set out in article 174 and 175 of the Constitution of Kenya. Such factors include negative politics, poor leadership at the county level, ethnicity and corruption among others. As Kofi Annan noted, our guiding light must be the needs and hopes of peoples everywhere, we must aim to perfect the triangle of development freedom and peace.¹¹⁶

¹¹⁶ Kofi Annan, *In larger freedom: Towards Development, Security and Human Rights for all* (Report of the Secretary General of the United Nations for Decisions by Heads of State and Government in September 2005, UN DOC. A/59/2005 United Nations 2005) 5.

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