HUMAN RIGHTS AND DISCRIMINATION

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1.0 INTRODUCTION

One of the preoccupations of the human rights movement has been the prohibition of discrimination and inequality. Indeed, the non-discrimination and equality have been identified as being at the heart of human rights, the respect of which immensely contributes to human dignity and sustainable development. This is evident from the provisions of various human rights instruments all of which prohibit discrimination and seek to ensure equal right of men and women to the enjoyment of all rights therein.

In an appreciation of the place and role of human rights in societal development, the African continent has adopted the human rights framework that comprehensively captures the international standards and the aspirations of the African people. These precepts have to some extent been mainstreamed in the municipal systems of African countries. In spite of the foregoing and various interventions by stakeholders in Africa, the attainment of the principles of human rights still remains a mirage on the continent. One of the challenges identified as contributing to this state of affairs is the continued discrimination fueled by historical reasons, skewed intervention measures and poor governance. This has led to inequality, marginalization and abject poverty and presented a challenge in the attainment of the Millennium Development Goals.

In order to address the inequality and discrimination on the continent, a number of measures have been identified by various stakeholders. These measures involve the targeting of policies, laws and administrative programmes to create a society based on social justice, equality and sustainable development. This presentation seeks to examine ways of
addressing structural discrimination and marginalization in Africa as a way of formulating appropriate measures for Africa’s future development.

2.0 THE CONCEPT OF HUMAN RIGHTS

The concept of human rights is one of the most important subjects in the history of human beings. Its foundation can be traced to many centuries back and predates the political society. Although there has never been consensus on the meaning of human rights, there is unanimity that they are inherent to every individual. This was succinctly summed up by Humphrey, one of the authors of the Universal Declaration of Human Rights, that human rights are those rights without which there can be no human dignity. Put differently, human rights a ‘common language of humanity.’ As such, they are recognized legitimate claims of individuals, which the society is legally and morally obligated to protect, respect, ensure and realize.

Throughout the evolutionary history of human rights, three aspects of human existence have sought to be safeguarded: human integrity, freedom and equality, all of which are premised on the respect for the dignity of the individual. The concept of human rights has crystallized globally through codification in various instruments, and captured within the national constitutional frameworks as ‘sovereignty of the people’ thereby underscoring the fact that the people should not be subordinated to anyone except themselves.

The Universal Declaration of Human Rights captures the philosophy of human rights by proclaiming that ‘all human beings are born free and equal in dignity and rights.’ This philosophy was adopted in the subsequent human rights instruments, which set the basic standard regarding the rights of individuals and the obligations of states to promote, protect and respect human rights.

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2 Speech by Boutros Boutros-Ghali, the United Nations Secretary General at the Vienna Conference, UN/DOC A/CONF 157/22, 12th July 1993.
Human rights have been broadly categorized into three ‘artificial’ categories, commonly referred to as ‘three generations’ of human rights. These are the civil and political rights (First Generation), economic, social and cultural rights (Second Generation) and collective/group rights (Third Generation). However, the categorization of human rights was demystified during the Vienna World Conference on Human Rights in 1993, which declared that human rights are universal, indivisible, inter-dependent and interrelated.\(^4\) The Declaration of the Conference brought the debate on the dichotomy of rights to an end and elevated the status of rights that were considered to play a second fiddle to the civil and political rights. Accordingly, all states, irrespective of the national, regional or cultural differences, are obligated to promote and protect all the rights by treating them in a fair and equal manner and with the same emphasis.

2.1 Human Rights Framework in Africa

The human rights landscape in Africa is fairly well developed. At the pinnacle of the framework is the African Charter on Human and Peoples’ Rights (African Charter) whose unique conceptual framework covers all the three categories of rights. The philosophy underpinning this framework is summed up in its preamble thus:

> It is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be disassociated from economic and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

The revolutionary nature of the African Charter is further illustrated by the contents of Article 13 and 14 which recognize rights such as the right to participate in the government of one’s country, access to public service and access to public property and services. These rights have been held by the Human Rights Committee to entail an obligation on the state to avoid discrimination or persecution on grounds of political opinion or expression.\(^5\) It is noteworthy that this historical and ideological feat was


achieved before the Vienna Conference in 1993, at a time when there was a debate on the viability and enforcement of the three categories of rights.


3.0 HUMAN RIGHTS AND DEVELOPMENT

Throughout the history of human rights, one of the key features has been their empowering language worldwide. As stated by Nowak, this is due to the focus of human rights on the life and dignity of the individual. Indeed, the empowering language of human rights has been evident from the successful struggles in many societies, which focused on the inalienable nature of human rights. Many scholars and governance practitioners such as John Locke, had earlier acknowledged the indispensable place of human rights in development and self-actualization. As a result, the modern constitutions, beginning with the American Constitution of 1787 and the French Constitution of 1791, have provided for a comprehensive Bill of Rights. In addition, national constitutions the world over have increasingly entrenched human rights institutional framework such as Constitutional Courts, Ombudsman Institutions and National Human Rights Institutions to ensure the implementation of the Bill of Rights.

Based on the foregoing, human rights have continued to play an important role in good governance, democracy and constitutionalism worldwide. For instance, the principle of sovereignty of the people, captured in many constitutions, is hinged on the exercise of the rights by the citizens in any given country. In this regard, the governors, exercise delegated powers from the people. Accordingly, human rights contribute to the rule of law, democracy and constitutionalism as has been empirically proven over the

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years. Countries that respect and protect human rights have been found to be more democratic than those with restrictive regimes.\textsuperscript{7}

Overall, human rights have been found to be fundamentally tied to development. Indeed, the case of human rights and development mirrors that of the chicken and egg. This is because respect for human rights lead to development, which at the same time is the process for the realization of human rights.\textsuperscript{8} The nexus of human rights and development aptly captured in the definition of development by the United Nations Declaration on the Right to Development as\textsuperscript{9}

A comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.\textsuperscript{10}

Moreover, it is instructive to note that the Declaration mainstreams human rights in the definition of the right to development as:\textsuperscript{11}

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 realised.

The nexus between human rights and development is further demonstrated by the fact that respect for human rights create a conducive environment for peace, security, conflict resolution all which are key to development.

\section*{4.0 CHALLENGES TO EQUALITY IN AFRICA: DISCRIMINATION AND MARGINALIZATION}

\textsuperscript{7} Nowak (n. 6 above) 48
\textsuperscript{8} For instance, see A Sen \textit{Development as freedom} (1999) New York: Alfred A Knopf 17. He defines development as the expansion of capabilities or substantive human freedoms for each person and the capacity to lead the kind of life he or she has reason to value.
\textsuperscript{9} The Declaration on the Right to Development adopted by the United Nations General Assembly vide Resolution 41/128 of 4 December 1986.
\textsuperscript{10} Preamble of the Declaration on the Right to Development (n 9 above).
\textsuperscript{11} Article 1.1
Equality is one of the most important principles of modern democracy. It focuses on fair treatment and human dignity. Indeed, equality is one of the key principles of the various human rights legal instruments as stated by Justice Lauterpacht that:12

The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in the most written constitutions. It is the starting point of all other liberties.

This position was similarly stated by the UN Human Rights Committee that ‘non-discrimination, together with equality before the law and equal protection of the law without discrimination, constitutes a basic and general principle relating to the protection of human rights’13 As a result, all the international human rights instruments have provisions on equality and non-discrimination.14 These instruments require states and other duty bearers to ensure equality.

In spite the above stated framework and the adoption of a number of human rights legal instruments, the realization of human rights in Africa has remained a mirage due to a number of challenges. As a result, poverty, ignorance, diseases and armed conflicts have bedeviled the continent to an extent that they have almost become the trademarks of Africa. Africans constitute the world’s most impoverished with about 315 million people living on less than US $ 1 daily, 33 percent of the population suffer from malnutrition, less than 50 percent have access to healthcare services and a substantial number of children are out of school.15 These problems have been compounded by other factors, key among them the HIV/AIDS pandemic which has affected a large proportion of Sub-Saharan Africa, with women and children being the most affected. As a result, achieving equality as propagated by a number of documents has continued to remain a challenge in many countries.

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15 See UNDP facts on poverty in Africa <http://www.africa2015.org/factspoverty.pdf.> This accounts for almost half of the entire population of the Sub Saharan region which has about 700 million people.
One of the factors that has been found to contribute to these challenges in Africa is inequality based on structural and systemic foundations. A number of studies have consistently found that a number of countries in Africa have high gini co-efficient meaning that they experience high levels of inequality. For instance, the Human Development Reports of the United Nations Development Programme have consistently found low levels of development index occasioned by factors such as inequality and poverty. The inequality has undermined the societal development and fabric in many African countries thereby caused widespread poverty. In this regard, the attainment of democratic governance becomes a secondary issue as the people’s priority is on survival as they can hardly afford the luxury of debating the nature and development good governance and constitutionalism.

The inequality in Africa has been caused by a number of factors, including poor economic policies, bad governance (corruption and state capture), marginalization based on discriminatory grounds, historical reasons based on colonialism or racial segregation and social-cultural reasons. While a number of redress interventions have been initiated in all African countries, the inequality gap has not reduced. On the contrary, the situation in some countries has worsened, with women, the elderly and people from marginalized areas being the most affected.

In Kenya, for instance, a study conducted in 2004 found that there was a high level of inequality that undermined democratic governance and realization of fundamental rights and freedoms.\textsuperscript{16} It found that income was heavily skewed in favour of the rich against the poor. For example, the country’s top 10 percent households were found to control 42 percent of the total income while the bottom 10 percent controlled less than one percent. When translated, it means that for every one shilling earned by the poorest 10 percent households, the richest earned more than 56 shillings. In terms of expenditure, the study found that for every shilling spent by the poorest 10 percent, the richest 10 percent spent about 52 shillings.

The study also found disparities in relation to access to socio-economic facilities such as education, healthcare, water and sanitation, and

infrastructure, land, electricity and justice. In all these facilities, it found that the wealthier had a better access to them compared to the poor. One interesting finding was that the proportion of households with electricity in Nairobi was more than the other regions combined (then seven Provinces). In terms of gender disparities, the study found that although there had been an improvement of the participation of women in political and socio-economic development, there still existed a big disparity which hampered their development. Their participation was still low compared to men, occupied low-grade positions in employment and were exposed to negative cultural practices such as wife beating and female circumcision among others.

One of the interesting findings of the study was the direct correlation between discrimination, inequality and poverty in the arid and semi-arid areas in Kenya. In particular, it was found that the inequality and poverty in Garissa, an arid county in North Eastern Kenya, was higher than many parts of the country, which could be explained by the then discriminatory policies, laws and programmes of the Government.

Besides the foregoing, the relegation of socio-economic rights to secondary status in a number of African countries is also to blame for the inequality on the continent. Given the place of such rights, it is important to realign national priorities and policy documents to mainstream socio-economic rights for an all round development, taking the peculiarities of every country into account.

5.0 ADDRESSING THE CHALLENGE OF DISCRIMINATION AND MARGINALIZATION IN AFRICA

The effects of discrimination and inequality in the development of society are monumental. As stated earlier, they directly lead to poverty and underdevelopment. As such, measures should be taken by the states and other actors to address the underlying root causes of discrimination and inequality as a way of creating a society based on social justice, equality and sustainable development. This would undoubtedly involve the formulation and implementation of measures targeting the cultural practices, policies, laws and administrative programmes which have historically entrenched discrimination and inequality. In this regard, some
of the measures that could be taken by African countries are the following:

5.1 Rights Based Approach to Development

The rights based approach to development has been identified by a number of governance practitioners as one of the measures that can guarantee and lead to equality and sustainable development in society. It is a conceptual framework for human development that is normatively anchored on international human rights instruments and standards. As stated by the United Nations, it describes situations not simply in terms of human needs, or of developmental requirements, but in terms of society’s obligation to respond to the inalienable rights of individuals, empowers people to demand justice as a right, not as charity, and gives communities a moral basis from which to claim international assistance when needed.\(^{17}\)

It aims at integrating international human rights norms, standards and principles into plans, policies, programmes and processes of development. It is centred on the individual, and as noted by one commentator, it brings together the human rights and development discourses together with a view to promoting good governance policies.\(^{18}\) In this regard, it focuses on community empowerment by recognizing the people’s inalienable right to make decisions about issues that affect their lives rather than treating them as passive objects of decisions made on their behalf by bureaucrats.

The elements of RBA include empowerment, participation, equality, non-discrimination, accountability and attention to vulnerable groups.\(^{19}\) Under this approach, citizens as rights holders are empowered to claim their rights while governments and non-state actors, as duty holders, are bound to strengthen their capacity to respond and account for their activities.

RBA views rights as interdependent, indivisible and interrelated and thus covers the whole range of rights, both civil and political rights and).


\(^{19}\) See Office of the High Commissioner for Human Rights, ‘What is a Rights Based Approach to Development?’ <http://www.unhchr.ch/development/approaches-04.html>
economic, social and cultural rights as enshrined in the various international human rights instruments such as the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1968), the Convention Against Torture (1984), the Convention on the Rights of the Child (1989), the Vienna Declaration and Programme of Action (1993) as well as the 8 Millennium Development Goals (2000).

Regionally, RBA is anchored on the various human rights instruments in Africa. The increasing prominence accorded to human rights and the democratic reforms on the continent both make the propagation of this approach relevant than before. As one scholar has observed, the approach is continuously gaining ground in Africa due to the realisation that the consolidation of democracy lies on the political stability and provision of socio-economic ‘goods.’

The perceived benefits of the RBA to development in Africa have been identified by Oluwo as:

1. It represents a comprehensive platform for evaluating the policies and actions of African governments in relation to their human rights obligations contained in various instruments;
2. It will provide a substantive operational agenda for policymakers in meeting the objective of empowerment;
3. If those who constitute the most vulnerable and most deprived in Africa are to be able to make any effective claims, there must be a platform for them or their representatives to access information, to press collectively for individual and/or group rights and to access a forum for the fair assessment of competing claims;
4. It will define the role of the African state as purveyor of those rights that enhance the conditions of human life. In this regard, it does not require the state to be a Santa Claus but to become ‘responsible’ for promoting policies that will secure those ends;
5. It will provide a viable framework for scrutinising the budgetary commitments of governments and invariably render them accountable to popular demands and priorities; and
6. It will help donor agencies as well as international development organisations to be able to promote human development and poverty reduction initiatives beyond bureaucratic set-ups.

Given the foregoing, African countries should fully embrace the rights based approach to development in all its policy, legal and administrative interventions. Similarly, non-state actors, as duty bearers, should mainstream human rights in their programmes as a way of ensuring ownership and sustainability. Towards this end, the following should be undertaken:

- Strengthening the capacity of duty bearers to meet the expectations of the public
- Allocation of more resources for the interventions
- Conducting human rights education to promote awareness
- Mainstreaming of human rights in the programmatic interventions
- Ensuring participation and inclusiveness at all stages of development

5.2 Legal Reforms

There is need for legal reforms in many African countries to provide for a comprehensive framework for human rights. The reforms should adequately provide for all the rights, including the socio-economic rights as a way of addressing the current situation where only a handful of African countries have economic, social and cultural rights in their constitutions. In addition, this would remedy the present situation in a number of Anglophone countries in Africa where the dualist theory of application of international law within the domestic jurisdictions reigns supreme, meaning that the instruments do not apply directly without domestication. In addition, citizens cannot hold their governments accountable for rights not provided for in their legal systems.

Secondly, legal reforms should focus on the discriminatory practices in society, including those propagated by the legal system itself, cultural and religious systems.

5.3 Mainstreaming of Human Rights Socio-Economic Programmes
While appreciating the importance of globalization in contemporary world, it is important to ensure that social and economic programmes and activities integrate human rights in their formulation and implementation. These would also include economic integration activities as well as those by non-state actors. In addition, liberalization and deregulation policies should not lead to state divesting from the core responsibility of ensuring the realization of rights by citizens.

5.4 Clear and Coordinated Interventions

It is important to understand the dynamics and underlying factors that propagate inequality in society in order to formulate and implement appropriate interventions. This involves identification of the existing inequalities, causation, political commitment and speedy implementation of the policies. The interventions should be clear, well coordinated and address capacity constraints that may affect their implementation.

5.5 Formulation of Targeted Programmes

There is need to formulate and implement targeted programmes for the disadvantaged groups in society as a way of addressing the historical injustices against them. The programmes should be informed by the prevailing circumstances and the needs of every group to address the inequality. Such programmes should preferably be entrenched in the constitutional framework and may involve a number of strategies depending on the circumstances of every country.

For instance in Kenya, one of the strategies adopted is that of devolution whereby 47 semi-autonomous units (counties) have been created by the Constitution as a way of addressing inequality and discrimination through decentralization of poverty, resources and representation. Further, in order to address the historical injustices occasioned by skewed and discriminatory policies and, laws and programmes, the Constitution establishes an ‘Equalisation 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.

Article 204 of the Constitution of the Republic of Kenya, 2010
The Fund will receive one half of the total revenue collected by the national government annually, and is a temporary measure expected to be in place for twenty years from 2010.

Secondly, Kenya has taken a bold step of addressing the plight of the marginalized and vulnerable groups in society, including women, persons with disabilities, youth, ethnic and other minorities and marginalized communities. Some of the measures include the creation of special seats for women, the gender principle whereby at least a third of the elective and appointive positions in the public service should be held by either gender and the affirmative action such as in procurement and development funds for these groups.

5.6 Resource Allocation

More resources should be allocated towards the interventions by the state to address inequality. The resources should be adequate for capacity building for the duty bearers and the rights holders to ensure the effectiveness of the interventions. 22 It should be noted that capacity building is key to the success of the interventions given the low literacy level in Africa and attitude by public servants in many African countries as was noted by a commentator that:

I have already noted the difficulties with defining the RBA to development and the precise elements that constitute the approach. This translates into a limited understanding of government officials and even civil society operatives on how to do the RBA to development. In the worse case scenario, they simply carry wrong impressions and understandings of the concept and then tend to dislike it. 23

5.7 Observance of Good Governance

African countries should fully embrace good governance in all its facets. This not only involves the adoption of good governance principles, but also living them. They must, for instance, respect the civil liberties, promote

22 For example, during the referendums on the constitutions in the DRC and Burundi in 2005, some members of the public were asking questions such as ‘who is a referendum? Where does he live? What does he eat? How does he look like? This means that citizens do not know understand the supreme laws of their countries, let alone their rights. This is the situation in a number of African countries.

transparency and accountability in governance and exhibit positive political will to address the challenge of inequality. As stated by Oluwo, African countries should not be the violators of civil liberties or exhibit discriminative and oppressive tendencies in their operations. On the contrary, they should practice democratic governance as a way of ensuring stability and sustainable peace and development of the people. Similarly, transparency and accountability not only ensure that the state accounts for its actions, but also brings the actions of non-state actors into the acceptability fold.

6.0 CONCLUSION

The normative framework of human rights in Africa provide a comprehensive foundation upon which the strategies to address discrimination and inequality should be premised. This would entail the adoption and implementation of the rights based approach in the various development programmes and activities. As such, African countries should embrace the rights based approach to development to promote equality, and sustainable and participatory development. In particular, they should pay special attention to the economic, social and cultural rights, whose implantation could immensely lead to societal transformation. In addition, targeted initiatives should be taken, albeit on temporary basis, to address the inequality caused by social, cultural and historical discriminative practices and policies.

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